LSU Journal of Energy Law and Resources

Volume 9
Issue 1 *Winter 2021*

3-26-2021

Natural Gas Exports are Necessary to Assuring Equilibrium in Domestic Supply and Demand

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INTRODUCTION

In the case of *City of Oberlin v. Federal Energy Regulatory Commission* (FERC or Commission), the D.C. Circuit ruled FERC failed to adequately address the reasons underlying its decision that it is lawful under Section 7 of the Natural Gas Act (NGA) "to credit demand for export capacity in issuing a Section 7 certificate to an interstate pipeline."[1] In its remand order, the court directed FERC to expound on its decision and show how "under the Takings Clause, and [court precedent] it is lawful to credit precedent agreements with foreign shippers toward a finding that an interstate pipeline is required by the public convenience and necessity under Section 7 of the [Natural Gas] Act."[2]

More specifically, the D.C. Circuit took issue over two Canadian precedent agreements where a new domestic pipeline would also service Canadian customers.[3] The court acknowledged FERC's authority to issue certificates of public convenience in "interstate commerce" does not include certificates issued in "foreign commerce."[4] Section 7 of the NGA "states that the Commission may issue a certificate of public convenience and necessity for 'the transportation in interstate commerce,' § 717f(c)(2) (emphasis added), and [the D.C. Circuit] explicitly refused to 'interpret

1. City of Oberlin v. FERC, 937 F.3d 599, 606 (D.C. Cir. 2019).
2. *Id.* at 611.
3. *Id.* at 603.
4. *Id.* at 606–07.

'interstate commerce'' within the context of the Act 'so as to include foreign commerce.'"[5] Presuming FERC did not have the authority, the court ruled when FERC conducted its public benefits versus adverse effects balance analysis,[6] it should have considered whether a substantial decrease in dekatherms (the amount of heat energy which is equal to one million British thermal units) resulting from removing the Canadian precedent agreements could affect its decision to grant the certificate.[7] As a consequence, the court remanded the case to FERC to further explain "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."[8]

True, Section 7 does not explicitly include "foreign commerce," but read in context with the intent of the statute's framers, it does not exclude it either. Thus, it will be argued the reason to permit sales of natural gas to Canada may lie in several parts of the NGA, including but not limited to: (1) FERC's broad authority to regulate just and reasonable rates within the domestic gas market;[9] (2) its prohibition from discriminating against imported natural gas from countries the United States has in place a free trade agreement;[10] and, (3) its exclusive authority over liquified natural gas ("LNG") terminals that import or export natural gas from foreign countries.[11]

Americans are constantly innovating, including in the energy sector of the economy. Shale fracking is one of those areas of innovation. As a reason to grant a certification in cases like *Oberlin* and permit sales to foreign countries such as Canada, FERC could deduce the probability that increased shale fracking could lead to an oversupply of natural gas, which left unchecked could negatively affect prices of domestic natural gas.

Advanced technology in shale gas fracking produced an abundance of natural gas, more than 600 trillion cubic feet, and significant revenues from the practice continue to attract states that have not yet opened their doors to fracking.[12] Theoretically, a sharp increase in fracking can lead to

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5. *Id.* at 606–07.
6. *Id.* at 602.
7. *Id.* at 606; Definition of Dekatherm, LAW INSIDER, https://www.lawinsider.com/dictionary/dekatherm [https://perma.cc/WT7A-2ZBH] (last visited Oct. 22, 2020).
8. *Id.* at 611.
9. 15 U.S.C. § 717c(a) (2018).
10. 15 U.S.C. § 717b(b).
11. 15 U.S.C. § 717b(e).
12. *How is Shale Gas Produced?*, ENERGY.GOV, https://www.energy.gov/sites/prod/files/2013/04/f0/how_is_shale_gas_produced.pdf [https://perma.cc/8

an imbalance of supply and demand and saturate the market with an excess of natural gas.[13] As the singular regulatory authority, FERC should be concerned, because if there is too much supply of natural gas and not enough demand, domestic gas prices would depreciate to a point where it would be unprofitable for businesses to produce natural gas through shale fracking, which eventually would lead to higher consumer prices.[14] This, in turn, could have a deleterious effect on the nation's economy, since shale gas produces 69% of the dry natural gas[15] and natural gas consists of 32% of the energy sector.[16] Thus, in order to have an efficient marketplace for natural gas, supply and demand need to be in harmony with each other, and, as this Article will argue, FERC has the statutory responsibility to maintain that balance.

This Article attempts to provide a solution to FERC's dilemma in cases like *Oberlin*, but also presents a broader argument that FERC has inherent authority to regulate exports and imports of foreign natural gas, provided there is a connection with interstate transport of natural gas. Since FERC has the statutory authority to regulate and monitor wholesale sales and transportation of natural gas in interstate commerce,[17] it logically follows that the power to grant a certification to build a pipeline supplying foreign markets with natural gas fits squarely within FERC's overall mandate to ensure an efficient interstate market. Selling to foreign

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MA7-BR54] (last visited Sept. 1, 2020); *see also* FED. ENERGY REGULATORY COMM'N, STRATEGIC PLAN 2018–2022 (Sept. 2018), https://www.ferc.gov/sites/default/files/2020-04/FY-2018-FY-2022-strat-plan.pdf [https://perma.cc/T9ZM-8GZQ].

13. Carolyn Davis, *Oversupply, Demand Stagnation to Strangle Long-Term U.S. Natural Gas Prices, Says Morgan Stanley*, NGIS DAILY GAS PRICE INDEX (Sept. 26, 2018), https://www.naturalgasintel.com/articles/115920-oversupply-demand-stagnation-to-strangle-long-term-us-natural-gas-prices-says-morgan-stanley [https://perma.cc/2NJH-G8GL].

14. *Id.* ("U.S. natural gas is about to enter a cycle of structural oversupply and demand stagnation, which in turn should reduce prices, according to Morgan Stanley.").

15. *How Much Shale Gas is Produced in the United States?*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/tools/faqs/faq.php?id=907&t=8 [https://perma.cc/27VJ-QGHN] (last updated Sept. 11, 2020).

16. *U.S. Energy Facts Explained, Consumption & Production*, U.S. ENERGY INFO. ADMIN., https://www.eia.gov/energyexplained/us-energy-facts/ [https://perma.cc/RK9X-732B] (last updated May 7, 2020).

17. 15 U.S.C. §§ 717–717z (2018); *What FERC Does*, FERC.GOV, https://www.ferc.gov/about/what-ferc/what-ferc-does [https://perma.cc/2F56-N76X] (last visited Sept. 11, 2020).

markets, therefore, may be the most practical way to maintain stability in domestic natural gas prices.

National economic policy has shaped the way the country is moving toward energy independence.[18] Exporting natural gas is the most logical answer to hedge against the risk of oversupply in domestic natural gas. If the domestic market was saturated with natural gas, it could have an adverse effect in maintaining just and reasonable rates of domestic natural gas. Building domestic pipelines that could both service domestic and foreign markets could prove to be the best way to prevent oversupply, as overseas demand is expected to increase forty percent over the next twenty years.[19]

Part I of this Article reviews the statutory and regulatory background of the NGA, beginning with the Commerce Clause, which gives Congress—and ultimately FERC—the power to regulate interstate and even foreign transportation and sales of natural gas. Part II discusses the *Oberlin* case and argues it is well within FERC's broad authority in regulating interstate commerce to permit wholesale sales to foreign shippers. Servicing foreign customers is merely an indirect effect of FERC taking action to stabilize domestic gas prices. Finally, Part III concludes it is lawful for FERC to credit precedent agreements with foreign shippers as part of the basis to certify building a publicly convenient and necessary interstate pipeline under Section 7 of the Natural Gas Act.

I. FERC HAS AUTHORITY TO REGULATE THE TRANSPORTATION AND SALE OF FOREIGN NATURAL GAS WITHIN THE DOMESTIC MARKETPLACE

A. Article I, Section 8, Clause 3 of the United States Constitution Grants Congress Broad Power to Regulate Interstate Commerce and Trade with Foreign Nations.

In theory, FERC's authority is derived from Congress's commerce power, its takings power, and its ability to make laws that are necessary and proper to execute its enumerated powers within the Constitution. The

18. *President Trump's Energy Independence Policy*, THE WHITE HOUSE (Mar. 28, 2017), https://www.whitehouse.gov/briefings-statements/president-trumps-energy-independence-policy/ ("President Trump's Executive Order lifts job-killing restrictions on the production of oil, natural gas, and shale energy.").

19. Huileng Tang & Akiko Fujita, *Natural Gas Oversupply Will Not Last Forever: Industry Executives*, CNBC (Apr. 3, 2017, 11:02 PM), https://www.cnbc.com/2017/04/03/natural-gas-oversupply-will-not-last-forever-industry-executives.html [https://perma.cc/9GCH-WX3V].

Department of Energy and FERC, both parts of the Executive Branch, have jurisdiction over foreign and domestic sales of natural gas through the enactments of Congress. Article I, Section 8, Clause 3 of the United States Constitution gives broad authority to Congress to: "regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[20] As the Supreme Court reaffirmed in *National Federation of Independent Business v. Sebelius*, that authority is shared with the states.[21] In principle, Congress's authority to regulate commerce surrounds whether a business activity is transactional, or involves actual buying and selling.[22] Certainly trade in natural gas is contemplated under the Commerce Clause.

But simply having the power to regulate natural gas markets is not enough. Since a certification of public convenience and necessity will involve the transportation of natural gas, it follows that privately-owned land would be taken for public use. Although the Founding Fathers could not envision gas pipelines or electric grids, or even a railroad that could transport energy across state lines, they understood natural law recognized a balance between the common good's right to property and an individual's right to the same. Under the Takings Clause of the Fifth Amendment, therefore, Congress through the NGA empowers FERC to take private land for public use at times to transport natural gas in interstate commerce.

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20. U.S. CONST. art. I, § 8, cl. 3.

21. 567 U.S. 519, 554 (2012).

> While Congress's authority under the Commerce Clause has of course expanded with the growth of the national economy, our cases have "always recognized that the power to regulate commerce, though broad indeed, has limits." Maryland v. Wirtz, 392 U.S. 183, 196 (1968). The Government's theory would erode those limits, permitting Congress to reach beyond the natural extent of its authority, "everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (J. Madison). Congress already enjoys vast power to regulate much of what we do. Accepting the Government's theory would give Congress the same license to regulate what we do not do, fundamentally changing the relation between the citizen and the Federal Government.

Id. (quoting Maryland v. Wirtz, 392 U.S. 183, 196 (1968); THE FEDERALIST NO. 48, at 309 (James Madison)).

22. *Id.* at 550–52 (For example, the Court held the Affordable Care Act's individual mandate was designed to help stabilize the health insurance market and could not be sustained under the Commerce Clause because it did not involve commercial activity. The "activity" Congress seeks to regulate under its power must be commercial in nature.).

Finally, the Necessary and Proper Clause activates Congress's broad authority to regulate interstate commerce and engage in foreign trade, because the Constitution grants it the power to "make all Laws which shall be necessary and proper for carrying into Execution" their enumerated powers.[23] Both regulating interstate commerce and engaging in foreign trade are enumerated powers. The NGA is the statute passed under the Necessary and Proper Clause that gives broad authority to FERC to regulate energy markets, and as argued below, includes the import and export of natural gas.

Even though these statements of general principle enumerated in the Constitution regarding Congress' commerce power, takings power, and ability to create federal statutes are simple and clear, the interpretation by the courts as to the scope of that power is not without controversy and begs the question as to how much authority do courts say FERC has to grant certifications of public necessity involving exports of natural gas. To understand that, it is necessary to review how courts over time treated the Commerce Clause.

One can visualize the history of the Court's interpretation of the Commerce Clause as a swinging pendulum between simple federal border control of trade among the states to broader interpretations, where Congress could do the unthinkable and meddle with a citizen's private land in an effort to expand its commerce power. As will be explained, the culmination of these judicial rulings tends toward a broader interpretation that in the end will help FERC in cases like *Oberlin* retain more control over the export market as it relates to granting domestic pipeline certificates.

Beginning with the landmark case of *Gibbons v. Ogden* where the Court looked at the "bigger picture" of Congress's economic policy responsibility, the Court held Congress is permitted under the Commerce Clause to control "intrastate" activity, as long as that activity involved a larger interstate commercial regulatory scheme.[24] That power was expanded in *NLRB v. Jones & Laughlin Steel Corp.*, where the Court held that Congress could regulate intrastate commerce as long as state legislation had a "substantial relation" to interstate commerce.[25] This nebulous phrase, "substantial relation," which does not appear in the words of the Constitution, left the door open for courts to move the pendulum from simply regulating trade among the states, or in other words, "border control," to possibly regulating all trade within a state

23. U.S. CONST. art. I, § 8, cl. 18.
24. Gibbons v. Ogden, 22 U.S. 1, 238–40 (1824).
25. NLRB v. Jones & Laughlin Steel Corp., 301 US 1, 32 (1937).

based on whether state activity had a substantial economic effect on interstate commerce. The New Deal in the late '30s and early '40s and the Court's rulings during that period moved the pendulum further, prompting more expansion of Congress's commerce power by the Court. *Wickard v. Filburn*[26] was the "most far-reaching example of Commerce Clause authority over intrastate activity,"[27] and arguably, the most controversial.

In *Wickard*, the Court upheld a government program designed to control the price of wheat sales. A farmer was penalized for exceeding his quota of wheat by growing some for his own consumption.[28] The Court ruled against the farmer, who argued Congress had no authority to regulate how much wheat he could grow on his own farm.[29] It reasoned, permitting the farmer to grow wheat for his own use (a non-commercial activity) allowed him the opportunity to avoid purchasing wheat in the marketplace.[30] Moreover, if the farmer decided to sell the extra wheat into the marketplace that also could work against what the government was trying to do to control the price of wheat. But there was no showing by the government that the farmer did either.

The Court further reasoned, although growing wheat on the farmer's property for personal use was noncommercial activity when considering the potential of other farmers doing the same, that noncommercial activity in the aggregate could have had a "substantial economic effect" on the interstate market for wheat.[31] Therefore, "it is within Congress's power to regulate [a market] by supporting its price. [And] price can be supported by increasing demand as well as by decreasing supply."[32] The same could be said of FERC's authority in regulating domestic sales of natural gas to include sales to foreign markets to support "prices," as will be discussed below.

Fast forward fifty-three years and contrast *Wickard* with *United States v. Lopez*, where the Court swung the pendulum back, narrowing Congress's authority in favor of Tenth Amendment states' rights, and finding a federal law prohibiting the possession of a firearm (another noncommercial activity) within a school zone was unconstitutional.[33] In *Lopez*, the Court held the "possession" of a firearm involved no buying and selling, and therefore, restricting such conduct was outside of

26. 317 U.S. 111 (1942).
27. U.S. v. Lopez, 514 U.S. 549, 560 (1995).
28. *Wickard*, 317 U.S. at 114–15.
29. *Id.*
30. *Id.* at 127–29.
31. *Id.*
32. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 552–53 (2012).
33. *See* U.S. v. Lopez, 514 U.S. 549, 560 (1995).

Congress' power to regulate commerce.[34] The Court ruled possession laws of this type were instead within the power of the states to regulate and to expand federal power in this manner "would require [the Court] to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated and that there never will be a distinction between what is truly national and what is truly local. This [the Court was] unwilling to do."[35]

But later in the case of *Gonzales v. Raich*, the Court reversed position again, in essence reaffirming *Wickard*, and held the state-sanctioned growing and possession of medical marijuana for personal use can be preempted by federal statute based on Commerce Clause grounds.[36] The Court reestablished the broad scope of Congress's commercial regulatory activity to include controlling what individual citizens do with their property: "Our case law firmly establishes Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[37] In sum, whether the regulation involves commercial "activity," as upheld in the more recent case of *NFIB v. Sebelius*, appears to be the touchstone to any Commerce Clause analysis: "As expansive as our cases construing the scope of the commerce power have been, they all have one thing in common: They uniformly describe the power as reaching 'activity.'"[38]

Thus, in analyzing FERC's administrative power over energy markets and how far that power stretches, it is worth noting Justice Thomas's unequivocal dissent in *Raich*, which describes the Court's centurial, historical interpretation of the amorphous and malleable boundaries to Congress's commerce power. Essentially, Justice Thomas finds under the Commerce Clause's text, history, and secondary sources such as the Federalist Papers, the power is limited to the "selling, buying, and bartering, as well as transporting" and not "productive activities," such as "manufacturing and agriculture."[39] He opined that "Congress may regulate interstate commerce, not activities that substantially affect interstate

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34. *Id.* at 561 ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."); *see also NFIB*, 567 U.S. at 550 ("The power to regulate commerce presupposes the existence of commercial activity to be regulated. If the power to 'regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous.").

35. *Lopez*, 514 U.S. at 567–68.

36. Gonzales v. Raich, 545 U.S. 1 (2005).

37. *Id.* at 17.

38. *NFIB*, 567 U.S. at 551.

39. *Raich*, 545 U.S. at 58.

commerce, any more than Congress may regulate activities that do not fall within, but that affect, the subjects of its other Article I powers." [40]

Focusing mostly on trade, Justice Thomas noted that the Court "has never held that Congress can regulate noneconomic activity that substantially affects interstate commerce."[41] To have such a nebulous, expansive view of the Commerce Power, Justice Thomas concluded: "[T]he Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States. This makes a mockery of Madison's assurance to the people of New York that the 'powers delegated' to the Federal Government are 'few and defined,' while those of the States are 'numerous and indefinite.'"[42]

Aside from the fact Justice Thomas and the legal scholars and judges who agree with him are correct that the Constitution does not give Congress such broad power, the case law up to this point provides, at minimum, that Congress can regulate "intrastate" economic activity that has a substantial effect on interstate commerce and may also include foreign trade that could affect interstate commerce. Thus, under the analysis above, the Department of Energy, and through its authority to delegate power to FERC, has broad authority from Congress to regulate domestic and foreign sales of natural gas, and under the Takings Clause also has broad authority to take private property in furtherance of maintaining efficient energy markets.[43]

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40. *Id.* at 67.

41. *Id.* at 68–69.

42. *Id.* at 69. Currently, the chasm created between *Raich* and *Lopez* places users of medical marijuana, as well as recreational users, in violation of federal law, even though states permit it. Although the Executive Branch is within its right to prosecute those violating federal law by consuming and using marijuana, it uses its inherent discretionary authority not to do so, provided states are effectively enforcing their statutes. *See* David Stout & Solomon Moore, *U.S. Won't Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES (Oct. 19, 2009), https://www.nytimes.com/2009/10/20/us/20cannabis.html [https://perma.cc/VFP7-T4RZ].

43. Nicholas Lansfeldt & John Echeverria, *Energy Infrastructure Siting Authority*, VT. J. ENVTL. L., http://vjel.vermontlaw.edu/topten/energy-infrastructure-siting-authority/ [https://perma.cc/GN53-E28F] (last visited Sept. 1, 2020) ("At the national level, natural gas companies granted licenses to construct pipelines by FERC have long exercised broad authority to take rights of way using the eminent domain power under the Natural Gas Act. This year, however, pipeline opponents have filed lawsuits in federal district court challenging the use of eminent domain to construct the proposed Mountain Valley and Atlantic Coast natural gas pipelines. The litigation raises the question of whether the use of eminent domain to support these projects violates the 'public use' requirement of

B. The NGA Grants FERC Jurisdiction Over the Transportation and Wholesale Sale of Natural Gas and The Department of Energy Over International Sales.

It is clear that the regulation of interstate commerce and foreign commerce is expressly within Congress's authority. Generally, these are "two distinct ideas," and therefore, "'[i]nterstate 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,"[44] and has done so in the NGA.

Section 3 of the NGA vests primary authority in the Department of Energy to regulate "both the movement of gas across the United States border and the sale of gas over the border."[45] Section 3 provides for a "public interest" standard for the export of natural gas.[46] Moreover, any export of natural gas to countries that have a free trade agreement with the United States are *per se* within the public interest and require no delay in granting an application for either import or export.[47] Under Section 7 of the NGA, the "public interest and necessity" standard requires "an examination of the border price, the need for gas, the security of supply, the effect on the U.S. balance of payments, the effect on domestic supplies and other factors."[48]

Sections 4, 5, and 7 of the NGA provide for the transportation of all gas from across the border and into the United States, including wholesale sales in interstate commerce.[49] The Department of Energy Organization Act vested authority in regulating imports and exports to the Secretary of Energy.[50] As a result, FERC has derivative authority over imports and exports of natural gas if the Secretary of Energy delegates that authority

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the Takings Clause, and whether Congress has made an overbroad delegation of the eminent domain power to FERC and in turn to private natural gas companies.").

44. Border Pipe Line Co. v. Fed. Power Comm'n, 171 F.2d 149, 150 (D.C. Cir. 1948).

45. 15 U.S.C. § 717 (2018); Robert C. Platt, *Trade in Natural Gas: The Changing Regulatory Framework*, 11 U. PA. J. INT'L BUS. L. 415, 416, 418 (1989) ("Prior to October 1977, all authority under the Natural Gas Act was vested in the Federal Power Commission (FPC). The Department of Energy Organization Act (DOE Act) transferred responsibility for gas imports and exports from the FPC to the Secretary of Energy.").

46. 15 U.S.C. § 717b.

47. 15 U.S.C. § 717b(c).

48. Platt, *supra* note 45, at 417.

49. 15 U.S.C. §§ 717c, 717d, 717f.

50. Platt, *supra* note 45, at 418.

to it.[51] Therefore, under the *Oberlin* fact scenario, FERC can derive that authority from the Secretary of Energy.

II. FERC HAS BROAD POWER TO CREDIT PRECEDENT AGREEMENTS WITH FOREIGN SHIPPERS SERVING FOREIGN CUSTOMERS AS EVIDENCE OF MARKET DEMAND FOR AN INTERSTATE PIPELINE

A. Review of City of Oberlin v. FERC – *The DC Circuit Gives a "Nod" to FERC to Credit Foreign Precedent Agreements When Evaluating Certificates of Public Convenience and Necessity.*

The *Oberlin* case provides a set of circumstances that behooves FERC to create a policy goal that maintains equilibrium between domestic supply and demand. The policy can include the transportation of natural gas in interstate commerce for export. The issue in *Oberlin* surrounded a certificate of "public convenience and necessity" granted to NEXUS Gas Transmission, LLC (Nexus), pursuant to Section 7 of the Natural Gas Act.[52] The pipeline in question consists of:

> an approximately 256-mile, 36-inch interstate natural gas transmission pipeline designed to transport up to 1.5 billion cubic feet per day (Bcf/d) of cleaner-burning natural gas from receipt points in eastern Ohio to existing pipeline system interconnects in southeastern Michigan. The full path of NEXUS allows for the delivery of natural gas supplies directly to consumers in northern Ohio; southeastern Michigan; and the Dawn Hub in Ontario, Canada.[53]

According to the company, the purpose of the pipeline is to provide affordable, clean-burning natural gas to its customers.[54] In granting the certificate, FERC also determined through an Environmental Impact Statement the "adverse environmental impacts [of the pipeline] would be

51. *Id.* at 418–19; 42 U.S.C. § 7172(f) ("No function described in this section which regulates the exports or imports of natural gas or electricity shall be within the jurisdiction of the Commission unless the Secretary assigns such a function to the Commission.").

52. Brief for Respondent FERC at 1, City of Oberlin v. FERC, 937 F.3d 599 (D.C. Cir. 2019) (No. 18-1248, 18-1261), 2019 WL 1435081, at *1.

53. *NEXUS Overview & Map*, NEXUS GAS TRANSMISSION, https://www.nexusgastransmission.com/content/nexus-overview-map [https://perma.cc/D76H-5MBP] (last visited Sept. 1, 2020).

54. *Id.*

reduced to less-than-significant levels by avoidance, minimization, and mitigation measures."[55]

FERC uses a "multi-step" analysis "to balance anticipated growth for natural gas against concerns about overbuilding, subsidization by existing captive customers, and unnecessary exercise of eminent domain."[56] In deciding whether to grant a certificate, FERC first looks to whether the pipeline can proceed without "subsidies from existing customers."[57] Second, it considers the impact of the new project on the "applicant's existing customers," competing pipelines and their "captive customers," and "landowners and surrounding communities."[58] Then, FERC "balances any residual potential adverse economic effects against a project's public benefits."[59] It looks at the benefits that "accrue" from the proposed pipeline itself and "not from the end-use of the transported gas."[60]

FERC also looks at the balance of the public benefits versus the adverse effects by focusing on "economic interests such as landowners' property rights" using a "sliding-scale" analysis.[61] During the examination, FERC considers evidence of market demand necessity and the presence of "precedent agreements" for "most of the new capacity" and how those would be viewed as "'strong evidence'" of market demand.[62] The "public convenience and necessity" analysis further includes a National Environmental Policy Act analysis, or "NEPA" analysis, to consider the environmental impact of a project.[63]

The Nexus project "intended to provide up to 1.5 million dekatherms per day" of natural gas to service customers in northern Ohio, southeastern Michigan, and the Dawn Hub in Canada.[64] Nexus submitted it had "eight long-term contracts (precedent agreements) for fifty-nine percent of the capacity (855,000 dekatherms per day)" provided by the pipeline.[65] The

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55. *See* Brief for Respondent FERC, *supra* note 52, at 2.
56. *Id.* at 6.
57. *Id.*
58. *Id.*
59. *Id.* at 7 ("Public benefits may include 'meeting underserved demand, eliminating bottlenecks, access to new supplies, lower costs to customers, providing new interconnects that improve the interstate grid, providing competitive alternatives, increasing electric reliability, or advancing clean air objectives.'").
60. *Id.*
61. *Id.* at 8.
62. *Id.*
63. *Id.* at 9.
64. *Id.* at 11.
65. *Id.*

breakdown of the 885,000 was DTE Gas and DTE Electric company serving end-users in the United States at 200,000 dekatherms per day.[66] Other domestic users totaled 425,000 dekatherms per day with the remaining going to Canadian customers at 260,000 dekatherms per day.[67]

After applying the above criteria, FERC granted a conditional certificate of public convenience and necessity, finding there was "a market need for the new pipeline," and considering the environmental impact of the project, the order was "an environmentally acceptable action."[68] Several parties requested a rehearing that FERC essentially denied.[69] As to the Canadian exports, it decided those exports did not "detract from . . . [a] finding of domestic need."[70] Furthermore, FERC "determined that the Project—which is located entirely within the United States, receiving gas in Ohio and delivering it in Ohio and Michigan—is not an export facility requiring approval under section 3 of the Natural Gas Act, 15 U.S.C. § 717f, for which eminent domain would not be available."[71] Finally, it decided the project met the requisite safety guidelines and did not pose a public risk.[72]

In its argument before the D.C. Circuit, FERC reminded the court of its "arbitrary and capricious" standard of review, asserting "the grant or denial of a section 7 certificate is within the Commission's discretion" and a court cannot "substitute its judgment for that of the Commission."[73] FERC has "broad discretion to invoke its expertise in balancing competing interests and drawing administrative lines."[74] A court is limited to deciding whether FERC "considered relevant factors" and whether there was clear error.[75]

In the outset of its ruling, the D.C. Circuit admitted while "reasoned justifications" for an agency's actions are required for review, a court cannot "micromanage" the agency.[76] The court acknowledged the separation of powers between the executive branch and the judiciary and agreed that FERC is the expert authority.[77] The petitioners, the City of

66. *Id.*
67. *Id.* at 12.
68. *Id.* at 15.
69. *Id.* at 16.
70. *Id.* at 17.
71. *Id.* at 18.
72. *Id.*
73. *Id.* at 19–20.
74. *Id.* at 20 (internal quotation omitted).
75. *Id.*
76. City of Oberlin v. FERC, 937 F.3d 599, 601 (D.C. Cir. 2019).
77. *Id.*

Oberlin, Ohio, and the Coalition to Reroute Nexus, an organization of landowners, moved the court to vacate FERC's order to certify the pipeline and vacate the order denying a rehearing on the matter.[78] In short, the court remanded for FERC's "further explanation of this determination" without vacatur.[79]

The court acknowledged Congress passed the NGA to facilitate abundant supplies of natural gas at reasonable prices.[80] Under this statutory mandate, FERC has broad authority to certify a pipeline to transport natural gas sales to Canada, as long as it is maintaining the balance of domestic supply and demand of natural gas at reasonable prices. This is consistent with its oversight authority and its directive to maintain just and reasonable rates. Moreover, due to the increased production of shale fracking, disallowing exports would lead to an overflow of supply and depreciated prices, which in the long run could cause the reverse where there is a lack of supply of natural gas, because it is not profitable to produce it anymore, and an increase in demand. The court then set forth FERC's policy as to how it considers applications and what it requires for a certificate of public convenience and necessity.[81] This also includes an environmental review.[82]

The D.C. Circuit recognized FERC's authority over the import and export of natural gas. Under Section 3, no one can import or export natural gas to any nation without FERC's order, which will only be granted if the trade with a foreign nation is in the "public interest."[83] Although Congress "transferred Section 3's regulatory function to the Secretary of Energy[,] . . . the Secretary delegated back to the Commission the narrow authority to approve or disapprove the construction and siting of facilities where natural gas will be imported or exported."[84] The issue in the Oberlin case surrounds the precedent agreements servicing Canadian customers.

FERC approved Nexus's application on three grounds: (1) its precedent agreements were "best evidence" of a market demand for gas; (2) FERC approved its fourteen percent return on equity, provided "Nexus design its initial customer rate based on a hypothetical capital structure of 50% equity and 50% debt;" and, (3) there is no public safety risk by building the pipeline.[85] Deferring to FERC's rationale and expertise, the

78. *Id.*
79. *Id.* at 601–02.
80. *Id.* at 602.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 602–03.
85. *Id.* at 603.

district court granted Nexus's condemnation action and permitted it to exercise eminent domain and "condemn certain easements," on the Petitioners' properties.[86] Under D.C. Circuit jurisprudence, landowners have standing to seek redress in the courts if they are "put to the choice" of either agreeing with a pipeline to access their property or in turn have the property condemned.[87]

Due to the unique expertise that administrative agencies have, courts have limited authority over agency decisions, and generally, can only set aside an order, or in this case, a certification for a pipeline, if the agency's decision is a result of circular reasoning, that is, "arbitrary and capricious" or "contrary to law."[88] Therefore, under 15 U.S.C. 717r(b) when exercising its authority to grant a certificate, FERC has to weigh the issues, explain its decision in an adequate manner, and base its findings on "substantial evidence."[89] The Petitioners argued the precedent agreements Nexus provided and FERC relied upon in granting the certification as "best evidence" are not "substantial evidence." They attacked the certification on three grounds.

First, Petitioners claim FERC contradicted its own policy when it accepted the precedent agreements as representing fifty-nine percent of "most of the new capacity" when it was not new capacity and therefore not representative of a "strong market demand."[90] The court, however, disagreed. FERC's policy is not a "bright line rule," but naturally, a flexible standard allowing the "Commission to consider a wide variety of evidence to determine the public benefits of the project."[91] The court accepted FERC's rationale that the pipelines already in place could not handle the amount of gas required by the precedent agreements; therefore, since there was more demand than the existing pipelines could support, a certification to build a new one was justified.[92]

The second argument was that the precedent agreements lacked "meaningful evidence" of the pipeline's need "because half of them are

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86. *Id.*

87. *Id.* at 604 ("As a result of the Commission's orders [petitioner] . . . must either sell its land to [the pipeline] or allow [the pipeline] to take its property through eminent domain. . . . That [the pipeline] ultimately will compensate [petitioner] for its property does nothing to erase [petitioner's] legally cognizable injury." (alteration in original) (quoting B&J Oil & Gas v. FERC, 353 F.3d 71, 75 (D.C. Cir. 2004))).

88. *Id.* at 605.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

with affiliates of the pipeline's sponsors."[93] To the court, this argument also lacked merit because FERC found no evidence of "self-dealing," and Nexus "bears the risk for any unsubscribed capacity."[94] The court noted FERC's policy of not "looking behind" precedent agreements "to make judgments about the needs of individual shippers."[95]

Finally, the third argument raised the issue as to whether FERC had given adequate explanations for granting the certificate to include sales to Canada. The Petitioners' contended "Nexus's precedent agreements [were] not strong evidence of market demand because a substantial portion of them are dedicated for export."[96] Since Section 3 authorizes the Secretary of Energy to export natural gas, the Petitioners argued, FERC "may not use precedent agreements for export 'to justify project need under Section 7 . . . which governs certificates for projects in interstate commerce."[97] The Petitioners' strongest argument against the certification is on eminent domain grounds. They assert:

> because Section 7 confers on a certificate holder the right to exercise eminent domain, crediting export agreements toward a Section 7 finding of project need runs afoul of the Takings Clause, as a private pipeline selling gas to foreign shippers serving foreign customers does not serve a 'public use' within the meaning of the Fifth Amendment.[98]

Yet, if the Petitioners and the court are correct, then the Secretary of Energy and FERC cannot allow any export of natural gas because it could involve taking American private property for "foreign" public use. If this were the constitutional standard, it would eviscerate both Congress's interstate commerce regulatory authority and foreign commerce negotiating authority, and in turn, FERC's derivative authority under the NGA to execute those powers.

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93. *Id.*

94. *Id.* at 605–06 ("[A]s the Commission explained, when it ended its policy of requiring pipelines to demonstrate a specific subscription rate, 'it was reducing "the significance of whether the [precedent agreements] are with affiliated or unaffiliated shippers."'" (alteration in original) (quoting Certification of New Interstate Natural Gas Pipeline Facilities, 88 FERC 61,227, 61,748 (1999))).

95. *Id.* at 606 (quoting Myersville Citizens for a Rural Community, Inc. v. FERC, 783 F.3d 1301, 1311 (D.C. Cir. 2015)).

96. *Id.*

97. *Id.*

98. *Id.*

There were two precedent agreements at issue totaling 260,000 dekatherms per day going to Canadian customers.[99] The court reasoned that if FERC "excluded these agreements from its Section 7 analysis of project need, Nexus would have [contracts] for only 625,000 dth/day, or approximately 41.6% of its 1.5 million [capacity]."[100] Since FERC did not consider whether the public benefits of the pipeline were outweighed by any adverse impacts if the line were "only subscribed for 625,000 dth/day (a substantial decrease from the analyzed 805,000 dth/day),"[101] the court remanded for further explanation. According to the court, it could "affirm its finding of public convenience and necessity only if the Commission's inclusion of the export precedent agreements in its analysis was proper."[102]

The court did not believe FERC adequately explained why it was lawful for it to permit the pipeline to utilize it for export, more particularly, "why it is lawful to credit demand for export capacity in issuing a Section 7 certificate to an interstate pipeline."[103] FERC responded to this assertion that: "(1) a substantial amount of the pipeline's subscribed capacity is for domestic consumption; (2) all shipper commitments have secondary delivery rights within the United States; and (3) Nexus's application listed eleven interconnections with potential customers."[104] But the court was not satisfied. It held the facts presented did not explain why FERC would permit a pipeline based on precedent agreements with "foreign shippers serving foreign customers."[105]

The court emphasized it "explicitly refused" to interpret "interstate commerce" to include commerce with foreign nations, such as Canada.[106] However, there is no Supreme Court precedent holding that the NGA completely bars FERC from including foreign sales in granting a certificate for a new pipeline. In addition, the court was not satisfied with FERC's response to the eminent domain dilemma—whether it is lawful to take an American citizen's property to service some Canadian citizen.[107] Relying on a prior case, FERC argued allowing the building of a new pipeline based on export agreements does not "present a Takings Clause problem," because once FERC determines the project is needed for public convenience, Section 7 "authorizes the certificate holder to exercise the

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 606–07.
107. *Id.* at 607.

right of eminent domain."[108] FERC also argued Congress did not suggest a "further test" was needed, that is, "certain certificated pipelines furthered a public use . . . while others did not."[109] The court did not agree that this fully answered the question of whether Section 7 authorizes the use of eminent domain in circumstances where FERC credits precedent agreements for export in a finding a "pipeline is required by the public convenience and necessity."[110]

Finally, the court rejected Petitioners' last two arguments, one where FERC approved a formula Nexus used to establish its initial rate, and the other, concerning whether the pipeline poses a safety risk. For the first argument, the court found FERC appropriately balanced both consumer and investor interests when it ordered Nexus to design its initial rate on a 50:50 debt to equity ratio, "since new pipelines are inherently riskier, and Nexus bears the responsibility for any unsubscribed capacity."[111] As to the pipeline's safety, the court held that FERC did not act arbitrarily when it relied on Nexus's promise to comply with safety standards as provided by the Department of Transportation (DOT), which has full authority to oversee and establish safety standards for the building of pipelines.[112] Merely relying on Nexus's commitment to obey DOT standards was not an abrogation of FERC's NEPA's obligations.[113] Furthermore, the court held that FERC did not fail to consider the proximity of the pipeline to residences and other buildings when DOT regulations do not require minimum distances.[114]

But the "nod" the court gives to FERC's approval of the pipeline based on crediting Canadian precedent agreements is supported by the fact the court did not vacate FERC's certification approving the pipeline outright, which was already in the process of being built. Instead, the court was looking for further explanation. Furthermore, Judge Rogers' concurrence acknowledges that FERC is within its statutory authority to grant a certification of public convenience and necessity when imported gas is used for domestic consumption, or in other words, to satisfy domestic demand. Judge Rogers suggested a "workaround" could be applied, provided if FERC explained why it would consider precedent agreements with Canada based on "market need" for a new pipeline to be located

108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 608–09.
112. *Id.* at 610.
113. *Id.*
114. *Id.* at 611.

exclusively within the United States. [115] A "market need" is a broad phrase and, as argued here, could mean sales of gas to Canada to maintain stable market prices.

Supporting this notion, in footnote 3, the court disagreed with the Petitioners' assertion that FERC could "never lawfully issue a Section 7 certificate where a pipeline has precedent agreements for export."[116] In fact, the court disagreed "because a pipeline may clearly be required by the public convenience and necessity independent of any of its precedent agreements for export. But, as explained, [FERC] has not made any finding to that effect in this case."[117] This footnote opens the door to FERC making an "independent" argument that crediting the Canadian precedent agreements satisfies a market need to maintain stable domestic prices and supplies of natural gas.

B. FERC Has Broad Authority to Maintain the Balance of Supply and Demand of Natural Gas in Interstate Commerce and May Grant Certificates of Public Convenience and Necessity Based in Part on Precedent Agreements with Foreign Shippers.

Under the Necessary and Proper Clause, Congress can give broad authority to the Department of Energy and FERC to regulate both domestic and foreign trade in natural gas. The Court has "been very deferential to Congress's determination that a regulation [or a statute, such as the NGA] is 'necessary.'"[118] It "upheld laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'"[119] The Court, however, has held "unconstitutional those laws that undermine the structure of government established by the Constitution."[120] Statutes "which are not 'consist[ent] with the letter and spirit of the constitution,' are not 'proper [means] for carrying into Execution' Congress's enumerated powers. Rather, they are, 'in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'"[121]

In addition, the Department of Energy and FERC's authority to regulate all energy markets is further broadened under the Takings Clause of the Constitution.[122] The government can seize private property for

115. *Id.* at 611–12 (Rogers, J., concurring).
116. *Id.* at 607 n.3.
117. *Id.*
118. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559 (2012).
119. *Id.*
120. *Id.*
121. *Id.*
122. U.S. CONST. amend. V.

public use provided it is taken with just compensation.[123] This assumes under natural law a balance between individual rights to private property and the common good.[124] In the controversial case of *Kelo v. City of New London*, the Court interpreted the Fifth Amendment to give the government expansive authority where the government was justified in using eminent domain to seize private property for a private development, provided the local community was benefitted through economic development.[125] Again, this is a broad authority and undercuts Petitioners' argument that the Takings Clause always prohibits government use of private land that has an indirect effect of benefiting foreign citizens.

The *Oberlin* court "pressed" the issue during oral argument as to why it is "lawful" for it to credit precedent agreements involving sales to foreign markets.[126] FERC responded that when it approved the Nexus application that it was "'looking at the benefits to domestic markets,'" but the court held this had "no explanatory value."[127] Measuring benefits to domestic markets is the proper answer, but FERC should have included the broader argument that those sales are necessary to maintain stable domestic prices.

1. Exports of Natural Gas Are Vital to Maintaining Equilibrium in Domestic Natural Gas Prices and May Justify Taking Property to Service Foreign Nations. FERC Must Weigh the Direct and Indirect Effects of Its Eminent Domain Actions.

Both the interstate commerce clause and the foreign commerce clause are like two hands: Sometimes they work independently of each other and sometimes together, but they always work toward benefiting the American consumer. When deciding whether FERC is acting arbitrarily (or any agency for that matter) a court should look at FERC's intent and the direct and indirect effects of its actions, especially when it exercises its eminent domain power.

With regard to the Canadian sales, FERC satisfied its Section 3 public interest test and its Section 7 public convenience and necessity test. Canadian export sales, as part of a larger, national policy to export natural gas, are within the public interest because they keep domestic prices stable.

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123. *Id.*

124. Alex Tuckness, *Locke's Political Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 11, 2016), https://plato.stanford.edu/entries/locke-political/ [https://perma.cc/3H6D-XY5S].

125. 545 U.S. 469 (2005).

126. City of Oberlin v. FERC, 937 F.3d 599, 607 (2019).

127. *Id.*

In addition, the new pipeline created to transport gas meets the public convenience and necessity standard, even though the gas transported through it will ultimately service Canadian customers. The pipeline, in fact, services both domestic and Canadian users.

The general standard for appellate review over FERC's orders is whether FERC acted in an arbitrary and capricious manner when deciding whether to grant a certificate of public convenience and necessity to construct a pipeline.[128] FERC does not act arbitrarily if it grants a certificate to build a pipeline that services primarily domestic users, but also some to foreign users. Measuring both the direct and indirect effects of building a new pipeline is the essence of FERC's analysis including, for example, when it is analyzing environmental impact. There is an ancient philosophical construct, namely the "principle of double effect," that evaluates the direct and indirect effects of an action. The Supreme Court has used this principle in the past to adjudicate constitutional cases involving First Amendment law, civil rights law, and criminal law.[129]

An analysis under the "principle of double effect"[130] supports government action (in this case, FERC and its surrogates) to take private property to service foreign customers, as long as those sales benefit the domestic consumer market. The "principle of double effect" focuses on the intent of the actor and permits a good and just action if taking that action produces two effects: one intended and foreseen, and the other unintended and foreseen. This analysis will be applied to the *Oberlin* case below.

In *Oberlin*, the D.C. Circuit's unease over the possibility of exercising eminent domain and taking an American citizen's property to service a foreign customer is misplaced. It is misplaced because servicing a foreign customer through using a domestic pipeline is an unintended indirect effect of crediting precedent agreements with Canada for a domestic benefit. Instead, crediting agreements for export has beneficial direct

128. Sacramento Mun. Util. Dist. v. FERC, 616 F.3d 520, 528 (D.C. Cir. 2010) ("We review FERC's orders under the arbitrary and capricious standard and uphold FERC's factual findings if supported by substantial evidence." (quoting Am. Gas Ass'n v. FERC, 593 F.3d 14, 19 (D.C. Cir. 2010))).

129. Edward C. Lyons, *In Incognito—The Principle of Double Effect in American Constitutional Law*, 57 FLA. L REV. 469, 508–43 (2005).

130. AUSTIN FAGOTHEY, RIGHT AND REASON 107–08 (3d ed. 1963) (There are four elements under the principle of double effect: "(1) the act to be done must be good in itself or at least indifferent; (2) the good intended must not be obtained by the means of the evil effect; (3) the evil effect must not be intended for itself but only permitted; and (4) there must be a proportionally grave reason for permitting the evil effect.").

effects: (1) it keeps the supply of gas in check and thereby preventing depreciated domestic prices harming the American consumer; (2) it yields a positive contribution to the balance of payments between the U.S. and foreign nations; (3) it satisfies an international demand for American natural gas; (4) it increases domestic activity and job growth through shale gas production; (5) it has geopolitical benefits, including agreements made between the United States and foreign nations to rectify decades of trade imbalances; and, (6) it also improves infrastructure. In the *Oberlin* scenario, the direct domestic benefits to the American consumer by crediting the export agreements to Canada simply outweigh the indirect benefits to Canadian consumers.

Moreover, given the Supreme Court's broad interpretation of the authority granted to Congress (and through Article II to FERC) under the interstate commerce clause, FERC can credit foreign precedent agreements as long as there is a connection with balancing interstate domestic prices and supplies of natural gas. FERC has broad authority to regulate gas prices and just and reasonable rates within the domestic gas market.[131] "Just and reasonable" rates should not just apply to approving tariffs. In the context of the rest of the statute, the language is broad enough to mean maintaining an efficient natural gas market, ensuring American consumers receive as much gas they need at reasonable prices.

In addition, under the Energy Policy Act of 2005, FERC has anti-manipulation authority over the wholesale sale of natural gas, and implied in this authority is maintaining an efficient market.[132] To underscore this notion that FERC has an interest in maintaining an efficient market, in its staff white paper on market fraud, FERC states: "Market manipulation threatens the integrity of the energy markets . . . by harming consumers, [and] rendering prices and price setting mechanisms inaccurate and unreliable . . . [where manipulating schemes have] wreaked havoc on energy markets." [133] The "integrity of the markets" also means maintaining equilibrium in supply and demand of natural gas, even if it means creating

131. 15 U.S.C. § 717c(a) (2018).

132. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594; 16 U.S.C. § 824v(a) (2018) ("Prohibition of Energy Market Manipulation" under FPA); 16 U.S.C. § 825o-1 (penalty authority of $1,000,000 per day per violation under the FPA); 15 U.S.C. § 717c-1 ("Prohibition on Market Manipulation" under NGA); 15 U.S.C. § 717t-1 (penalty authority of $1,000,000 per day per violation under the NGA).

133. FED. ENERGY REGULATORY COMM'N, STAFF WHITE PAPER ON ANTI-MARKET MANIPULATION ENFORCEMENT EFFORTS TEN YEARS AFTER EPACT 2005, at 13 (2016), https://www.ferc.gov/sites/default/files/2020-05/marketmanipulationwhitepaper.pdf [https://perma.cc/Z5EJ-E2DV].

a pipeline that can service both domestic customers and exports. If maintaining market equilibrium is not a stated FERC policy, perhaps it should be so.

There is another reason to allow using a domestic pipeline for exports. FERC cannot discriminate against imported natural gas from countries where the United States has a free trade agreement in place, [134] such as Canada. But the converse should also be true—that FERC should not discriminate against "exporting" natural gas to any country where the United States has an agreement in place. Finally, since FERC has exclusive authority over LNG terminals that import or export natural gas from foreign countries, then it should follow it also has authority over crediting precedent agreements for export.[135]

2. Both the Trump and Obama Administrations Adopted Policies to Support Shale Fracking and Promote the Export of Natural Gas to Foreign Nations.

President Trump, in his speeches and policies, seeks to boost production and sales of natural gas abroad.[136] President Obama also saw the importance of shale fracking both in aiding the environment and helping the nation's economy.[137] A recent U.S. Chamber of Commerce report indicated the importance of shale fracking and what a "devastating" effect it would have for the country if it were banned.[138] More particularly, its Global Energy Institute predicted that without shale fracking, the country would suffer "catastrophic" economic impacts, including but not limited to: 19 million jobs lost; an increase in gasoline prices; a giant leap in household energy bills by 324%; "cost-of-living impacts to residential consumers in Wisconsin and Michigan," growing from \$4,700 to \$5,100 per household between the years 2021 and 2025; and, possible economic ruin of oil and gas producing states, such as New Mexico, Texas, Ohio, Colorado, and Pennsylvania.[139] Clearly, exports of natural gas are

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134. 15 U.S.C. § 717b(b).

135. *Id.*

136. Kevin Freking, *Trump Pushes 'America First Energy Policy' on Louisiana Trip*, AP NEWS (May 14, 2019), https://apnews.com/b75911009f0e4982b6557ccbb588f357 [https://perma.cc/E8BN-Q2LC].

137. Jude Clemente, *President Obama's Support for America's Shale Oil and Natural Gas*, FORBES (Dec. 31, 2019, 1:06 PM), https://www.forbes.com/sites/judeclemente/2020/12/31/president-obamas-support-for-americas-shale-oil-and-natural-gas/#cb7f64618830 [https://perma.cc/TXL9-6QFY].

138. *Id.*

139. *Id.*

important to maintaining equilibrium in domestic prices of natural gas and are necessary to keep domestic supply levels in check.

CONCLUSION

Shale fracking technology gave the United States an abundance of natural gas and exporting it has major benefits. According to one study, "for every 1 Bcf/d of shale gas production, approximately 32,000 total jobs are supported throughout the economy."[140] Exports "could contribute as much as $10 billion to $31 billion per state to the economies of natural gas-producing states."[141] And states that do not produce natural gas will also "benefit from increased demand for steel, cement, equipment, and other goods."[142]

In order to have a vibrant natural gas market, demand and supply need to be in harmony with each other. If there is too much supply and not enough demand, the result is depreciated prices to the point where it would become unprofitable for anyone to produce natural gas through shale fracking. This could damage a key component of the nation's energy industry, which is why exports are necessary.

Both the Trump administration and the Obama administration confirmed that by increasing exports of natural gas, natural gas markets in the United States will be in "balance."[143] Moreover, since natural gas is a greater value good, exporting it will benefit the U.S. economy because the country can, in turn, import larger quantities of goods than it could if it dedicated resources to producing something less in value than natural gas.[144]

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140. AM. PETROLEUM INST., LIQUEFIED NATURAL GAS EXPORTS – AMERICA'S OPPORTUNITY AND ADVANTAGE 5 (2016), https://www.api.org/policy-and-issues/policy-items/lng-exports/~/media/Files/Policy/LNG-Exports/LNG-primer /Liquefied-Natural-Gas-Exports-highres.pdf [https://perma.cc/94C6-9ADX].

141. *Id.*

142. *Id.*

143. *Effect of Increased Levels of Liquefied Natural Gas Exports on U.S. Energy Markets*, U.S. ENERGY INFO. ADMIN. (Oct. 29, 2014), https:// www.eia.gov/analysis/requests/fe/ [https://perma.cc/46MS-4BCP] ("Natural gas markets in the United States balance in response to increased LNG exports mainly through increased natural gas production."); NERA ECON. CONSULTING, MACROECONOMIC OUTCOMES OF MARKET DETERMINED LEVELS OF U.S. LNG EXPORTS (Jun. 7, 2018), https://www.energy.gov/sites/prod/files/2018/06/f52 /Macroeconomic %20LNG%20Export%20Study%202018.pdf [https://perma.cc /4VDA-Y6YP].

144. NERA ECON. CONSULTING, *supra* note 143, at 38; *see also The Economics of Natural Gas Exports*, BARNETT SHALE ENERGY EDUC. COUNCIL,

FERC, as the sole regulator of energy markets in the United States, has the responsibility to maintain equilibrium between domestic supply and demand to ensure just and reasonable rates for consumers. It has the constitutional, statutory, and moral authority to do so. Therefore, under Section 7 of the Natural Gas Act, FERC may credit precedent agreements with foreign shippers as part of the basis to certify building a publicly convenient and necessary interstate pipeline that services both domestic and foreign customers.

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http://www.bseec.org/_the_economics_of_natural_gas_exports [https://perma.cc/54PN-H2NN] (last visited Sept. 11, 2020) ("The experts at NERA found that LNG exports would produce net economic benefits for the U.S. across a range of possible natural gas price changes. In all cases, benefits increased as LNG exports increased.").