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Exports, Eminent Domain, and the “Public Convenience and Necessity”: FERC Weighs In

On September 3, 2020, the Federal Energy Regulatory Commission (“FERC” or the “Commission”) issued an Order on Remand from the U.S. Court of Appeals for the District of Columbia Circuit, providing a more robust explanation regarding how the NEXUS Gas Transmission, LLC (“NEXUS”) pipeline project, which relied in part on precedent agreements that would export natural gas to Canada, merits authorization under section 7(c) of the Natural Gas Act (“NGA”), thus giving NEXUS eminent domain authority.¹

BACKGROUND

On August 25, 2017, the Commission had issued a certificate of public convenience and necessity under section 7(c) to NEXUS.² The Certificate Order approved the Project, which allowed for the use of eminent domain to build an approximately 250-mile-long pipeline in Ohio and Michigan. NEXUS had executed eight precedent agreements, accounting for 59 percent of the capacity of the Project, and the Commission found that these agreements demonstrated a need for the Project. Two of the eight precedent agreements were with Canadian companies.

Protesters argued that NEXUS should not be permitted to use eminent domain because some of the project’s capacity would be used to export gas and exports are subject to NGA section 3 authorization, rather than section 7, which does not allow for eminent domain. The Commission affirmed its underlying decision on rehearing and stated that Commission policy did not require FERC to look beyond precedent or service agreements to make judgments about the needs of individual shippers.³

Protesters appealed to the D.C. Circuit. In September 2019, the D.C. Circuit, in *City of Oberlin v. FERC*, 937 F.3d 599, remanded the case to FERC and directed the Commission to supply an explanation for why it allowed the crediting of export precedent agreements with foreign shippers when analyzing market need for a domestic pipeline project. The D.C. Circuit also asked FERC for more robust explanation for why eminent domain was needed or appropriate.

ORDER ON REMAND

In a 2-1 vote, the Commission affirmed the Commission’s underlying finding that the project was in the public convenience and necessity and that the Commission appropriately credited NEXUS’s precedent agreements with foreign shippers that may serve foreign customers. The Commission also went further and stated that, regardless of the precedent agreements with the Canadian companies, the Project was necessary because of a myriad of specific benefits that support a finding of public convenience and necessity.

The Commission stated that the fact that a precedent agreement is with a foreign shipper that may serve foreign customers does not alter the finding that these agreements support approval under section 7(c). The Commission considered congressional intent behind NGA section 3(c), which deems exports to free trade partners, such as Canada, to be in the public interest. The Commission explained that when it considers a proposed interstate gas pipeline project it is appropriate to include exports to a free trade partner toward a project's need under section 7. The Commission emphasized the importance of giving equal weight to precedent agreements for transportation involving domestic and export use. The Commission stated that failing to do so would thwart Congressional intent. The Commission also considered several public benefits that apply regardless of end use such as "contributing to the development of the gas market...adding new transportation options...strengthening the domestic economy and the international trade balance..." and creating jobs.⁴ The Commission concluded that contracts for the import or export of gas both are required by public convenience and necessity.

The Commission differentiated the facts here to the facts in *Border Pipe Line Co. v. FPC*⁵ by stating that the pipeline in *Border Line* failed to engage in interstate commerce because it only transported in Texas and into Mexico, which meant the Commission's assertion of NGA section 7 jurisdiction was not valid. Here, the Commission stated that the NEXUS pipeline clearly transports through various states in the United States, which made for valid NGA section 7 jurisdiction.

The Commission undertook an analysis of the takings clause and determined that a 7 certificate satisfies the public use standard of the takings clause. The Commission looked to Congress and U.S. Supreme Court decisions to conclude that there is no requirement that the Commission to first make a finding of public convenience and necessity under NGA section 7 and then verify that the project furthers a public use prior to utilizing eminent domain.⁶

Finally, the Commission also looked to its Certificate Policy Statement⁷ and considered the project without the two precedent agreements with Canadian shippers and determined that the remaining precedent agreements still demonstrated the requisite need in support of a public convenience and necessity finding. The Certificate Policy Statement also provided several relevant factors for the Commission to consider to demonstrate market need and found that the Project fulfilled several of these factors, such as "alleviat[ing] a bottleneck of available capacity for transporting gas... provid[ing] northern Illinois and other Midwestern markets access to additional supplies of gas... [and] enhanc[ing] the pipeline grid and ensur[ing] access to future domestic energy supplies."⁸ The Commission concluded that these benefits would help the United States' gas market.

Commissioner Richard Glick, who had dissented from FERC's original approval of the Project,⁹ concurred in part and dissented in part. Commissioner Glick's concurrence discussed how FERC should weigh exports and agreed that precedent agreements with shippers for gas exports can provide evidence that a pipeline project is needed. In his dissent, Glick argued that the majority presumed that the project is needed because of the supposed benefits of added pipeline capacity without assessing the possibility that the future gas demand for that added pipeline capacity may never materialize.

For additional information, please contact:

Mark R. Haskell, Washington, D.C. Office
Partner, Energy
202.420.2654 | mhaskell@blankrome.com

Brett A. Snyder, Washington, D.C. Office
Partner, Energy
202.420.2656 | bsnyder@blankrome.com

Jane Thomas, Washington, D.C. Office
Associate, General Litigation
202.420.2577 | jthomas@blankrome.com

1. *NEXUS Gas Transmission, LLC*, 172 FERC ¶ 61,199 (2020) (Order on Remand).
2. *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (2017) (Certificate Order), *on reh'g*, 164 FERC ¶ 61,054 (2018) (Rehearing Order).
3. Rehearing Order, 164 FERC ¶ 61,054 at P 27.
4. Order on Remand, 172 FERC ¶ 61,199 at P 17.
5. *Border Pipe Line Co. v. FPC*, 171 F.2d 149, 151 (D.C. Cir. 1948)
6. Order on Remand, 172 FERC ¶ 61,199 at P 23.
7. *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, 90 FERC ¶ 61,128, *further clarified*, 92 FERC ¶ 61,094 (2000).
8. Order on Remand, 172 FERC ¶ 61,199 at P 25.
9. *NEXUS Gas Transmission, LLC*, 164 FERC ¶ 61,054 (2019) (Glick, Comm'r, dissenting).