ORAL ARGUMENT NOT SCHEDULED

No. 20-1492

In the United States Court of Appeals For the District of Columbia Circuit

CITY OF OBERLIN, OHIO
Petitioner,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

NEXUS GAS TRANSMISSION, LLC,
Intervenor-Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL ENERGY REGULATORY COMMISSION

BRIEF OF INTERVENOR-RESPONDENT NEXUS GAS TRANSMISSION, LLC

July 27, 2021

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rules 27(a)(4) and 28(a)(1), Intervenor-Respondent NEXUS Gas Transmission, LLC ("NEXUS") submits this certificate as to parties, rulings, and related cases.

1. Parties and Amici. This case is a petition for review filed directly in this Court. Therefore, the requirements of D.C. Circuit Rule 28(a)(1) to list the parties, intervenors, and amici that appeared below does not apply. The parties, amici, and entities moving to intervene and to participate as amici in this Court are as follows:

Petitioner

The petitioner in this proceeding is City of Oberlin, Ohio.

Respondent

The respondent is the Federal Energy Regulatory Commission.

Intervenors

NEXUS has moved for leave to intervene in support of respondent.

Amici

Amici are among the Petitioners in *Deborah Evans et al. v. FERC*, Docket No. 20-1161 (May 22, 2020), including Stacey McLaughlin, Craig McLaughlin, Deborah Evans, Ronald C. Schaaf, Evans Schaaf Family LLC, Bill Gow, Sharon Gow, Wilfred E. Brown, Elizabeth A. Hyde, Barbara L. Brown, Pamela Brown

Ordway, Chet N. Brown, Neal C. Brown Family LLC, Richard Brown, Twyla Brown, Clarence Adams, Will McKinley, James Dahlman, and Joan Dahlman.

Circuit Rule 26.1 Disclosures. NEXUS filed a Corporate Disclosure Statement on January 5, 2021, contemporaneously with its Motion to Intervene. This Brief includes a revised Corporate Disclosure Statement, reflecting changes since January 5, 2021.

2. Rulings Under Review. Petitioner seeks review of the following orders of the respondent Federal Energy Regulatory Commission:

(1) *NEXUS Gas Transmission*, Remand Order, 172 FERC ¶ 61,199 (Sept. 3, 2020) (Remand Order); and

(2) *NEXUS Gas Pipeline*, Notice of Denial of Rehearing By Operation of Law and Providing For Further Consideration, 173 FERC ¶ 62,065 (Nov. 5, 2020).

3. Related Cases. The August 25, 2017 Order Issuing Certificates and Granting Abandonment ("Certificate Order") that was addressed in the Remand Order was previously before this Court. *City of Oberlin, Ohio v. Federal Energy Regulatory Commission*, No. 18-1248 (D.C. Cir. filed Sept. 11, 2018); *Coalition to Reroute Nexus v. Federal Energy Regulatory Commission*, No. 18-1261 (D.C. Cir. filed Sept. 21, 2018) (consolidated with No. 18-1248). On September 6, 2019, this Court remanded without vacatur to FERC. *City of Oberlin v. FERC*, 937 F.3d 599, 601 (D.C. Cir. 2019).

Additionally, although not related cases within the meaning of Circuit Rule 28(a)(1)(C), City of Oberlin, Ohio and other petitioners previously challenged the Certificate Order in the following proceedings:

(1) *City of Oberlin, Ohio v. Federal Energy Regulatory Commission*, No. 17-4308 (6th Cir. filed Dec. 22, 2017).

(2) *Coalition to Reroute NEXUS and John Selzer and Elaine Selzer v. Federal Energy Regulatory Commission*, No. 17-4302 (6th Cir. filed Dec. 21, 2017).

NEXUS intervened in these cases in support of respondent Federal Energy Regulatory Commission.

At this time, to the knowledge of undersigned counsel, there are no other cases related to this case within the meaning of D.C. Circuit Rule 28(a)(1)(C).[1]

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[1] City of Oberlin, Ohio cites *Deborah Evans et al. v. FERC*, Docket No. 20-1161 (May 22, 2020) as a related case. Pet. Br. At ii. However, the instant appeal and *Evans* do not involve "substantially the same parties and the same or similar issues" and, therefore, *Evans* is not a "related case" for the purposes of D.C. Circuit Rule 28(a)(1)(C). Although the *Evans* briefing cites this Court's ruling in *City of Oberlin v. FERC*, the instant case and *Evans* deal with entirely different scenarios. The Pacific Connector Pipeline at issue in *Evans* was proposed to transport natural gas exclusively to a Liquefied Natural Gas ("LNG") export facility, meaning that 100 percent of the natural gas transported by the pipeline would first be converted to LNG at that export facility and then enter foreign commerce through further transportation as LNG. In contrast, the NEXUS pipeline system at issue here exclusively transports natural gas in interstate commerce produced from the U.S. Appalachian Basin to consuming markets in northern Ohio and southeastern Michigan, while also delivering some gas to a cross-border pipeline on which NEXUS has capacity rights for further transportation to the Dawn Hub in Ontario, Canada. The analysis presented here—whether precedent agreements for transportation of gas exclusively in interstate commerce for possible ultimate export

Dated: July 27, 2021

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might *add* to a finding of public benefits attributable to an interstate pipeline that *also serves domestic markets*—is different from the analysis of public benefits associated with a pipeline like the Pacific Connector Pipeline that by virtue of its terminus at an LNG export terminal is exclusively transported for ultimate export as LNG to foreign markets.

CORPORATE DISCLOSURE STATEMENT

In accordance with Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Intervenor-Respondent NEXUS Gas Transmission, LLC ("NEXUS") makes the following disclosure.

NEXUS Gas Transmission, LLC is 50% owned by Spectra Nexus Gas Transmission, LLC and 50% owned by DTE NEXUS, LLC.

Spectra Nexus Gas Transmission, LLC is wholly owned by Spectra Energy Transmission II, LLC, which is wholly owned by Spectra Energy Partners, LP. Spectra Energy Partners, LP ("Spectra Partners") is a publicly-traded master limited partnership. Spectra Partners is managed by a general partner, Spectra Energy Partners (DE) GP, LP. Enbridge Inc., through direct wholly-owned subsidiaries, owns Spectra Energy Partners (DE) GP, LP, and owns the majority of partnership units for Spectra Partners. Enbridge Inc. is a publicly held corporation with no parent companies, and no publicly held corporation has a 10% or greater ownership interest in Enbridge Inc.

DTE NEXUS, LLC is wholly owned by DTE Pipeline Company, which is a wholly-owned subsidiary of DT Midstream, Inc., which is publicly owned.

Dated: July 27, 2021

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GLOSSARY

Oberlin	City of Oberlin, Ohio
Dawn Hub	A natural gas trading hub located in Dawn, Ontario, Canada
DOE	Department of Energy
Dth/day	Dekatherms per day
FERC or Commission	Federal Energy Regulatory Commission
JA	Joint Appendix
NEXUS	Intervenor NEXUS Gas Transmission, LLC
NGA	Natural Gas Act

STATUTES AND REGULATIONS

Relevant statutes are contained in the Addendum to the brief filed by Respondent Federal Energy Regulatory Commission. Additional relevant statutes and relevant regulations are contained in the attached Addendum.

INTRODUCTION

This is the second appeal by the City of Oberlin ("Oberlin") challenging certificates of public convenience and necessity issued by Respondent Federal Energy Regulatory Commission ("FERC" or "Commission") under Section 7 of the NGA to NEXUS Gas Transmission, LLC ("NEXUS") to (i) construct, own and operate a new interstate pipeline system in Michigan and Ohio (the "NEXUS Pipeline"), and (ii) lease upstream and downstream capacity from other interstate pipelines in Pennsylvania, West Virginia, Ohio and Michigan (the "Leased Capacity," and the Nexus Pipeline and Leased Capacity collectively, the "NEXUS Project" or "Project"). Since commencement of service in November 2018, the NEXUS Project has transported natural gas exclusively in interstate commerce from the Appalachian region to consuming markets in Ohio and Michigan, and provided access through capacity leased or subscribed on other pipelines, to the Dawn Hub in Ontario, Canada, either for consumption in Canadian markets or in domestic markets following possible subsequent importation into the U.S.

In the first appeal, this Court "reject[ed]" "the vast majority of" Oberlin's arguments. *City of Oberlin v. FERC*, 937 F.3d 599, 601 (D.C. Cir. 2019) ("*Oberlin*"). The Court affirmed the Commission's conclusion that precedent agreements for 59% of the NEXUS Project's capacity and other public benefits demonstrated a need for the Project, and confirmed that "the Commission engaged

in that broad-ranging inquiry reasonably." *Id.* at 605. However, the Court remanded without vacatur to the Commission to provide further "explanation of why it is lawful to credit precedent agreements for export toward a Section 7 finding that an interstate pipeline is required by the public convenience and necessity." *Id.* at 611. The Commission's Remand Order explains why precedent agreements for gas transportation for potential delivery in Canada can be instructive in finding that a proposed interstate pipeline project is in the public convenience and necessity under Section 7. 172 FERC ¶ 61,199, PP 10-12 (2020) ("Remand Order"), JA ___. This Court should affirm that finding.

In the alternative, the Commission also found that the NEXUS Project is in the public convenience and necessity even without considering agreements for potential export to Canada. The Commission had jurisdiction to make that alternative finding, it is fully supported by the record, and it should be affirmed.

STATEMENT OF ISSUES

1. Whether the Commission adequately explained that it is lawful to consider exports to Canada as support for its finding that the NEXUS Project is in the public convenience and necessity under Section 7?

2. Whether the Commission properly found, in the alternative, that the NEXUS Project is in the public convenience and necessity under Section 7 without considering exports to Canada?

STATEMENT OF THE CASE

A. The Certificate Order.

Following years of dialogue with FERC, state and other federal regulators, and receipt of all necessary authorizations and permits, NEXUS constructed a new interstate pipeline system to transport Appalachian Basin natural gas produced in Pennsylvania, West Virginia, and Ohio directly to consuming markets in Ohio and Michigan, and via capacity subscribed on existing pipelines to the Dawn Hub, a natural gas trading hub in Ontario. The NEXUS Project includes a new greenfield pipeline system in Ohio and Michigan owned by NEXUS that terminates 65 miles from the Canadian border and capacity leased from other interstate pipelines in Pennsylvania, West Virginia, Ohio, and Michigan. From the terminus of the NEXUS Project, gas can then be transported by Vector Pipeline to Canada via a border crossing facility previously authorized by FERC under Section 3 of the NGA, either for consumption in Canada or in the U.S. following possible subsequent importation. *See Vector Pipeline L.P.,* 103 FERC ¶ 61,146 (2003).

On August 25, 2017, FERC issued a certificate of public convenience and necessity for the NEXUS Project, 160 FERC ¶ 61,022 (2017) ("Certificate Order"), JA___. NEXUS had executed precedent agreements with eight entities for 885,000 Dth/day of firm service—59% of the Project's certificated capacity. *Oberlin*, 937 F.3d at 603. FERC found the NEXUS Project to be required by the public

convenience and necessity because the "benefits the project will provide" outweigh the "minimal adverse impacts," and the Project "will serve a demonstrated demand for natural gas." Certificate Order P 51, JA___. FERC noted that NEXUS "obtained easements for over 93 percent of the project route without the use of eminent domain." *Id*. at P 49; *see also* Remand Order P 26.

Oberlin requested rehearing of the Certificate Order arguing, in part, that because some of the Project's capacity would be used to transport gas that would ultimately be exported to Canada, it would be inappropriate to allow NEXUS to use eminent domain rights afforded by its Section 7 certification. On July 26, 2018, the Commission denied all requests for rehearing, confirming that it properly analyzed the Project under Section 7. 164 FERC ¶ 61,054 (2018) ("Rehearing Order"), JA___.

On October 10, 2018, FERC authorized NEXUS to put the Project into service, *NEXUS Gas Transmission, LLC*, Authorization to Proceed with Construction, (Oct. 11, 2017), JA___. Since November 2018, NEXUS has transported natural gas exclusively in interstate commerce for its shippers.

B. Oberlin's First Appeal.

On September 11, 2018, Oberlin petitioned this Court to vacate the Certificate Order and Rehearing Order.

On September 6, 2019, this Court issued an Opinion "reject[ing]" "the vast majority of" Oberlin's arguments. *Oberlin*, 937 F.3d at 601. The Court affirmed the Commission's conclusion that precedent agreements for 59% of the pipeline's capacity demonstrated public need, as the Certificate Policy Statement imposes "no bright-line rule about when precedent agreements may be persuasive evidence of market demand," but instead "lays out a flexible inquiry that allows the Commission to consider a wide variety of evidence to determine the public benefits." *Id.* at 605. The Court confirmed that "the Commission engaged in that broad-ranging inquiry reasonably." *Id.* In her concurrence, Judge Rogers noted that "the Commission's findings regarding the need for and the nature of the NEXUS pipeline are supported by substantial evidence in the record considered as a whole, and the Commission reasonably explained that petitioners mischaracterized the extent to which the project may be used to export gas." *Id.* at 612 (Rogers, J., Concurring); *see also Env't. Def. Fund v. FERC*, No. 20-1016, --- F.4th ---, 2021 WL 2546672, at *14 (D.C. Cir. June 22, 2021) (referring to "evidence of market demand" in *Oberlin* as "much stronger").

However, the Court remanded without vacatur to the Commission to provide an "explanation of why it is lawful to credit precedent agreements for export toward a Section 7 finding that an interstate pipeline is required by the public convenience and necessity." *Oberlin*, 937 F.3d at 611. The Court observed that excluding the

precedent agreements for export, "Nexus would have precedent agreements for only 625,000 Dth/day, or approximately 41.6% of its 1.5 million Dth/day capacity," and the issue of whether such a pipeline is in the public convenience and necessity was not before the Court. *Id.* at 606. But the Court rejected the notion that "the Commission can never lawfully issue a Section 7 certificate where a pipeline has precedent agreements for export . . . because a pipeline may clearly be required by the public convenience and necessity *independent of* any of its precedent agreements for export." *Id.* at 607 n.3.

C. The Commission's Remand Order.

On September 3, 2020, the Commission issued its Remand Order, affirming that the NEXUS Project is required by the public convenience and necessity. The Commission confirmed that "precedent agreements with foreign shippers serving foreign customers can indeed support a finding that a project merits authorization under [NGA] section 7," Remand Order P 1, JA___, and provided a twelve-page explanation of its conclusion. *Id.* at pp. 5-16. The Commission alternatively found that the NEXUS Project is required by the public convenience and necessity without considering exports. *Id*. PP 5, 10, 24-28, 30. Oberlin appealed the Remand Order.

SUMMARY OF ARGUMENT

The Remand Order fulfills this Court's request, explaining why it is *instructive* to consider precedent agreements for potential export to Canada as

evidence of public need under Section 7. Oberlin mischaracterizes the Remand Order as holding that a finding of public interest under Section 3 *automatically* equates to a finding of public interest under Section 7. But the Commission made clear that contracts for export are just one factor to be considered, along with a variety of other public benefits attributable to the proposed pipeline. The Commission properly considered *all* benefits attributable to the NEXUS Project—including precedent agreements with domestic shippers, precedent agreements with two Canadian shippers, and other evidence of public need—in concluding that NEXUS is in the public interest.

Oberlin's argument that the pipeline does not transport gas exclusively in interstate commerce is wrong. The pipeline receives gas in Ohio, Pennsylvania, and West Virginia and transports it directly to domestic markets in Ohio and Michigan, indisputably transportation in interstate commerce. *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981). Nor is the Commission's analysis inconsistent with this Court's precedent, as Oberlin argues. This case does not present any threshold jurisdictional issues as to whether Section 7 applies: it cannot be disputed that the NEXUS Project transports gas exclusively in interstate commerce. That the NEXUS Project is an interstate pipeline—crossing multiple state lines and terminating in Michigan at its interconnection with Vector Pipeline—is plainly depicted by the map included in FERC's Brief at 12. That some gas transported in interstate commerce is also

ultimately delivered to foreign consumers utilizing the separate Vector Pipeline border crossing facility that the Commission previously approved under Section 3, does not take such gas out of interstate commerce. Cases addressing exports or imports of gas that was not otherwise in interstate commerce are distinguishable.

The Commission's alternative finding that the NEXUS Project is required by the public convenience and necessity independent of exports should be affirmed. On remand, the Commission had jurisdiction to consider the entire record and assess whether a pipeline with precedent agreements for 41.6% of its capacity to domestic consumers, along with other public benefits, is in the public interest. In exercising that jurisdiction, the Commission properly analyzed the domestic precedent agreements, *but did not stop there*. The Commission considered evidence of other public benefits and found, as a whole, that the Project is required by the public convenience and necessity. Thus, without considering the precedent agreements for export, there is a substantial basis to affirm the Commission's approval of the NEXUS Project under Section 7.

ARGUMENT

I. The Commission Explained Why It Is Lawful To Credit Precedent Agreements For Export To Help Establish Need.

In the Remand Order, the Commission explained that although its limited jurisdiction under Section 3 is not directly implicated because the NEXUS Project does not include any new Section 3 facilities, Section 3 is nonetheless "instructive

when determining the appropriateness of the Commission's decision to consider precedent agreements with foreign shippers that plan to transport gas for export to be evidence of the need for a proposed project under section 7." Remand Order P 12, JA___. The Commission stated that "Congress has further demonstrated the importance it places on establishing a reciprocal gas trade between Canada and the United States in the provisions of the North American Free Trade Agreement. . . . : *Id.* P 13. The Commission explained that "[g]iven Congress' mandate in NGA section 3 that exports to a free trade partner are deemed to be in the public interest, we believe that when considering a proposed project under section 7, it is appropriate to credit contracts for transportation of gas volumes subject to a free trade agreement as supporting a public convenience and necessity finding." *Id.* P 14 (internal citations omitted).

The Commission made clear, however, that the public interest analysis under Section 3 is not "dispositive" of the Section 7 analysis as to "whether a pipeline proposed to transport [some] gas in interstate commerce on its journey to the point of export is required by the public convenience and necessity." *Id.* P 15. Rather, the Section 3 analysis "highlights why it is appropriate for the Commission to give precedent agreements for the transportation of gas destined for export the same weight in determining need that it gives to other precedent agreements for transportation." *Id.* The Commission further explained that if it "were precluded

from considering the benefits represented by precedent agreements with shippers transporting gas for export in determining whether the interstate facilities are required by the public convenience and necessity, Congress' directive and intent, as expressed in section 3 and various trade agreements, would be thwarted." *Id*.

The Commission observed that, notwithstanding the end uses of the gas, transportation service for all shippers provides public benefits, including "contributing to the development of the gas market, in particular the supply of reasonably-priced gas; adding new transportation options for producers, shippers, and consumers; strengthening the domestic economy and the international trade balance; and supporting domestic jobs in gas production, transportation, and distribution, and jobs in industrial sectors that rely on gas." *Id.* P 17.

The Commission found that, regardless of any exports, "the NEXUS project will provide additional capacity to transport gas out of the Appalachian Basin, a prolific producing region that has experienced take-away capacity constraints." *Id*. P 18. The Commission observed that NEXUS "would expand shippers' options for transporting gas to the Dawn Hub," which, as the second most traded hub in North America, "serves as a liquid trading point where supplies move freely to and from the United States and Canada, allowing shippers and marketers in both countries to access the best market available." *Id.* P 19. The Commission recognized that "[i]t is incorrect to assume that gas shipped to the Dawn Hub will be consumed in Canada;

rather, as with any hub, the party holding title can elect to move its gas to any available destination, which in the case of the Dawn Hub, can mean sending gas previously exported from the United States back into the United States," in particular via "Canadian pipelines that extend along the northern edge of the Great Lakes and then interconnect at the border with pipelines that serve the periodically supply-constrained New York and New England markets." *Id.* The Commission also noted that the Dawn Hub serves as a major natural gas storage site, from which domestic and foreign parties can readily access gas supplies. *Id.*[2]

All of this, the Commission concluded, supports viewing precedent agreements for export as instructive evidence of public need. *Id*. Accordingly, the Commission found "it is lawful under the NGA to credit precedent 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." *Id.* P 21.

[2] The Commission was correct in acknowledging these real-world facts. Indeed, the operator of the Dawn Hub recently announced an open season soliciting new business for expanded capacity and services, highlighting the ability to redeliver gas from the Dawn Hub to U.S. markets. *See* Enbridge Gas Binding Open Season for Peak Storage Service at Dawn Hub, E&E ONLINE, Jun. 11, 2021, https://electricenergyonline.com/article/energy/category/oil-gas/89/904544/enbridge-gas-binding-open-season-for-peak-storage-service-at-dawn-hub.html.

A. Oberlin Misstates The Commission's Reliance On Precedent Agreements For Export.

Oberlin's attack on the Commission's analysis of exports is largely premised on two misconceptions. First, Oberlin suggests that the Commission relied "on Section 3 to justify a Section 7 pipeline," and treated Sections 3 and 7 as "interchangeable." Pet. Br. at 10, 13. That is incorrect. The Commission said its consideration of "the provisions of [Section 3] *are instructive* when determining the appropriateness of the Commission's decision to consider precedent agreements with foreign shippers that plan to transport gas for export to be evidence of the needs for a proposed project under section 7." Remand Order P 12 (emphasis added), JA___. It is not "dispositive." *Id.* P 15. This distinction was echoed by then-Commissioner, now-Chairman Glick, in his concurrence: "Because Congress has seen fit to deem [exports of natural gas to free trade countries] to be consistent with the public interest, it makes sense that a precedent agreement to facilitate those exports can, at least under certain circumstances, *help support* a finding of need for a proposed pipeline." *Id.* P 4 (emphasis added).

Second, Oberlin hypothesizes about "a pipeline one hundred percent subscribed by foreign contracts" and warns of "a grant of a Section 7 certificate for a 100 percent export project." Pet. Br. at 14-15. But those are not the facts before this Court. The NEXUS Project transports natural gas in interstate commerce from points in Pennsylvania, West Virginia, and Ohio to points in Ohio and Michigan and

via leased capacity to the international border. The analysis here—whether precedent agreements for export might *add* to a finding of public convenience and necessity attributable to an interstate pipeline serving *domestic markets*—is different from the analysis of Oberlin's hypothetical pipeline carrying only gas that is destined for export.

Thus, Oberlin's assertion that the Commission "rel[ied] on exports to manufacture need for an otherwise unnecessary interstate pipeline" is incorrect. *Id*. at 15. The Commission relied on exports as *additional* support for its finding of public convenience and necessity, along with precedent agreements for domestic service and "a variety of other relevant factors to demonstrate need." Remand Order PP 17-21, 25, JA___.

In *Town of Weymouth v. FERC*, 2018 WL 6921213, No. 17-1135 (D.C. Cir. Dec. 27, 2018), this Court specifically rejected an argument that a proposed interstate pipeline could not be in the public convenience and necessity under Section 7 despite roughly half its transported gas being exports to Canada:

> The petitioners also contend that the project does not serve the public convenience and necessity because *roughly half its gas is slated for export to Canada*. But given that much of the gas will be used for domestic consumption, petitioners have not identified why granting the certificate in this case would not still advance the public convenience and necessity, even if a portion of the gas is ultimately diverted for export.

Weymouth, 2018 WL 6921213, at *1 (emphasis added); *Oberlin*, 937 F.3d at 611 (Rogers J., Concurring) ("This court has recently reaffirmed its understanding that the Commission acts lawfully under the [NGA] in granting a Section 7 certification of public convenience and necessity when 'much of the [imported] gas will be used for domestic consumption.'" (quoting *Weymouth*).[3] The Sixth Circuit made this point in a separate case concerning the NEXUS Project itself: "That the pipeline may benefit customers in foreign countries does not preclude a finding that it will also benefit consumers in the United States." *Nexus Gas Transmission, LLC v. City of Green*, No. 18-3325, 2018 WL 6437431, at *5 (6th Cir. Dec. 7, 2018) (undisputed that "a substantial amount of the natural gas transported by the pipeline will serve U.S. consumers"). That same analysis applies here.

More broadly, the Commission's interpretation of the scope of the factors it may consider in making a public convenience and necessity determination under Natural Gas Act section 7 is entitled to *Chevron* deference. *See, e.g.*, *Assoc. Gas Dist. v. FERC*, 824 F.2d 981, 1001 (D.C. Cir. 1987) (where Congress granted Commission "broad power" to implement the NGA, "*Chevron* binds us to defer to

[3] Respectfully, it is unclear why Judge Rogers inserted the word "imported" in brackets instead of retaining the original words "export to Canada" used in *Weymouth*. *Id.* The fact is, the pipeline in *Weymouth* involved a situation where "half [of the pipeline's] gas is slated for *export* to Canada" and this Court still held that the pipeline was still in the public interest. *Weymouth*, 2018 WL 6921213, at *1 (emphasis added).

Congress's decision to grant the agency, not the courts, the primary authority and responsibility to administer the statute"). The Commission's findings concerning the public benefits of the pipeline are likewise entitled to deference. *See Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1308 (D.C. Cir. 2015) ("Because the grant or denial of a Section 7 certificate of public convenience and necessity is a matter peculiarly within the discretion of the Commission, this court does not substitute its judgment for that of the Commission.") (citations and internal quotation marks omitted).

B. That NEXUS Carries Gas Exclusively In Interstate Commerce Is Entirely Consistent With The NGA And Precedent.

1. Oberlin Misapplies *Maryland v. Louisiana*.

Oberlin relies on *Maryland* for the proposition that "the entire flow of gas must be considered when assessing whether it travels in interstate commerce, and not simply a segment of its journey, viewed in isolation." Pet. Br. at 17. But Oberlin's reliance on *Maryland* is backwards. There, the issue was whether a gas tax Louisiana sought to impose within its borders violated the Commerce Clause by providing a direct commercial advantage to local business. 451 U.S. at 753-54. Louisiana argued that the taxable uses within the state break the flow of commerce and are wholly local events, and thus taxable. *Id.* at 754-55. The Court rejected that position, stating: "[W]e do not agree that the flow of gas from the wellhead to the consumer, even though 'interrupted' by certain events, is anything but a continual

flow of gas in interstate commerce. *Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey*." *Id.* at 755 (emphasis added); *accord Public Util. Comm'n of Kan. v. Landon*, 249 U.S. 236, 245 (1919), *vacated on other grounds*, 249 U.S. 590 (1919) ("That the transportation of gas through pipelines from one state to another is interstate commerce may not be doubted.").

Here, as recognized in *Oberlin*, 937 F.3d at 603, and by the Commission, the NEXUS pipeline receives gas in Ohio, Pennsylvania, and West Virginia and transports it to markets in Ohio and Michigan, and any gas that ultimately enters foreign commerce will only do so upon delivery via leased capacity to Vector's border crossing facility previously authorized under Section 3. Remand Order P 16, JA___. Thus, applying *Maryland*, the Commission recognized that the gas carried by the NEXUS pipeline is being transported, exclusively, in interstate commerce. *Id.* The "flow of gas" on the NEXUS pipeline "is not anything but the continual flow of gas in interstate commerce." *Maryland*, 451 U.S. at 755.

Oberlin's discussion of "Hinshaw pipelines" (Pet. Br. at 18) draws the exact wrong conclusion. Oberlin correctly notes that the NGA excludes from Section 7 jurisdiction a Hinshaw pipeline that receives interstate gas at a state's boundary if all such gas is consumed in that state and is subject to that state's regulation. *Id.* But this simply underscores that, without such a statutory exclusion (which was enacted

after the Supreme Court found that such movements were in interstate commerce, *see FPC v. East Ohio Gas Co.*, 338 U.S. 464, 469–71 (1950)), any gas commingling with gas in interstate commerce, even if only one molecule, "is not anything but the continual flow of gas in interstate commerce." *Maryland*, 451 U.S. at 755. Here, all of the gas flowing through the NEXUS pipeline, which crosses multiple state lines and is delivered, in part, in states other than where it was received, is undisputedly in interstate commerce.

2. Oberlin's Discussion Of Commingling Disregards Precedent.

The Commission explained that "[i]f gas being transported between states is combined with gas being imported or exported, or with gas being transported within a single state, then all the molecules of gas in the comingled stream are considered to be in interstate commerce, and thereby subject to the Commission's jurisdiction under section 7." Remand Order P 17 n.37, JA___. Oberlin seeks to refute that point by arguing that the cases on which the Commission relies involved commingling of interstate and intrastate gas. Pet. Br. at 18-19. But that misses the point: once gas is flowing in interstate commerce, one cannot differentiate "the molecules of gas in the comingled stream" (Remand Order P 17 n.3), even if individual molecules end up being exported. *See also California v. LoVaca Gathering Co.*, 379 U.S. 366 (1965); *FPC v. Amerada Petroleum Corp.*, 379 U.S. 687 (1965).

Oberlin attributes a quote to the *Oberlin* opinion that does not exist: The Commission may "issue a Section 7 certificate for a pipeline that carries gas for export, so long as the pipeline is clearly required by the public convenience and necessity [under Section 7] *independent of contracts for export*." Pet. Br. at 19. This Court asked the Commission to *explain* why exported gas may be counted toward the public interest, and the Commission did so. Oberlin is wrong in asserting that treating all gas transported by NEXUS as part of interstate commerce would prevent the Commission from conducting a proper analysis of benefits. *Id*. The Commission demonstrated how to conduct that analysis by examining precedent agreements for domestic deliveries, precedent agreements for exports, and "a variety of other relevant factors to demonstrate need." Remand Order PP 17-21, 25, JA___. Thus, a public convenience and necessity analysis of Oberlin's hypothetical pipeline—*i.e.*, "a pipeline for the sole purpose of exporting gas from Marcellus Shale directly to Canada" with a "contract to sell a tiny fraction of gas en route within the United States" (Pet. Br. at 20)—would be radically different from the actual facts here.

3. The Commission's Analysis Is Consistent With *Border*.

Oberlin asserts that the Commission's reliance on precedent agreements for export to support a finding of public convenience and necessity violates *Border Pipe Line Co. v. FPC*, 171 F.2d 149 (D.C. Cir. 1948). Pet. Br. at 20. That is incorrect. The Commission addressed the observation in *Oberlin* that the Court has "explicitly

refused to 'interpret "interstate commerce"' within the context of the Act 'so as to include foreign commerce.'" Remand Order P 16 (quoting *Oberlin*, 937 F.3d at 606-07 (quoting *Border*, 171 F.2d at 152)). But as the Commission explained, *Border* involved a pipeline located entirely within Texas, and thus, there was no transportation in interstate commerce for purposes of Section 7 jurisdiction. *Id.* (citing *Border*, 171 F.2d at 152). In contrast, the NEXUS Project "receives gas in Pennsylvania and West Virginia and transports it through Ohio to Michigan." *Id.* Indeed, Oberlin itself distinguishes *Border*, "where purely intrastate gas was transported for export and Section 7 was not implicated." Pet. Br. at 23 n.12. NEXUS agrees. As the Commission explained, "[t]he fact that some of the volumes NEXUS transports ultimately may be exported does not alter the status of the project as a section 7 pipeline transporting gas in interstate commerce." Remand Order P 16, JA ___. Thus, "all of the gas carried by the NEXUS pipeline is being transported, exclusively, in interstate commerce. *Id.* (citing *Maryland*, 451 U.S. at 755).

More fundamentally, the key issue in both *Border* and *Distrigas Corporation v. FPC*, 495 F.2d 1057 (D.C. Cir. 1974)—*i.e.,* whether Section 3 or Section 7 was applicable to the proposed project at issue—is not presented here. It is undisputed

that NEXUS did not seek authorization for any facility to handle natural gas exports.[4] Unlike the export and import projects at issue in *Border* and *Distrigas*, respectively, there is no legitimate dispute that Section 7 applied to the interstate pipeline at issue, which transports gas from Ohio, West Virginia, and Pennsylvania to markets in Ohio and Michigan and via leased capacity to the Canadian border. NEXUS provides transportation service to the Canadian border through capacity leased from Vector, a separate company that *years earlier* obtained authorization for a cross-border facility under Section 3. *See Vector Pipeline L.P.*, 103 FERC ¶ 61,146 (2003). That the NEXUS pipeline connects to a *different, pre-existing* interstate pipeline that runs into Canada does not raise any of the threshold jurisdictional questions implicated by *Border* and *Distrigas*.

In contrast to the threshold jurisdictional issues presented in *Border* and *Distrigas*, the separate issue presented here—the extent to which exports to Canada may be relevant to a finding of public convenience and necessity under Section 7—was addressed by Congress long after *Border* and *Distrigas* were decided. As the Commission explained, Section 3(c) of the NGA—which was added as part of the Energy Policy Act of 1992 (*i.e.*, after *Border* and *Distrigas*)—expressly states that "the exportation of natural gas to a nation [*i.e.,* Canada] with which there

[4] The project at issue in *Distrigas* involved proposed LNG import facilities which would be linked to proposed new pipelines to other states. 495 F.2d at 1061 & n.20.

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*." 15 U.S.C. § 717b(c) (emphasis added); *see also Town of Weymouth*, No. 17-1135, 2018 WL 6921213, at *1 (describing Section 3(c) and stating that "in the context of export authorizations under section 3(a) of the NGA, 'exportation of natural gas to a nation with which there is in effect a free trade agreement'—as is the case for Canada—is 'consistent with the public interest'").

Thus, this Court's observation in *Distrigas* that the Commission "has long regarded Section 3's 'public interest' standard and Section 7's 'public convenience and necessity' standard as substantially equivalent," 495 F.2d at 1065, is even more compelling today in light of the Congressional directive embodied in Section 3(c). Because the NGA explicitly provides that exporting gas to free trade nations like Canada is in the public interest, and "public interest" and "public convenience and necessity" are substantially equivalent, it was appropriate for the Commission to view Canadian exports as "instructive" in assessing the public need for the NEXUS Project. This is particularly true in light of the Commission's reliance on a "variety of other relevant factors to demonstrate need." Remand Order P 17-21, 25, JA___. This Court's jurisdictional analysis in *Border* and *Distrigas* does not suggest otherwise.

4. The Commission's Practice Of Authorizing Cross-Border Facilities Under Section 3 Is Legally Sound And Entitled To Deference.

Oberlin challenges the Commission's practice of using Section 3 to assess authorizing cross-border facilities. Pet. Br. at 21-22. As the Commission explained its precedent, "we authorize a pipeline transporting interstate volumes to a border crossing facility under section 7, and then authorize only a small segment of the pipeline close to the border . . . deemed to be the import or export facility, under section 3." Remand Order P 16 (internal quotes omitted), JA___.

The Commission has long interpreted its authority over imports and exports to apply only to small segments of border-crossing facilities. *See Trans-Pecos Pipeline, LLC*, 155 FERC ¶ 61,140, P 31 (2016) (granting Section 3 authorization as to 1,093-foot border-crossing facility connected to 148-mile intrastate pipeline), *aff'd on other grounds sub nom. Big Bend Conservation All. v. FERC*, 896 F.3d 418 (D.C. Cir. 2018); *S. LNG Inc.*, 131 FERC ¶ 61,155, n.17 (2010) ("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"); *Oasis Pipeline, LP*, 127 FERC ¶ 61,263, P 18 (2009) (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, pp. 61,954-55 (1991) (same, as to

1,000-foot border-crossing facility, not for connected intrastate pipeline). This is consistent with *Border*, where the Commission authorized the border-crossing facilities under Section 3 but did not have Section 7 jurisdiction over the remainder of the pipeline that only transported gas in intrastate commerce.

Oberlin asserts that the Commission's practice of authorizing solely cross-border facilities under Section 3 "is not persuasive authority here." Pet. Br. at 22. But the Commission's reasonable interpretation of the NGA is entitled to deference. *United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1166 (D.C. Cir. 1999) (per curiam) ("As we have found that the statute is not unambiguous . . . we defer to the agency's interpretation of the statute if it is reasonable and consistent with the statute's purpose"); *see also Assoc. Gas Dist.*, 824 F.2d at 1001; *N. Carolina v. FERC*, 913 F.3d 148, 150 (D.C. Cir. 2019) ("The Court owes deference to FERC's interpretation of the Federal Power Act since it is the agency charged with administering that statute.").

Finally, Oberlin again seeks to support its argument by pointing to "interstate pipelines with one hundred percent of capacity bound for Mexico." Pet. Br. at 23 n.12. But that scenario is simply a distraction with no relevance to NEXUS, which is undisputedly an interstate pipeline serving domestic markets.

C. The Commission's Public Convenience And Necessity Analysis Applies To The NEXUS Project As Proposed And Constructed.

Oberlin makes a convoluted argument that the public benefits on which the Commission relied in approving the NEXUS Project "are imagined and lack any connection to the project that Nexus *actually* proposed." Pet. Br. at 23. That assertion contradicts this Court's findings. *Oberlin*, 937 F.3d at 605 (Commission "engaged [the Certificate Policy Statement's] broad-ranging inquiry reasonably"); *id.* at 612 (Rogers, J., concurring) ("Here, the Commission's findings regarding the need for and the nature of the NEXUS pipeline are supported by substantial evidence in the record considered as a whole …"); *see also Env't. Def. Fund*, 2021 WL 2546672, at *14 (D.C. Cir. June 22, 2021) (referring to "evidence of market demand" in *Oberlin*—which includes market studies—as "much stronger").

Oberlin asserts that the NEXUS Project was intended to transport 260,000 Dth/d to the Dawn Hub. Pet. Br. at 24-25. Oberlin criticizes the Commission for "speculating" that gas delivered to the Dawn Hub, a liquid trading point, may move back to the U.S. to serve public demand. *Id.* at 26. But the Commission need not disregard known facts about the Dawn Hub's operation, "where supplies move freely to and from the United States and Canada, allowing shippers and marketers in both countries to access the best market available." Remand Order P 19. The Dawn Hub has long been recognized as an important cross-border connection point. *See, e.g.*, U.S. ENERGY INFO. ADMIN.: OFFICE OF OIL AND GAS, NATURAL GAS MARKET

CENTERS: A 2008 UPDATE, 13 (2008) ("[I]ts location and interconnections along the TransCanada mainline, as well as its access to several major U.S. pipelines via Michigan, have made the Dawn Center convenient to both U.S. and Canadian natural gas shippers, contributing to its steady growth.").[5] In recognizing the *real-world* operation of the North American gas market, the Commission is not "depart[ing]" from its policy of not "looking behind precedent agreements to make judgments about the shipper' needs." Pet. Br. at 27. The Commission is simply recognizing known facts about the workings of the Dawn Hub and applying those facts to its public convenience and necessity analysis, along with the other benefits on which the Commission relied. Remand Order PP 17-20, 25, JA___.

II. The Commission's Reliance On Exports To Support Its Public Convenience And Necessity Analysis Is Consistent With The Takings Clause.

A. The Commission Did Not Treat Any Section 3 Analysis As Equivalent To A Public Use As Required By The Takings Clause.

Oberlin argues that the Commission treated the public interest and public convenience and necessity analyses under Sections 3 and 7 as "functionally equivalent" and thereby added eminent domain authorization to Section 3. Pet. Br.

[5] Courts regularly rely on government reports reflecting known circumstances, including reports from the U.S. Energy Information Administration. *See, e.g., Khan v. Bank of New York Mellon,* 525 Fed. Appx. 778, 780 (10th Cir. 2013) (taking judicial notice of a government report).

29-30. Oberlin's underlying premise is wrong: the Commission made clear that public interests under Section 3 can be considered in a Section 7 analysis as a non-dispositive factor, but the Commission still must analyze all of the public interests supporting a pipeline under Section 7, which the Commission did here. Remand Order P 12 (Section 3 is "instructive" to Section 7 public convenience and necessity analysis), JA___; *id.* P 15 (consideration of exports not "dispositive"); *id.* Glick Concurrence P 4 (export contracts "help support a finding of need for a proposed pipeline").[6]

B. The Commission's Finding That NEXUS Is In The Public Interest Satisfies The Fifth Amendment's Public Use Requirement.

Oberlin does not—and cannot—contend that the recipient of a Section 7 certificate such as NEXUS lacks lawful eminent domain authority. *See* 15 U.S.C. § 717f(h). "Once a certificate has been granted, the statute allows the certificate holder to obtain needed private property by eminent domain….The Commission does not have the discretion to deny a certificate holder the power of eminent

[6] Oberlin oddly devotes a discrete argument to criticizing the Commission's reliance on "stimulating economic growth and job creation" (Pet. Br. at 30-31 (citing Remand Order P 18)), but Oberlin disregards other key benefits found by the Commission, including benefits applicable to NEXUS that Oberlin itself quotes from the Certificate Policy Statement: "access to new supply sources or connections of new supply sources to the interstate grid, the elimination of pipeline facility constraints, better service from access to competitive transportation options and the need for an adequate pipeline infrastructure." Pet. Br. at 31 (quoting Certificate Policy Statement, 88 FERC ¶ 61,227, P 16).

domain." *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (citation omitted). Courts have consistently upheld the exercise of eminent domain authority by pipelines holding FERC certificates. *See, e.g., Appalachian Voices v. FERC*, No. 17-1271, 2019 WL 847199, *2 (D.C. Cir. Feb. 19, 2019) ("FERC's rational public convenience and necessity determination satisfies the Fifth Amendment's 'public use' requirement."); *Midcoast Interstate Transmission, Inc.*, 198 F.3d at 973.

III. The Commission Correctly Concluded That The NEXUS Project Is In The Public Convenience And Necessity Independent Of Any Precedent Agreements For Export.

The Commission's alternative finding that the NEXUS Project is required by the convenience and necessity independent of the precedent agreements for export should also be affirmed. Remand Order PP 10, 24-28. Contrary to Oberlin's assertions, the Commission had jurisdiction to make that alternative finding, and the Commission's conclusions are fully supported by the record. The alternative finding provides a separate and independent basis to uphold the Certificate Order.

A. The Commission Had Jurisdiction To Analyze The NEXUS Project's Public Convenience And Necessity Independent Of Precedent Agreements For Export.

When the Commission reacquires jurisdiction on remand, it has "the discretion to reconsider the whole of its decision." *Se. Michigan Gas Co. v. FERC*, 133 F.3d 34, 38 (D.C. Cir. 1998). This Court has "allowed additional reasoning on

remand" where, as here, the Court "remanded the proceedings for further explanation." *Atl. City Elec. Co. v. FERC*, 329 F.3d 856, 858 (D.C. Cir. 2003) Contrary to Oberlin's assertion (Pet. Br. at 34), the Commission needed no "invitation" to further analyze the record and reach an alternative conclusion.

This Court's request that the Commission explain its reliance on precedent agreements for export did not cabin the Commission's authority to find additional bases to approve the NEXUS Project. In *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 298 (D.C. Cir. 2001), this Court remanded an order to the Commission for reconsideration in light of *Williston Basin v. FERC,* 165 F.3d 54 (D.C. Cir. 1999). The Court stated that the remand "prescribed affirmatively what the Commission *was required* to do—reconsider the weighting issue that was directly affected by *Williston*. But under our cases such a remand restores jurisdiction to the Commission and 'discretion to reconsider the *whole of its original decision*.'" *Canadian Ass'n of Petroleum Producers,* 254 F.3d at 298 (emphasis added).

Here, with jurisdiction to consider the entire record and "discretion to reconsider the whole of its original decision," *id.* "FERC was obligated to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *SFPP, L.P. v.*

FERC., 592 F.3d 189, 193 (D.C. Cir. 2010) (quotations omitted). The Commission's alternative finding satisfied its obligations.

B. The Commission's Alternative Finding Of Public Interest Is Supported By The Record.

Oberlin's attack on the Commission's alternative finding of public benefits fails because Oberlin disregards the full record on which the Commission properly relied. Pet. Br. at 34-44. When the entire record is considered, as it must be, there is ample support for the Commission's finding of public benefits.

First, the Commission relied heavily on the six precedent agreements representing "625,000 Dth per day of firm transportation service, or 42% of the project's total capacity." Remand Order P 24. That is fully consistent with *Oberlin*, where this Court explained:

> [T]he Certificate Policy Statement imposes no bright-line rule about when precedent agreements may be persuasive evidence of market demand. Instead, it lays out a flexible inquiry that allows the Commission to consider a wide variety of evidence to determine the public benefits of the project.

937 F.3d at 605; *see also Env't. Def. Fund*, 2021 WL 2546672, at *1 ("In analyzing the need for a particular project, the Certificate Policy Statement makes clear that the Commission will 'consider *all* relevant factors.'") (quoting Certificate Policy Statement). Applying the Certificate Policy Statement's "flexible approach for evaluating projects," the Commission found the 41.6% "level of subscription

adequate to support a finding that the NEXUS project is required by the public convenience and necessity." Remand Order P 24, JA___.

But, critically, the Commission's public convenience and necessity analysis did not stop there. Although the Commission was not *required* to look beyond the public need reflected by the precedent agreements, *see Minisink Residents for Environmental Preservation & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014), the Commission did so and found ample additional evidence of public need. The Commission found "a variety of other relevant factors to demonstrate need," including "market studies, a comparison of projected demand with the amount of capacity currently serving the market, and whether a project may offer access to new supplies, new interconnects, and competitive alternatives, and potential cost savings to customers." Remand Order P 25, JA___ (citing Certificate Policy Statement, 88 FERC at 61,747-48.). In *Oberlin*, this Court found that the Commission—in relying on these *very same factors* in addition to precedent agreements— "engaged [the Certificate Policy Statement's] broad-ranging inquiry reasonably." *Oberlin*, 937 F.3d at 605; *see also id.* at 612 (Rogers, J., concurring) ("Here, the Commission's findings regarding the need for and the nature of the NEXUS pipeline are supported by substantial evidence in the record considered as a whole …").

In addition to the 41.6% subscription rate, the substantial evidence in the record supports the Commission's finding that the NEXUS Project is required by the

public convenience and necessity independent of any exports. For example, the Commission relied on market studies (Remand Order P 25, JA___), which the Commission previously found show "evidence of growing demand for natural gas pipeline transportation capacity" in the markets served by the Project. Rehearing Order P 34 & n.83, JA___. An Ohio market study specifically found that the northern Ohio markets served by the NEXUS Project have "an increasing demand for natural gas and will require additional infrastructure to meet [their] needs in the coming years." *Id*. A market study by the Michigan Public Service Commission found that the low price of natural gas combined with the retirement of coal plants could lead to the development of new natural gas-fired electric generating plants in Michigan, which would increase demand.[7] Further, a market study by Michigan State University found a growing demand for natural gas in the upper Midwest U.S. and eastern Canada and a decline in supply from western Canada, which traditionally served those markets. *See id*. at n.84 (quoting study appended to NEXUS' Resource Report 5). Thus, Oberlin's assertion that the "Commission did not undertake an assessment of the market" (Pet. Br. at 37) is false. As this Court observed in *Environmental Defense Fund,* unlike the Spire STL pipeline for which the

[7] *See* Rehearing Order P 34 & n.83, JA___ (citing "evidence of growing demand for natural gas pipeline transportation capacity" by referring, in part, to NEXUS Application Resource Report 1 at 1-4 to 1-5, which quotes from the Mich. PSC study).

Commission "rejected arguments that a market study should be undertaken to establish the need for the project," the NEXUS project is supported by multiple market studies and the "evidence of market demand" is "much stronger." 2021 WL 2546672, at **2, 14.

Oberlin cites Glick's Dissent for the proposition that the Commission did not consider contrary evidence (Pet. Br. at 37-38, citing P 8), but that is incorrect. The Commission *did* consider the countervailing studies, but exercised its discretion and expertise to adjudge one set of studies as more credible than the other. Rehearing Order P 34, JA___ ("We are unpersuaded by the studies cited by Sierra Club and by the City of Oberlin in their attempt to show that there is insufficient demand for the NEXUS Project."); *see also id.* P 87, JA___ (report prepared by Cleveland State University failed even to address demand for natural gas and methodology was flawed); *id.* P 31, JA___ (DOE study on which Oberlin relied actually showed projected growth in natural gas production in the Marcellus region, requiring additional pipeline capacity, and Commission rejected Oberlin's suggestion that DOE study supports allegations of overbuilding). In sum, the Commission did not "close its eyes" to the studies proffered by the NEXUS Project's opponents, *Minisink*, 762 F.3d at 109, but determined that, on balance, the studies support a finding that the Project is required by the public convenience and necessity. Rehearing Order P 34, JA___.

As additional evidence of public need, the Commission found that the NEXUS Project would "help to alleviate a bottleneck of available capacity for transporting gas from the Marcellus and Utica production regions to markets currently sourcing higher priced gas." Remand Order P 25, JA___ (citing Rehearing Order P 30, JA___).

The Commission also found that the Project would benefit the public interest by providing northern Illinois and other Midwestern markets access to additional supplies of gas. Remand Order P 25, JA___ (citing Rehearing Order P 35, JA___).

The Commission found that all of these public benefits fully apply to the NEXUS Project *independent of any exports*. In fact, even Glick's Dissent, with one exception, praised the Commission's "consideration of other evidence besides precedent agreements." Remand Order P 6, JA____. Referring to "the project's potential to alleviate bottlenecks in transportation and diversify supplies of natural gas in the upper Midwest," Glick declared that "[t]hose types of benefits ought to be considered and I strongly support this more comprehensive approach to assessing the need for the Project." *Id.*

In sum, combining (i) the Commission's reliance on these "*other* relevant factors to demonstrate need" (Remand Order P 25, JA___), with (ii) the Commission's reliance on the Project's 41.6% subscription rate (*id.* P 24), it is clear that the Commission "engaged in [the Certificate Policy Statement's] broad-ranging

inquiry reasonably." *Oberlin*, 937 F.3d at 605; *see also id.* at 612 (Rogers, J., concurring) ("Here, the Commission's findings regarding the need for and the nature of the NEXUS pipeline are supported by substantial evidence in the record considered as a whole …").

C. Oberlin Disregards The Full Record Of Public Convenience And Necessity On Which The Commission Based Its Alternative Finding.

Oberlin completely disregards that the Commission's finding of public need was supported by "a variety of other relevant factors to demonstrate need" (Remand Order P 25, JA___), as discussed in Part III.B. above. Instead of looking at the entire record, Oberlin focuses solely on discrete aspects of the Commission's finding, including the Commission's discussion of the ability of other pipelines to absorb excess capacity served by the NEXUS Project (Pet. Br. at 34-36), and the Commission's partial focus on the Project creating new capacity. *Id.* at 36-38. Oberlin's myopic focus on these two points is both incorrect and insufficient.

First, Oberlin complains that the Commission's analysis of whether other pipelines could absorb the 665,000 Dth/d of service subscribed by NEXUS' domestic shippers uses the same language the Commission used for the 885,000 Dth/d when including the two precedent agreements for export. Pet. Br. at 34. But the Commission concluded that other pipelines lack capacity to absorb 665,000

Dth/d (Remand Order P 27, JA___), and Oberlin fails to explain why the Commission was required to use different words to state that conclusion.

Oberlin also complains (Pet. Br. at 35) that "Commission staff used publicly-available information from NEXUS' application and other pipeline company's electronic bulletin boards to determine that there is similarly no unsubscribed capacity available to serve the 625,000 Dth per day." Remand Order P 27. But the Commission used that same source of information in its prior determination regarding the capacity to absorb 885,000 Dth/d. *See* Certificate Order P 40 & n.29, JA___; Rehearing Order P 30, JA___. Oberlin did not challenge the Commission's use of that information in its first appeal, and this Court affirmed it. *Oberlin*, 937 F.3d at 605. Oberlin should be held to have waived the right to challenge this point.[8] Thus, contrary to Oberlin's suggestion, the Commission is not asking the Court to "take my word for it" (Pet. Br. at 36); it is relying on the same source of information that both Oberlin itself and this Court found acceptable in *Oberlin*.

Second, Oberlin seizes upon Glick's narrow objection to counting the NEXUS Project's new capacity as a public benefit because, according to him, such a benefit would apply to any pipeline project. Pet. Br. 36-38. But Oberlin disregards that

[8] *See ESI Energy, LLC v. FERC*, 892 F.3d 321, 330 (D.C. Cir. 2018) ("This objection is waived, however, because Marcus Hook did not raise it on rehearing and has provided no reasonable ground for its failure to do so."); 16 U.S.C. § 825*l*(b)).

Glick agreed with the Commission's other conclusions on public need. Remand Order PP 4-6, JA___.

In short, Oberlin's failed attempt to chip away at the edges of the Commission's public benefits analysis, while completely ignoring the bulk of the substantial evidence supporting that analysis, provides no basis to reject the Commission's alternative finding that the NEXUS Project is required by the public convenience and necessity independent of precedent agreements for export.

D. Oberlin's Attack On The Commission's Balancing Of Benefits And Adverse Impacts Is Baseless.

Oberlin's assertion that the Commission did not properly consider the adverse impacts of the NEXUS Project (Pet. Br. 38-40) is incorrect. The Commission properly followed the Certificate Policy Statement in balancing the public benefits of the NEXUS Project against its adverse impacts. Remand Order P 26, JA___. Oberlin simply reiterates its argument regarding the 41.6% subscription rate (Pet. Br. at 38), but continues to disregard the Commission's public benefits analysis as a whole.

Moreover, Oberlin is precluded from challenging the balancing of adverse impacts because it failed to do so in the prior appeal. *Nw. Indiana Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand."). Oberlin quarrels (Pet. Br. at 39) with the

Commission's observation, in weighing adverse impacts, that "NEXUS negotiated agreements with substantially all landowners for right-of-way across 2,070 tracts of land, representing 93% of the total land required." Remand Order P 26 & n.68, JA___. But the Commission expressly relied on that point in the Certificate Order (*see* PP 36-37, 49-50, JA___), and Oberlin failed to challenge it in the first appeal before this Court, focusing its "adverse impacts" argument on alleged safety issues, which this Court rejected. *Oberlin*, 937 F.3d at 610.

Oberlin's assertion that the Commission "overlooked" an assessment of the Project's feasibility (Pet. Br. at 39) is wrong. *See* Remand Order P 28, JA___ (citing Rehearing Order P 27 (citing Certificate Order P 48, JA___)). Oberlin just disagrees with the Commission's conclusion.

Oberlin's complaint that the Commission did not analyze a hypothetical smaller project designed to transport 625,000 Dth/d (Pet. Br. at 40-41), is easily dispatched. First, Oberlin failed to challenge that aspect of the Commission's analysis in the first appeal, and should be precluded from doing so now. *Nw. Indiana Tel.,* 872 F.2d at 470. Further, as the Commission explained, its prior analysis of a hypothetical project designed to carry 885,000 Dth/d applies with equal force to a hypothetical project designed to carry 625,000 Dth/d: "The Commission has recognized that certificating a pipeline with capacity larger than initially subscribed in a location where there is potential for future growth in demand for service is

appropriate as it will minimize potential environmental and landowner impacts that could occur in the future were a smaller pipeline constructed now." Remand Order P 28 n.73, JA___ (citing Certificate Order P 46, JA___).

Oberlin's arguments about updated information (Pet. Br. at 41-44) are incorrect. The Commission's analysis of public benefits (Remand Order PP 24-26, JA___), on its face, is not dependent on the fact "that well over 60% of NEXUS's deliveries have been within the United States." *Id.* P 27. As the Commission stated, that fact simply "provides *validation* for the conclusion that the NEXUS project can be justified without reliance on the foreign delivery contracts." *Id.* Moreover, the data cited by the Commission are correct. Oberlin attempts to refute that data by arguing that the denominator should be total capacity versus total volume of gas transported. Pet. Br. at 42. But the fact is that 64% to 69% of the volume transported by NEXUS was delivered to domestic markets. Remand Order P 27, JA___. Because the pipeline was not completely full, that also means the percentage of total capacity being transported to domestic markets is smaller than the percentage of total volumes. The point is that usage of the pipeline is predominantly domestic.

Finally, Oberlin's reliance on alleged "updated facts"—*i.e.,* tax revenues to local communities, lawsuits about construction, and "a recent state regulatory process" (Pet. Br. at 43-44)—is irrelevant to this appeal because those points are not among the public benefits on which the Remand Order relied to find that the NEXUS

Project is required by the public convenience and necessity. Overall, Oberlin's "updated facts" range from incorrect to highly misleading and cannot be relied upon to show anything. As just one example, the news article Oberlin cites (*id.* at 43 n.28) relies solely on the brief of the Michigan Environmental Council, not a Michigan Public Service Commission decision, and that proceeding concerned cost recovery, not project need.

CONCLUSION

For the above-stated reasons, NEXUS requests that the Court deny the petition.

Dated: July 27, 2021

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and this Court's briefing order because this brief contains **9,054 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

2. This brief 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 brief has been prepared in a proportionally-spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of July 2021, pursuant to Federal Rules of Appellate Procedure 15(d) and 25(b) through (d), I electronically filed the foregoing BRIEF OF INTERVENOR-RESPONDENT NEXUS GAS TRANSMISSION, LLC with the Clerk of the Court for the U.S. Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system, and served copies of the foregoing via the Court's CM/ECF system upon on all ECF-registered counsel.

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ADDENDUM

Statutes and Regulations

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STATUTES

ed Pub. L. 113–235, div. H, title I, §1301(b), (d), Dec. 16, 2014, 128 Stat. 2537.)

CODIFICATION

''Sections 1535 and 1536 of title 31'' substituted in text for ''sections 601 and 602 of the Act of June 30, 1932 (47 Stat. 417 [31 U.S.C. 686, 686b])'' on authority of Pub. L. 97–258, §4(b), Sept. 13, 1982, 96 Stat. 1067, the first section of which enacted Title 31, Money and Finance.

CHANGE OF NAME

''Director of the Government Publishing Office'' substituted for ''Public Printer'' in text on authority of section 1301(d) of Pub. L. 113–235, set out as a note under section 301 of Title 44, Public Printing and Documents.

''Government Publishing Office'' substituted for ''Government Printing Office'' in text on authority of section 1301(b) of Pub. L. 113–235, set out as a note preceding section 301 of Title 44, Public Printing and Documents.

§825*l*. Review of orders

(a) Application for rehearing; time periods; modification of order

Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), 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.

(b) Judicial review

Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. 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 unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(c) Stay of Commission's order

The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

(June 10, 1920, ch. 285, pt. III, §313, as added Aug. 26, 1935, ch. 687, title II, §213, 49 Stat. 860; amended June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, §127, 63 Stat. 107; Pub. L. 85–791, §16, Aug. 28, 1958, 72 Stat. 947; Pub. L. 109–58, title XII, §1284(c), Aug. 8, 2005, 119 Stat. 980.)

CODIFICATION

In subsec. (b), ''section 1254 of title 28'' substituted for ''sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347)'' on authority of act June 25, 1948, ch. 646, 62 Stat. 869, the first section of which enacted Title 28, Judiciary and Judicial Procedure.

AMENDMENTS

2005—Subsec. (a). Pub. L. 109–58 inserted ''electric utility,'' after ''Any person,'' and ''to which such person,'' and substituted ''brought by any entity unless such entity'' for ''brought by any person unless such person''.

1958—Subsec. (a). Pub. L. 85–791, §16(a), inserted sentence to provide that Commission may modify or set aside findings or orders until record has been filed in court of appeals.

Subsec. (b). Pub. L. 85–791, §16(b), in second sentence, substituted ''transmitted by the clerk of the court to'' for ''served upon'', substituted ''file with the court'' for

''certify and file with the court a transcript of'', and inserted ''as provided in section 2112 of title 28'', and in third sentence, substituted ''jurisdiction, which upon the filing of the record with it shall be exclusive'' for ''exclusive jurisdiction''.

CHANGE OF NAME

Act June 25, 1948, eff. Sept. 1, 1948, as amended by act May 24, 1949, substituted ''court of appeals'' for ''circuit court of appeals''.

§ 825m. Enforcement provisions

(a) Enjoining and restraining violations

Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper District Court of the United States or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who, in his discretion, may institute the necessary criminal proceedings under this chapter.

(b) Writs of mandamus

Upon application of the Commission the district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this chapter or any rule, regulation, or order of the Commission thereunder.

(c) Employment of attorneys

The Commission may employ such attorneys as it finds necessary for proper legal aid and service of the Commission or its members in the conduct of their work, or for proper representation of the public interests in investigations made by it or cases or proceedings pending before it, whether at the Commission's own instance or upon complaint, or to appear for or represent the Commission in any case in court; and the expenses of such employment shall be paid out of the appropriation for the Commission.

(d) Prohibitions on violators

In any proceedings under subsection (a), the court may prohibit, conditionally or unconditionally, and permanently or for such period of time as the court determines, any individual who is engaged or has engaged in practices constituting a violation of section 824u of this title (and related rules and regulations) from—

(1) acting as an officer or director of an electric utility; or

(2) engaging in the business of purchasing or selling—

(A) electric energy; or

(B) transmission services subject to the jurisdiction of the Commission.

(June 10, 1920, ch. 285, pt. III, § 314, as added Aug. 26, 1935, ch. 687, title II, § 213, 49 Stat. 861; amended June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Pub. L. 109–58, title XII, § 1288, Aug. 8, 2005, 119 Stat. 982.)

CODIFICATION

As originally enacted subsecs. (a) and (b) contained references to the Supreme Court of the District of Columbia. Act June 25, 1936, substituted ''the district court of the United States for the District of Columbia'' for ''the Supreme Court of the District of Columbia'', and act June 25, 1948, as amended by act May 24, 1949, substituted ''United States District Court for the District of Columbia'' for ''district court of the United States for the District of Columbia''. However, the words ''United States District Court for the District of Columbia'' have been deleted entirely as superfluous in view of section 132(a) of Title 28, Judiciary and Judicial Procedure, which states that ''There shall be in each judicial district a district court which shall be a court of record known as the United States District Court for the district'', and section 88 of Title 28 which states that ''the District of Columbia constitutes one judicial district''.

AMENDMENTS

2005—Subsec. (d). Pub. L. 109–58 added subsec. (d).

§ 825n. Forfeiture for violations; recovery; applicability

(a) Forfeiture

Any licensee or public utility which willfully fails, within the time prescribed by the Commission, to comply with any order of the Commission, to file any report required under this chapter or any rule or regulation of the Commission thereunder, to submit any information or document required by the Commission in the course of an investigation conducted under this chapter, or to appear by an officer or agent at any hearing or investigation in response to a subpena issued under this chapter, shall forfeit to the United States an amount not exceeding $1,000 to be fixed by the Commission after notice and opportunity for hearing. The imposition or payment of any such forfeiture shall not bar or affect any penalty prescribed in this chapter but such forfeiture shall be in addition to any such penalty.

(b) Recovery

The forfeitures provided for in this chapter shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States, brought in the district where the person is an inhabitant or has his principal place of business, or if a licensee or public utility, in any district in which such licensee or public utility transacts business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures under this chapter. The costs and expenses of such prosecution shall be paid from the appropriations for the expenses of the courts of the United States.

(c) Applicability

This section shall not apply in the case of any provision of section 824j, 824k, 824*l*, or 824m of this title or any rule or order issued under any such provision.