

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

NEXUS GAS TRANSMISSION, LLC) **CASE NO. 5:17-cv-02062**
)
Plaintiff,) **JUDGE JOHN ADAMS**
)

vs.)
)

2.00 ACRES ± PERMANENT)
EASEMENT, AND 3.2 ACRES ±)
TEMPORARY EASEMENT OF)
LAND IN CITY OF GREEN,)
SUMMIT COUNTY OHIO, et al.)
)

Defendants.)
)

NEXUS GAS TRANSMISSION, LLC,) **Case No., 5:17-cv-2066**
)

Plaintiff,)
)

0.8 ACRES + PERMANENT)
EASEMENT, AND 0.7 ACRES +)
TEMPORARY EASEMENT OF)
LAND IN CITY OF NEW)
FRANKLIN, SUMMIT COUNTY,)
OHIO, et al.,)
)

Defendants.) **Motion to Stay Proceedings**

Now come the Defendants¹ John and Elaine Selzer, by and through counsel, and hereby move this Court to Stay this action with respect to the Defendants until the Administrative Appeal process has been completed. For the reasons set forth in the attached Memorandum of Law, there is good cause to stay this proceeding and such stay should be granted.

¹ Of the thirteen properties represented in this case by David Mucklow and Aaron Ridenbaugh, the Defendants have either entered into agreements, agreements are pending, or have been dismissed due to rerouting except for John and Elaine Selzer.

WHEREFORE, Defendants pray that this Court stay these proceedings until the administrative appeal process is complete, and for such other and further relief as this Court may find to be just and equitable.

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MEMORANDUM

Defendants have been attempting, in this action and before the Federal Energy Regulatory Commission (“FERC”), to have someone, somewhere answer the legal issue of whether the Natural Gas Act (“NGA”) permits Nexus Gas Transmission, LLC (“Nexus”) to utilize eminent domain proceedings on a pipeline that is an export pipeline. At every turn, Nexus asserts that Defendants do not have standing to make this argument. Nexus consistently argues that Defendants must first exhaust their administrative remedies pursuant to 15 U.S.C. § 717r before they have the ability to raise this issue in court. As set forth below, should Nexus prevail on this argument, the issue will become moot prior to the resolution of the administrative appeal process. Thus, should this Court find Nexus’ arguments persuasive, it should stay this proceeding until the administrative remedies Nexus insists must take place have had a chance to occur.

A. Facts

On May 12, 2017, Defendants, and others, filed a Complaint in this Court, case no. 5:17-cv-01005, seeking, *inter alia*, a determination that Nexus was proceeding before FERC under the incorrect section of the NGA. Instead of section 7, Nexus should be required to proceed under section 3 of the NGA, which does not afford the right of eminent domain. Defendants previously moved this Court for a preliminary injunction in case 5:17-cv-01005 to enjoin the issuance of a Certificate until this issue could be decided and to stop the overly aggressive Nexus tactics of negotiating directly with property owners despite representation by legal counsel. See City of Green’s Memorandum in Opposition page 7, doc#331.

Nexus moved to dismiss that complaint, arguing that the NGA provides an exclusive pathway for judicial review: “First, a party ‘aggrieved by an order issued by the Commission’

may apply to the Commission for a rehearing after the issuance of that order. . . . A party that, after rehearing, remains ‘aggrieved by an order issued by the Commission . . . may obtain a review of such order in the court of appeals of the United States.’” Case: 5:17-cv-01005-JRA Doc #: 28, PageID #: 5052. This argument pervades Nexus’ motion to dismiss.

Nexus continued to rely on the position that the Defendants must first exhaust the administrative appeal process before a court could determine the validity of their argument. See *Memorandum in Opposition to Motion for preliminary Injunction*, Case: 5:17-cv-01005-JRA Doc #: 29, PageID #: 5080; *Nexus’ Reply in Support of Motion to Dismiss*, Case: 5:17-cv-01005-JRA Doc #: 38, PageID #: 5174; *Response to Objection to Report and Recommendation*, Case: 5:17-cv-01005-JRA Doc #: 42, PageID #: 5232.

On October 2, 2017, Nexus filed its Complaint in this matter seeking to acquire by eminent domain certain easements, including an easement on the property of the Defendants. On October 25, 2017, Defendant filed their Motion to Dismiss for Lack of Jurisdiction contending that the Certificate could not authorize this eminent domain proceeding because the pipeline was an export pipeline and, therefore, could only be authorized under section 3 of the NGA. Once again, Nexus asserted that Defendants could not bring this argument in this case—that they had to first apply for rehearing before FERC and if that was denied, appeal to the Sixth Circuit. See *Memorandum in Opposition to Motion to Dismiss*, Case: 5:17-cv-02062-SL Doc #: 245, PageID #: 3111. Defendants attempt to make their section 3 argument in their Response to Nexus’ Motion for Partial Summary Judgment. Again, Nexus argues that this argument must be made to FERC and then the Court of Appeals, not in opposition to summary judgment. Case: 5:17-cv-02062-JRA Doc #: 317, PageID #: 3694.

In the meantime, the nonprofit organization Coalition to Reroute Nexus (CoRN) has been pursuing administrative remedies before FERC on behalf of property owners in Stark, Summit and Medina Counties, including Defendants. CoRN filed two Requests for Rehearing on September 22, 2017, one of which asserted that FERC erred in causing a Certificate to issue under section 7 of the NGA and that the authorization of eminent domain was an unconstitutional taking. See Exhibit A, a true and accurate copy of the Request for Rehearing. In response to the Request for Rehearing, FERC issued an Order Granting Rehearings for Further Consideration on October 23, 2017. See Exhibit B, a True and accurate copy of the FERC Order. This Order states in part:

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order.

Thus, it is uncertain as to when Defendants may expect a decision on their Requests for Rehearing. Until such order is entered, Defendants do not have the ability to proceed to the Court of Appeals. Defendants also requested that FERC stay the effectiveness of the Certificate while rehearing was pending. None of those requests have been ruled upon by FERC².

B. Law and Argument

Defendants believe that this Court may the issue of whether Nexus was authorized under statute to proceed under section 7 of the NGA in this case, or in the previously filed case. However, should this Court disagree with Defendants' arguments regarding the authority of this

² FERC routinely does not acknowledge or rule on Motions filed by intervenors despite its rules of procedure require rulings. However, recently Nexus represented that FERC granted an exparte request for a variance on the Starkey property allowing Nexus to move the pipeline and avoid this outspoken Defendant resulting in their dismissal from the action.

Court to decide this issue, this Court should stay this matter to allow the administrative appeals process, which Nexus has always contended should apply, to run its course.

Four Factors are considered when deciding whether to issue a stay pending appeal: “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991)(citing Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n, 812 F.2d 288, 290 (6th Cir.1987). This standard is identical to the standard the court considers when deciding whether to issue an injunction. These factors are not always equally weighted. Friendship Materials, Inc. v. Michigan Brick, Inc., 679 F.2d 100, 105 (6th Cir.1982)(“where the plaintiff fails to show a strong or substantial probability of ultimate success on the merits of his claim, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if an injunction is issued.”

When these factors are considered, it is clear that the Court should issue a stay in this proceeding.

1. Likelihood of Success on the Merits

The likelihood of success on the merits has been extensively briefed for this Court. Briefly, the NGA contains separate provisions for import/export and domestic or interstate gas transportation and storage. Section 707b deals with importing and exporting Natural Gas: “[N]o person shall export any natural gas from the United States to a foreign country or import any natural gas from a foreign country without first having secured an order of the Commission authorizing it to do so.” 15 U.S.C. § 717b(a).

Section 717f, on the other hand, only applies to “natural gas companies” which the Act defines as “a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.” 15 U.S.C. § 717a(6). Interstate commerce is defined as “commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.” 15 U.S.C. § 717a(7).

The D.C. Circuit recognized the difference between these sections stating:

“‘Interstate commerce’ does not include foreign commerce, unless Congress by definition for the purposes of a particular statute includes them both in the single expression. Congress has frequently done that. It has also many times applied its enactments to ‘interstate and foreign commerce’ and is perfectly familiar with that expression and that idea. In the present statute it first declared the necessity for federal regulation of transportation and sale ‘in interstate and foreign commerce’. It then provided one section applicable to exports ‘from the United States to a foreign country’, and in other sections provided regulatory measures applicable to ‘interstate commerce’, defining that term without mention of foreign commerce. In view of the prevailing practice of Congress in other acts, the separation of the two subjects in this Act must be noticed and, we think, observed.”

Border Pipe Line Co. v. Fed. Power Comm'n, 171 F.2d 149, 150–51 (D.C. Cir. 1948)(internal citations omitted). “It is significant to note that the exportation of natural gas from the United States to a foreign country, or the importation of natural gas from a foreign country is not ‘interstate commerce’ as that term is contemplated by the Act.” *Ibid*.

Although section 717b of the Act appears to be significantly less burdensome than section 717f, FERC may impose section 717f requirements upon an applicant under section 717b. Distrigas Corp. v. Fed. Power Comm'n, 495 F.2d 1057, 1066 (D.C. Cir. 1974). However, there is one significant advantage to 717f—once a Certificate of Public Convenience is issued, the proponent of the pipeline is given the ability to acquire the property it needs via eminent

domain. 15 U.S.C. § 717f(h). In this case, this will permit Nexus to acquire property for a fraction of what it would cost if it had to reach an agreement with the Plaintiffs.

The majority of natural gas which will flow through the NGT Project is destined for the Dawn Hub in Canada (77.5% of the subscribed capacity). Nexus has never contested this fact. As such, this is an export pipeline. Section 717f is simply inapplicable to this case. FERC has made no finding in the Certificate that the pipeline complies with Section 3 of the NGA, the Code of Federal Regulations³, or constitutes “interstate commerce” within the meaning of the NGA. FERC has only found, “Nexus has sufficiently demonstrated a need for the project.” Exhibit C, Certificate ¶48. FERC acknowledges that through “Vector” (an existing export system) Nexus through acquisition of lease rights will transport natural gas “sufficient to provide 445,000 Dth per day of existing firm transportation service on two pipeline segments extending from interconnections with DTE Gas in Michigan to the international border with Canada . . .”. Id at ¶4, 8, 21, 22. FERC has refused to conduct any evidentiary hearing on any matter. Id at ¶28. Obviously, the natural gas being transported via Vector from Nexus into Canada does not simply stop at the international border. In this case, Nexus is attempting to stand the Natural Gas

³ The Congressional Research Service in 2013 wrote:

“FERC regulations governing authorization of facilities to construct, operate, or modify natural gas import/export facilities are set forth at 18 C.F.R. Part 153. Applications for Presidential Permits are subject to these regulatory requirements. 18 C.F.R. § 153.5 articulates “who should apply” for such FERC authorizations. **The regulation provides that any person proposing to site, construct, or operate natural gas import or export facilities or to “amend an existing Commission authorization, including the modification of existing authorized facilities,” must apply for a permit.**” (emphasis added) Page 4, 7-5700, www.crs.gov, R43261, October 29, 2013. The Nexus certificate expressly states that Nexus is acquiring the lease rights to export natural gas through the Vector system. Certificate ¶4, 8, 21, 22. There is no evidence supplied by Nexus to support that an application to amend Vector’s Presidential Permit has been submitted to FERC or the Secretary of State.

Act on its head. Nexus wants to construct an export pipeline, while receiving the benefits Congress reserved for an interstate pipeline, while ignoring a significant number of regulations. Nexus believes that by mixing around 25% interstate transportation with the remaining exports it has found a loophole and may take property from the American public even though it will be used for private foreign gain.

If given the chance, Defendants believe that they will prevail on this argument.

Defendants ask this Court to stay these proceedings to give them that chance.

2. The likelihood that the moving party will be irreparably harmed absent a stay

In this case, the likelihood that Defendants will be harmed absent a stay is exceptionally high. If this Court decides that this case is not the forum to decide the section 3 versus 7 issue that Defendants have raised in opposition to Nexus' Motion for Summary Judgment, it is highly likely that Nexus will win its Motion. Further, Nexus has moved for immediate possession citing a number of cases which have permitted access in the NGA context. Should Nexus gain possession, it will fell trees, dig trenches and place heavy equipment on Defendants' property. It will simply not be possible to restore the property to the condition it was before the taking. Defendants will be irreparably harmed.

Further, Defendants will suffer this harm without having had a chance to have a court decide the legal issues present in this case. Defendants have tried every avenue available to them to get this issue decided by a federal court. If this Court decides that it is for FERC, and ultimately the Sixth Circuit, to hear this issue, it should allow that process to run its course before proceeding with this eminent domain case. Otherwise, this issue can never be litigated as the FERC appeals process takes longer than the condemnation process. Without a stay, Defendants can never have their day in court.

3. The prospect that others will be harmed if the court grants the stay

Defendants anticipate that nexus will argue that great harm will befall it should a stay issue. However, this is not the case. Defendants are not asking this Court to stay construction of the pipeline. Construction can proceed on the 99% of easements Nexus currently possesses. Further, nothing would prevent Nexus from continuing to attempt to negotiate a settlement with the remaining Defendants. Nexus expects construction to begin in the Spring and take one to two years.

Additionally, Nexus will be receiving exactly what it has been asking for throughout this case and the previously filed case. Nexus has consistently argued that Defendant should first apply for rehearing before FERC and then appeal to the Sixth Circuit if they are not content with FERC's decision on the rehearing. This process is currently ongoing. Defendants have applied for rehearing and are awaiting FERC's decision. Nexus is receiving exactly what it has asked for since Defendant first filed the prior action against Nexus in May this year. Nexus should be required to wait until the process it has insisted upon has run its course before seeking relief which would render Defendants' position moot.

4. The public interest in granting the stay

Defendants believe that FERC is overstepping its statutory authority by authorizing condemnation where the NGA does not permit it. Clearly the public is best served if the government agencies charged with safeguarding public interests are checked from overstepping their bounds or improperly colluding with the industry that they are charged with supervision and oversight.

When considering the above factors, it is clear that a stay should issue in this case. Should this Court issue a stay Nexus will be receiving what it has asked for all along: for Defendants to avail themselves of the appeal process set forth in 15 U.S.C. § 717r.

5. 15 U.S.C. § 717r does not prohibit this Court from entering a stay

Defendants anticipate that Nexus will argue that 15 U.S.C. § 717r(c) prohibits this Court from entering a stay in this matter. This section provides:

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.

15 U.S.C.A. § 717r (West). Courts have construed this section to mean that a motion for rehearing does not operate to stay the effectiveness of the Certificate. See Tennessee Gas Pipeline Co. v. Massachusetts Bay Transp. Auth., 2 F. Supp. 2d 106, 109 (D. Mass. 1998)(court could not stay condemnation action due to pending challenge to validity of certificate); Steckman Ridge GP, LLC v. An Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres, More or Less, in Monroe Twp., No. CIV.A.08-168, 2008 WL 4346405, at *3 (W.D. Pa. Sept. 19, 2008)(court would not stay action due to pending rehearing before FERC challenging certificate on basis it did not adequately address safety concerns.)

The cases where courts declined to stay proceeding have been challenges to a certificate in its entirety. Defendants are not asking the Court to stay these proceedings based upon such a broad challenge. Instead, Defendants challenge Nexus' ability to utilize eminent domain *in connection with* the Certificate. This is not a challenge to the Certificate itself—the Certificate does not order this Court, or any Court, to permit eminent domain.

In fact, the Certificate itself acknowledges that this Court has the sole authority to determine the timing of events in this case. It states:

In the event remaining affected landowners are unable to reach agreement with NEXUS, NEXUS, pursuant to NGA section 7(h), may acquire the needed property rights through the eminent domain process in state or federal court. In such a proceeding, the court will take into account the fair market value of the necessary property rights in deciding the compensation due. The sufficiency of compensation is a contractual matter or, if agreement is not reached, a matter for a court with appropriate jurisdiction and not an area over which the Commission has jurisdiction. **The timing of eminent domain proceedings is likewise a matter for a court with appropriate jurisdiction and not an issue over which the Commission has jurisdiction.**

Certificate, p. 18, ¶ 50 (emphasis added). As acknowledged by FERC in the Certificate, only this Court has the jurisdiction to determine the timing of events in this case. Such timing would naturally include a determination of when to consider dispositive motions or a motion for preliminary injunction as well as any other scheduling matters. Defendants ask this Court to schedule the timing of events in this case in such a way as to allow Defendants to pursue their appeal of FERC's decision.

C. Conclusion

For the foregoing reasons, if this Court determines that it cannot decide the legal issues raised by Defendants in this case, it should stay this matter until the administrative appeal process initiated by Defendants has run its course and been completed, or schedule the timing of events in this case in such a manner as to allow Defendants to avail themselves of review provided for in the NGA.

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CERTIFICATE OF SERVICE

I certify that, on November 21, 2017, a true and correct copy of this motion to stay was served by electronic mail, to the following.

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