

ARGUED MAY 6, 2019; DECIDED SEPTEMBER 6, 2019

**In the United States Court of Appeals
for the District of Columbia Circuit**

Nos. 18-1248 and 18-1261 (consolidated)

—————
CITY OF OBERLIN, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

—————

**RESPONDENT'S OPPOSITION TO
PETITIONER'S MOTION FOR ATTORNEY FEES**

—————

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October 15, 2019

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GLOSSARY

Certificate Order	<i>NEXUS Gas Transmission, LLC</i> , 160 FERC ¶ 61,022 (2017)
Coalition	Petitioner Coalition to Reroute NEXUS
Commission or FERC	Federal Energy Regulatory Commission
EAJA	Equal Access to Justice Act
NEPA	National Environmental Policy Act
Oberlin	Petitioner City of Oberlin, Ohio
Petitioners	Petitioners City of Oberlin, Ohio and the Coalition to Reroute NEXUS
Project	The NEXUS Project, a new 257.5-mile-long pipeline in Ohio and Michigan
Rehearing Order	<i>NEXUS Gas Transmission, LLC</i> , 164 FERC ¶ 61,054 (2018)

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CITY OF OBERLIN, OHIO, *ET AL.*,
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v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

**RESPONDENT'S OPPOSITION TO
PETITIONERS' REQUEST FOR ATTORNEY FEES**

Respondent Federal Energy Regulatory Commission (Commission or FERC) opposes the motion for attorney fees under the Equal Access to Justice Act, 28 U.S.C. § 2412 (EAJA or Act), filed by Coalition to Reroute Nexus (Coalition). The Coalition is not entitled to an award of fees because it prevailed on just one of the many issues raised on appeal. And even with respect to that issue, the Court did not vacate the underlying Commission orders. It simply remanded the matter to the Commission for further explanation. Moreover, the Commission's position was substantially justified; the Court found it "plausible" that the Commission can re-justify its decision on the one remanded issue. Finally, a significant portion of the fees sought by the Coalition was incurred in proceedings before the agency. Such fees are ineligible for recovery under the Act.

BACKGROUND

In the underlying agency licensing proceeding, the Commission conditionally authorized NEXUS Gas Transmission, LLC (NEXUS) to construct and operate a new natural gas pipeline in Ohio and Michigan (the Project). Prior to doing so, the Commission engaged in a detailed review of the Project, culminating in a lengthy environmental impact statement issued pursuant to the National Environmental Policy Act, 42 U.S.C. § 4332 *et seq.* (NEPA). The Commission determined that the Project, upon the satisfaction of numerous mandatory environmental conditions and mitigation measures, was consistent with the public convenience and necessity under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c). *See NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (2017) (Certificate Order), *on reh'g*, 164 FERC ¶ 61,054 (2018) (Rehearing Order).

On appeal, the Coalition filed a joint brief with its co-petitioner, the City of Oberlin, Ohio (Oberlin). The Petitioners alleged that the Commission erred in: (1) basing a finding of market need on contracts with shippers for 59 percent of the Project's capacity; (2) treating contracts between NEXUS and affiliated shippers as evidence of market demand; (3) failing to exclude shipping contracts for export capacity from its market need analysis; (4) approving the formula that NEXUS used to design its initial rates; (5) purportedly delegating its obligations under NEPA to independently review the Project's potential adverse impacts on public

safety; and (6) failing to consider moving the pipeline away from residences and buildings.

In its September 6, 2019 decision, the Court affirmed the Commission's orders in all respects but one: the Court found that the Commission had failed to adequately explain whether it was lawful to consider precedent agreements with foreign shippers when determining that a project is required by the public convenience and necessity under the Natural Gas Act. *City of Oberlin v. FERC*, No. 18-1248, 2019 WL 4229074, at *1 (D.C. Cir. Sept. 6, 2019) ("Petitioners raise many arguments, the vast majority of which we reject."). The Court remanded the matter to the Commission for further explanation, without vacating the at-issue orders. *Id.* at *9 ("we remand without vacatur, because we find it plausible that the Commission will be able to supply the explanations required"). The Commission has not yet issued an order on remand.

ARGUMENT

I. THE COALITION IS NOT A PREVAILING PARTY.

To be considered a "prevailing party" under the EAJA, a petitioner must "succeed on any significant issue in [the] litigation which achieves some benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (internal quotations omitted). The relief secured in court must "materially alter[] the legal relationship between the parties by modifying the defendant's

behavior in a way that directly benefits the plaintiff.” *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). The benefit must amount to more than just a “favorable statement of the law in an otherwise unfavorable opinion.” *Hewitt v. Helms*, 482 U.S. 755, 762 (1987). “A remand to an agency or trial court for further proceedings generally will not justify an award of attorneys’ fees.” *Autor v. Pritzker*, 843 F.3d 994, 997 (D.C. Cir. 2016). *But see SecurityPoint Holidngs, Inc. v. Transp. Sec. Admin*, 836 F.3d 32 (D.C. Cir. 2016) (petitioner may be deemed “prevailing party” where agency decision is vacated on the merits and remand terminates court’s jurisdiction). The Coalition has failed to establish that it is a “prevailing party” under the EAJA.

First, the Coalition ignores the fact that it succeeded on only one of the many issues raised on appeal. The Court rejected challenges to the Commission’s (i) reliance on precedent agreements for 59 percent of the Project’s capacity; (ii) reliance on precedent agreements with affiliates; (iii) design of NEXUS’s initial rates; (iv) reliance on NEXUS’s compliance with Department of Transportation safety standards, and (v) consideration of the Project’s potential impact upon residences and buildings. *See City of Oberlin*, 2019 WL 4229074 at *4-8.

The Coalition attempts to avoid this fact by asserting that it only “pursued three of the issues raised on appeal.” Motion at 6. But this claim is belied by the

record. On appeal, the Coalition voluntarily joined forces with the Oberlin and filed a joint brief raising numerous of issues. Nothing in the brief indicated that the Coalition was only pursuing a discrete subset of issues. And the case was argued by Oberlin’s counsel on behalf of all Petitioners.

Second, the Coalition ignores the fact that the Court did not vacate the underlying Commission orders. Instead, the matter was remanded to the Commission for further explanation of whether it is appropriate to consider precedent agreements for export in an analysis under section 7 of the Natural Gas Act. *City of Oberlin v. FERC*, 2019 WL 4229074, at *9. This is not a case where the “terms of a remand [were] such that a substantive victory [would] obviously follow.” *Initiative and Referendum Inst. v. U.S. Postal Serv.*, 794 F.3d 21, 25 (D.C. Cir. 2015) (internal quotations omitted). Where, as here, the remand “did not foreclose the possibility that the government could prevail on the merits,” this Court has declined to find that a litigant is a “prevailing party.” *Autor*, 843 F.3d at 997. In short, although the Coalition, on one issue, “‘achieved a desired result,’ their success [on appeal] ‘lacks the necessary judicial *imprimatur*’ on the merits of their challenge” to the Commission’s authorization of the Project “to secure the status of ‘prevailing party.’” *Id.* at 999 (quoting *Buckhannon Bd. & Care Home, Inc. v. W.V. Dep’t of Health & Human Res.*, 532 U.S. 598, 600 (2001)).

II. THE COMMISSION'S POSITION WAS SUBSTANTIALLY JUSTIFIED.

A fee award is precluded where the agency's position was "substantially justified," 28 U.S.C. § 2412(d)(1)(A), meaning that it had a "reasonable basis in law and fact." *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C. Cir. 2000) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). The fact that the government loses on the merits "does not mean that legal arguments advanced in the context of our adversary system were unreasonable." *Taucher v. Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005). *See also Pierce*, 487 U.S. at 565 n.2 (distinguishing between the statutory standard substantially *justified*, versus substantially *correct*; the latter is not the standard).

When an agency discusses the relevant legal authority, *Taucher*, 396 F.3d at 177, and follows its longstanding policy, *Tripoli Rocketry Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 698 F. Supp. 2d 168, 176 (D.D.C. 2010), its position is likely to be substantially justified. In contrast, positions may not be substantially justified where they are "obviously insufficient under well-established precedent," "pressed in the face of an unbroken line of authority," "or in defiance of a string of losses." *Taucher*, 396 F.3d at 1178.

Here, the Commission focused its public-need analysis on the anticipated domestic consumption of gas transported by the pipeline and on potential market growth in Michigan and Ohio. *See Rehearing Order P 45, JA 1128-29* (citing the

substantial amount of subscribed capacity for firm delivery points in the U.S., secondary firm delivery rights within the U.S. for all shippers, and numerous domestic interconnections to facilitate future service); FERC Br. 27. In addition, consistent with longstanding policy and precedent, the Commission determined that the pipeline “is not an export facility” requiring approval under section 3 of the Natural Gas Act (15 U.S.C. § 717b). Rehearing Order P 45, JA 1229; *see* FERC Br. 27, 36-37 (discussing policy and precedent).

That the Court disagreed does not mean that the agency’s position was not substantially justified. In a case of first (or, at most, second) impression, the Court found that the Commission’s focus on domestic consumption was incomplete and held that the Commission must explain why, in evaluating market demand for purposes of considering whether a project is required by the public convenience and necessity under Natural Gas Act section 7 (15 U.S.C. § 717f), it is lawful to include contracts with foreign shippers that serve foreign customers. *See City of Oberlin*, 2019 WL 4229074 at *6, *9. (The Court, however, rejected the Coalition’s argument that the pipeline must be certificated, if at all, under section 3, rather than under section 7. *See id.* at *6.) On the related question of whether reliance on demand for export in issuing a certificate under section 7 of the Natural Gas Act contravenes the Takings Clause, the Court recognized that the Commission cited its analysis in an earlier order (*see id.* at *5); the Court again

found the explanation incomplete for the same reason – because that agency precedent likewise did not answer whether it is lawful to consider precedent agreements with foreign shippers that serve foreign customers. *Id.* Nevertheless, the Court declined to vacate the orders, as the Petitioners had urged, “because we find it plausible that the Commission will be able to supply the explanations required” *Id.* at *9.

The Commission’s position was not contrary to or obviously insufficient under well-established precedent, nor did the agency face “an unbroken line of authority” or “a string of losses” – indeed, there was no controlling precedent. *Cf. id.* at *5 (discussing 1948 and 1974 cases regarding exclusion of “foreign commerce” from “interstate commerce”); *id.* at *9 (Rogers, J., concurring) (discussing the same cases: “In neither [case] was the issue precisely the same as in the instant case”). Moreover, in focusing on domestic consumption even where some gas would ultimately be exported, the Commission’s approach was consistent with roughly contemporaneous orders in another pipeline case that this Court recently upheld. *See Town of Weymouth v. FERC*, No. 17-1135, 2018 WL 6921213, at *1 (D.C. Cir. Dec. 27, 2018), *cited in City of Oberlin*, 2019 WL 4229074 at *9 (Rogers, J., concurring); *see also* FERC Br. at 29. Accordingly, the Commission’s position, though ultimately unsuccessful in this case, was substantially justified.

III. A SIGNIFICANT PORTION OF THE FEES SOUGHT BY THE COALITION IS INELIGIBLE FOR RECOVERY.

If the Court determines that the Coalition is entitled to any fees, it is entitled only to “reasonable” fees. *Anthony v. Sullivan*, 982 F.2d 586, 589 (D.C. Cir. 1992). Here, a significant portion of the fees sought by the Coalition is ineligible for recovery under the Equal Access to Justice Act.

A. Fees Incurred In FERC Licensing Proceedings Are Not Recoverable Under the EAJA.

Nearly a third of the fees sought by the Coalition – \$29,335.19¹ – relates to work performed in connection with the underlying FERC licensing proceeding. *See* Motion at 13 (noting that request for fees “extends prior to September 2017 when its Requests for Rehearing were researched, prepared and filed in the proceedings below”).

The Equal Access to Justice Act provides for an award to a prevailing party of attorney’s fees “incurred ... in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action.” 28 U.S.C. § 2412(d)(1)(A). The “EAJA only contemplates reimbursement for fees and expenses directly associated with the pursuit of a ‘civil action’ in federal court and does not encompass administrative actions.” *Cal. Marine Cleaning, Inc. v. United*

¹ This amount reflects the fees incurred by Mr. Mucklow and Mr. Ridenbaugh prior to the issuance of the Rehearing Order on July 25, 2018.

States, 43 Fed. Cl. 724, 731 (Fed. Cl. 1999). *See also Ardestani v. INS*, 502 U.S. 129, 138 (1991) (“we cannot extend the EAJA to administrative deportation proceedings when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise”); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 887 (8th Cir. 1995) (finding that EAJA does not encompass pre-litigation administrative fees, notwithstanding argument that parties were “required to exhaust all of their administrative remedies before bringing an action in the district court”).

Under 28 U.S.C. § 2412(d)(3) – which is not cited in the Coalition’s motion – a court is authorized to award fees incurred in connection with adversary agency adjudications conducted under 5 U.S.C. § 554 to parties which eventually prevail in court. The statutory definition of “adversarial adjudication,” however, expressly “excludes an adjudication for the ... purpose of granting or renewing a license.” *See* 5 U.S.C. § 504(b)(1)(C). And as the Commission recently explained, “[b]ecause a certificate of public convenience and necessity falls within the Administrative Procedure Act’s broad definition of a ‘license,’ the Commission’s certificate proceeding is not an ‘adversary adjudication’ for the purposes of the EAJA.” *Fla. Se. Connection, LLC*, 167 FERC ¶ 61,068, P 9 (2019).

Moreover, the definition of “adversary adjudication” also includes the requirement that “the position of the United States is represented by counsel or

otherwise.” 5 U.S.C. § 504(b)(1)(C). In a licensing proceeding under the Natural Gas Act, the Commission serves as an adjudicator, rather than as an adversary represented by counsel. *See Fla. Se. Connection, LLC*, 167 FERC ¶ 61,068 at P 10. *See also In re Perry*, 882 F.2d 534, 540-41 (1st Cir. 1989) (the EAJA reflects “Congress’s unmistakable intent to disallow fee awards for administrative proceedings in which the government is an adjudicator rather than an adversary”).

B. The Coalition Is Not Entitled To Any Fees Incurred In Connection With Unsuccessful Claims.

“Where [a party] has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.” *Hensley*, 461 U.S. at 440; *see also Anthony*, 982 F.2d at 589 (“[N]o fee may be granted for work done on claims on which the party did not prevail, unless the unsuccessful claims were submitted as alternative grounds for a successful outcome.”). Here, the Coalition acknowledges that it unsuccessfully asserted that the Commission violated NEPA by failing to adequately analyze the Project’s safety impacts. *See Motion at 6* (“On the remaining issues, safety concerns, this Court found in favor of the Commission.”). These safety claims are entirely distinct from the export issue that the Court remanded to the Commission. The safety issues relate to the Project’s potential impacts, rather whether there is a market need for the Project.

It is the Coalition's obligation to support its motion with documentation that enables the Court to determine "with a high degree of certainty" that the sought-after fees are reasonable. *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 970 (D.C. Cir. 2004). Here, the Coalition's supporting affidavits only list three entries that explicitly mention the safety issue, totaling \$3,855.90. *See* Motion, Exh. 1 (Ridenbaugh Decl. at 12/7/18 and 3/5/19 entries), Exh. 2 (Mucklow Decl. at 12/10.18 entry)).² But presumably other generic entries regarding appellate matters included time spent on the unsuccessful safety issues.

The Coalition asserts that the safety issue was one of the issues that it was responsible for under the division of labor with Oberlin. *See* Motion, Exh. 1 (Ridenbaugh Decl.) at ¶ 3. Given this fact – and accepting the Coalition's characterization of its market need and Takings Clause arguments as separate issues – the Commission submits that any award should be further reduced by one-third. Applying this reduction to the \$61,844.17³ sought in appellate litigation fees would result in an award (if any is appropriate) of \$41,435.59.

² Mr. Mucklow's December 10, 2018 entry also indicates that some portion of the four hours expended related to the Takings Clause claim.

³ This figure reflects the total award sought by the Coalition (\$91,179.36) reduced by the amount of fees incurred before the agency (\$29,335.19).

CONCLUSION

For the foregoing reasons, the Court should deny the Coalition's request for attorney's fees in its entirety. In the alternative, the Court should exercise its discretion to substantially reduce the fee award.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this response complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 2,737 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I further certify that this response 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 motion has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

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October 15, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on October 15, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Carol J. Banta

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