

162 FERC ¶ 61,011
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

NEXUS Gas Transmission, LLC,	Docket No. CP16-22-001
Texas Eastern Transmission, LP	Docket No. CP16-23-001
DTE Gas Company	Docket No. CP16-24-001
Vector Pipeline, L.P.	Docket No. CP16-102-001

ORDER DENYING STAY

(Issued January 10, 2018)

1. On August 25, 2017, the Commission issued an order that, among other things, authorized NEXUS Gas Transmission, LLC (NEXUS) under section 7(c) of the Natural Gas Act (NGA) to construct and operate a new pipeline system designed to provide up to 1,500,00 dekatherms (Dth) per day of firm transportation service from supply areas in the Appalachian Basin to consuming markets in northern Ohio, southeastern Michigan, and the Dawn Hub in Ontario, Canada (the NEXUS Project).¹ In the August 25 Order, the Commission also authorized Texas Eastern Transmission, LP (Texas Eastern) to construct and operate natural gas pipeline facilities for transportation service from certain receipt points in Texas Eastern's Market Zone 2 and on its Line 73 to a proposed interconnection with the NEXUS project in Columbiana County, Ohio (Texas Eastern Appalachia Lease (TEAL) Project). The August 25 Order also authorized DTE Gas Company (DTE) and Vector Pipeline L.P. (Vector) to lease certain capacity to NEXUS in connection with the project

¹ *NEXUS Gas Transmission, LLC.*, 160 FERC ¶ 61,022 (2017) (August 25 Order).

I. Requests For Stay

2. On September 22, 2017, Sierra Club filed a request for rehearing of the August 25 Order and moved for a stay.² On September 25, 2017, the City of Oberlin, Ohio (Oberlin), Sustainable Medina County, Neighbors Against Nexus and Freshwater Accountability Project (collectively, Sustainable Medina County), and Communities for Safe and Sustainable Energy (Communities) also filed requests for rehearing which included requests for stay.³ On October 2, 2017, the Coalition to Reroute Nexus (Coalition) filed a motion for stay of the August 25 Order and NEXUS's September 28, 2017 request for a notice to proceed.

3. On October 10, 2017, NEXUS filed a motion for leave to answer and answer to the motions for stay and requests for rehearing of the August 25 Order.⁴ For the reasons discussed below, the Commission finds that justice does not require a stay and therefore denies the motions for stay.⁵

II. Commission Determination

4. The Commission grants a stay when "justice so requires."⁶ In determining whether this standard has been met, the Commission considers several factors, including: (1) whether the party requesting the stay will suffer irreparable injury without a stay;

² Sierra Club September 22, 2017 Request for Rehearing and Motion for Stay at 32.

³ See Oberlin September 25, 2017 Request for Rehearing and Request for Stay at 35-38; Sustainable Medina County September 25, 2017 Request for Rehearing and Motion for Stay at 11-12; Communities for Safe and Sustainable Energy September 25, 2017 Request for Rehearing and Request for Stay at 5.

⁴ NEXUS is permitted to answer the motions for stay pursuant to Rule 212 of the Commission's Rules of Practice and Procedures and we will consider the relevant portion of NEXUS's October 10 filing (generally pp. 47-50). See 18 C.F.R. § 385.213(a)(3). In this order, we make no ruling on NEXUS's motion for leave to answer the rehearing requests, which are addressed in the balance of the October 10 filing.

⁵ The Commission has yet to consider the merits of any of the requests for rehearing.

⁶ *Tennessee Gas Pipeline Co., L.L.C.*, 157 FERC ¶ 61,154, at P 4 (2016); *Algonquin Gas Transmission, LLC*, 156 FERC ¶ 61,111, at P 9 (2016); *Enable Gas Transmission*, 153 FERC ¶ 61,055, at P 118 (2015); *Transcontinental Gas Pipe Line Co.*, 150 FERC ¶ 61,183, at P 9 (2015).

(2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.⁷ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.⁸

5. In order to support a stay, the movant must substantiate that irreparable injury is “likely” to occur.⁹ The injury must be both certain and great and it must be actual and not theoretical. Bare allegations of what is likely to occur do not suffice.¹⁰ The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future.¹¹ Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.¹²

6. Oberlin and the Coalition contend that a stay is necessary because NEXUS may bring eminent domain actions to secure property needed for the project.¹³ As previously explained, the Commission does not oversee the acquisition of necessary property rights. Issues related to the acquisition of property rights by a pipeline under the eminent domain provisions of section 7(h) of the Natural Gas Act are matters for the applicable state or federal court.¹⁴

7. Sustainable Medina County, Oberlin, and the Coalition speculate that their legal challenges could be rendered moot if the pipeline is allowed to proceed before their

⁷ Ensuring definiteness and finality in our proceedings also is important to the Commission. *See Constitution Pipeline Co.*, 154 FERC ¶ 61,092, at P 9 (2016); *Enable Gas Transmission*, 153 FERC ¶ 61,055 at P 118; *Millennium Pipeline Co.*, 141 FERC ¶ 61,022, at P 13 (2012).

⁸ *See, e.g., Algonquin Gas Transmission*, 156 FERC ¶ 61,111 at P 9.

⁹ *See Transcontinental Gas Pipe Line*, 150 FERC ¶ 61,183, at P 10 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Oberlin Request for Rehearing at 37; Coalition Motion for Stay at 4.

¹⁴ *See Millennium Pipeline Company, L.L.C.*, 158 FERC ¶ 61,086, at P 6 (2017) (citing cases).

rehearing requests are resolved.¹⁵ But that does not establish that irreparable injury is “certain and great” and “actual and not theoretical.”¹⁶ Moreover, the movants’ concern is a consequence of the Natural Gas Act, which provides that, in and of itself, the filing of a request for rehearing or petition for judicial review does not warrant a stay of a Commission order.¹⁷ Finally, to the extent that NEXUS elects to proceed with construction, it bears the risk that we will revise or reverse our initial decision or that our orders will be overturned on appeal. If this were to occur, NEXUS might not be able to utilize any new facilities and could be required to remove them or to undertake further remediation.¹⁸

8. Sierra Club primarily contends that a stay is necessary because its request for rehearing raises “substantial questions.”¹⁹ But “the factors we examine when considering whether to grant a stay, enumerated above, do not include the likelihood of success on the merits.”²⁰

9. Sierra Club also states that a stay is necessary because “there is no complete and adequate remedy once trees are cut down and wetlands destroyed.”²¹ This generalized

¹⁵ Sustainable Medina County Request for Rehearing at 11 (arguing that “members will suffer irreparable harm if the proposed pipeline project is implemented without reconsideration of the issues” raised on rehearing); Oberlin Request for Rehearing at 37-38 (“many of the City’s legal challenges could be rendered moot if the pipeline is allowed to proceed before the City’s rehearing request is resolved”); Coalition Motion for Stay at 4 (“many of [the] legal challenges raised by all of the parties could be rendered moot if the pipeline is allowed to proceed before the rehearing requests are full resolved”).

¹⁶ *Tennessee Gas Pipeline Company, L.L.C.*, 160 FERC ¶ 61,062, at P 45 (2017).

¹⁷ See 15 U.S.C. § 717r(c) (“The filing of an application for rehearing ... shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order. The commencement of [judicial] proceedings ... shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order.”).

¹⁸ *Northwest Pipeline, LLC*, 156 FERC ¶ 61,086, at 15 (2016).

¹⁹ Sierra Club Request for Rehearing at 32.

²⁰ *Florida Southeast Connection, LLC*, 154 FERC ¶ 61,264, at P 9 (2016). See also *Transcontinental Gas Pipe Line*, 150 FERC ¶ 61,183, at P 18 (same).

²¹ Sierra Club Request for Rehearing at 33.

claim does not constitute evidence of irreparable harm that would justify a stay.²² Moreover, as explained in the project's Environmental Impact Statement, 92 percent of the project is being co-located with existing utility corridors or located in active agricultural areas in order minimize impacts to forested areas. The project has also been routed to avoid isolated woodlots in areas with heavy agricultural areas.²³ The August 25 Order also explained that construction in accordance with the conditions imposed by the Commission and in compliance with the U.S. Army Corps of Engineer's Section 404 permit will sufficiently minimize impacts on wetlands.²⁴

10. While Communities' request for rehearing includes a sentence requesting a stay, the filing does not set forth any argument explaining the purported irreparable harm to the Communities. Accordingly, Communities have not established any basis to stay the August 25 Order.²⁵

²² See *Transcontinental Gas Pipe Line Company, LLC*, 155 FERC ¶ 61,246, at P 6 (2016) ("Chesterfield states that a stay is necessary because the Garden State Expansion Project 'will result in irreparable harm in the form of tree removal and destruction of wetlands.' This generalized claim does not constitute evidence of irreparable harm that would justify a stay."); *Tennessee Gas Pipeline Co., L.L.C.*, 155 FERC ¶ 61,087, at P 5 (2016) (finding that a "generalized claim [of environmental harm] does not constitute evidence of irreparable harm that would justify a stay"); *Florida Southeast Connection*, 154 FERC ¶ 61,264 at P 8 (denying stay premised upon "generalized environmental harm without identifying specifics"); *Empire Pipeline, Inc.*, 153 FERC ¶ 61,379, at P 11 (2015) (denying stay where movant "provided only unsupported, generalized allegations about environmental harm resulting from the project"); *Transcontinental Gas Pipe Line*, 150 FERC ¶ 61,183, at P 19 (denying stay request where movant "only asserts generalized environmental harm to its members without identifying specifics"); *Tennessee Gas Pipeline Co.*, 96 FERC ¶ 61,116, at 61,446 (2001) ("general allegations do not constitute evidence of irreparable harm that would justify staying the orders in this proceeding").

²³ See November 30, 2016 Final Environmental Impact Statement at 4-100.

²⁴ August 25 Order, 160 FERC ¶ 61,022 at P 129.

²⁵ Communities Request for Rehearing at 5 ("we request a stay of this proceeding until these and related issues, which are extensively and persuasively argued in [other parties' filings] have been resolved on rehearing and judicial review.").

11. Where, as here, parties seeking a stay are unable to establish that they will suffer irreparable harm absent a stay, the Commission need not examine other factors.²⁶ Nonetheless, we note that any delay in the construction of the NEXUS Project would affect the in-service date of a project that the Commission has found to be required by the public interest.²⁷

12. In approving the NEXUS Project, the Commission fully considered the Environmental Impact Statement prepared by Commission staff and addressed the comments of Oberlin, Sierra Club, and others in the August 25 Order's environmental discussion.²⁸ The Commission determined that, on balance, the NEXUS Project, if constructed and operated in accordance with the Environmental Impact Statement and the conditions imposed by the August 25 Order, is an environmentally acceptable action.²⁹ Given this conclusion, we do not believe that denying the motions for stay puts the environment at risk.

13. For these reasons, the Commission finds that justice does not require a stay.

The Commission orders:

The motions for stay filed by Sierra Club, Oberlin, Sustainable Medina County, the Coalition and Communities are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁶ *Tennessee Gas Pipeline, L.L.C.*, 160 FERC ¶ 61,062, at P 4 (2017).

²⁷ *See* August 25 Order, 160 FERC ¶ 61,022 at 51; NEXUS Answer at 50 and Attachment 1 (discussing impacts of construction delays upon in-service date).

²⁸ *See id.* PP 104-185.

²⁹ *See id.* P 183.