

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

Laura D. Urban, <i>et al.</i> ,)	
Plaintiffs,)	Case No. 5:17-cv-01005 (JRA)
)	
v.)	Judge John R. Adams
)	
Federal Energy Regulatory Commission,)	
<i>et al.</i> ,)	
Defendants.)	

**FEDERAL DEFENDANTS’ REPLY
IN SUPPORT OF MOTION TO DISMISS COMPLAINT**

Plaintiffs’ response offers several theories in support of their argument that this Court may exercise jurisdiction over an ongoing proceeding before the Federal Energy Regulatory Commission (“FERC” or the “Commission”) concerning the Nexus pipeline certificate application. None of Plaintiffs’ theories, however, supports jurisdiction. Because Plaintiffs have brought their claims in the wrong court, at the wrong time, and because the complaint fails to state a claim on which relief may be granted, the complaint must be dismissed.

The Natural Gas Act (“NGA” or “Act”) provision governing judicial review of FERC certificate proceedings, 15 U.S.C. § 717r, vests the courts of appeals with exclusive jurisdiction to review FERC certificate proceedings and all related matters. The exclusive review provision, along with controlling Sixth Circuit precedent and numerous precedents from other circuits, bar the district court from hearing this case. *See* Motion to Dismiss at 6-11. Under the processes set forth in the Natural Gas Act, Plaintiffs must raise their concerns regarding the Nexus pipeline to the Commission, and, at the appropriate time, to the court of appeals; they cannot escape the jurisdictional requirements of the Act by preemptively filing a lawsuit in district court.

Plaintiffs contend that precedents finding that district courts lack jurisdiction to consider challenges to FERC certificate orders are somehow inapposite because Plaintiffs have brought their challenge prior to the issuance of a certificate order by the Commission. But the lack of a certificate order in this case actually cuts against Plaintiffs. Under the Act and relevant case law, the courts of appeals have exclusive jurisdiction to review Commission actions in pipeline certificate proceedings, but only when the Commission has acted with finality—i.e., once the Commission has issued a certificate order and has acted on requests for rehearing. *See, e.g., American Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010). Here, the Commission has done neither.

If Commission action is not final when the Commission has issued a certificate order (which confers eminent domain authority), but is still considering a request for rehearing, then a proceeding is even less final—and less ripe for judicial review—when the Commission has not yet issued a certificate order. *See, e.g., Total Gas & Power N.A., Inc. v. FERC*, 859 F.3d 325, 339 (5th Cir. 2017) (affirming district court’s dismissal of natural gas company’s declaratory judgment action prior to issuance of FERC order for lack of ripeness, where “FERC order . . . may never be issued,” and “all of [plaintiff’s] arguments are predicated on future events and are brought before FERC has even scheduled the matter for a hearing—let alone issued an order . . .”). As discussed in the Motion to Dismiss, the Environmental Impact Statement prepared by FERC Projects staff does not represent final agency action. *See* Motion to Dismiss at 14-16. There is no precedent for judicial review of Environmental Impact Statements prepared by Projects staff prior to Commission action. Rather, the relevant case law demonstrates that NGA § 717r bars district court challenges to ongoing FERC certificate proceedings. *See* Motion to Dismiss at 6-11, 14-16.

Plaintiffs turn to NGA § 717u and the Administrative Procedure Act (“APA”) in an effort to avoid NGA § 717r and governing precedent. *See* Response at 5-8. But neither confers jurisdiction on the district court in this case. As discussed at pages 11-12 of the Motion to Dismiss, section 717u does not constitute an “open-ended grant of jurisdiction” to the district courts. *Town of Dedham v. FERC*, No. 15-12352, 2015 WL 4274884, at *2 (D. Mass. July 15, 2015) (dismissing similar district court complaint).

Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning, 136 S. Ct. 1562 (2016), does not help Plaintiffs. *See* Response at 15-16. That case concerned a provision of the Securities Exchange Act, which, like NGA § 717u, provides for federal court jurisdiction over actions “brought to enforce any liability or duty” created by the statute. The Supreme Court interpreted the scope of the relevant provision, and concluded that it did not support federal jurisdiction over plaintiff’s state law claims, even though plaintiff referred to a federal regulation issued under the Securities Exchange Act. *See Merrill Lynch*, 136 S. Ct. at 1568 (rejecting defendant Merrill Lynch’s “expansive” interpretation of the jurisdictional provision, explaining that the provision does not “embrac[e] any complaint that happens to mention a duty established by the [Securities] Exchange Act”).

As the district court in the *Total* case recognized, certain New Deal-era jurisdictional provisions, such as NGA § 717u and the provision at issue in *Merrill Lynch*, have been interpreted to address federalism concerns—i.e., “the allocation of authority between state and federal courts.” *Total Gas & Power N.A., Inc. v. FERC*, No. 16-1250, 2016 WL 3855865, at *12-13 & nn.88, 94 (July 15, 2016) (citing *Merrill Lynch*, 136 S. Ct. at 1572-73), *aff’d*, 859 F.3d 325. However, “[n]othing in th[e] precedent [addressing such provisions] indicates that NGA

§ [717u] was intended or understood to govern the allocation of responsibilities between the agency and the courts.” *Total*, 2016 WL 3855865, at *12.

The federalism issue addressed in *Merrill Lynch* is not present here. Rather, as in *Total*, Plaintiffs here invoke NGA § 717u as the jurisdictional basis for the Court to grant relief prior to the completion of administrative proceedings before the Commission. In *Total*, plaintiff sought a declaration that it was entitled to have a civil penalty action heard in federal district court, rather than in a FERC administrative proceeding. 859 F.3d at 337. The district court rejected NGA § 717u as a basis for jurisdiction. *Total*, 2016 WL 3855865, at *11 (“[I]t is fairly discernible that Congress intended for the claims [p]laintiffs assert to be evaluated through the administrative process with judicial review in the court of appeals.”). As in *Total*, NGA § 717u does not support jurisdiction in this action. See *American Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) (NGA § 717r prescribes a “highly reticulated procedure for obtaining, and challenging, a FERC certificate to build an interstate pipeline”).

Plaintiffs’ alternative contention that the Administrative Procedure Act (“APA”) grants them a cause of action because the Commission is allegedly reviewing the Nexus application under the incorrect NGA provision, Response at 5-6, likewise fails. As Plaintiffs acknowledge, the APA does not provide for judicial review if “statutes preclude judicial review” or “agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a)(1)-(2). Here, the exclusive review provision of the NGA precludes district court jurisdiction. Moreover, Congress has entrusted FERC with exclusive authority to administer the Natural Gas Act. See *Schneidewind v. ANR Pipeline*, 485 U.S. 293, 300-301 (1988); *Michigan Consol. Gas Co. v. Panhandle E. Pipe Line Co.*, 887 F.2d 1295, 1299 (6th Cir. 1989). Any allegation that Nexus is an export pipeline proceeding under the wrong NGA provision is well within the Commission’s expertise to

determine, but the Commission has not yet had the opportunity to do so. If properly raised to the Commission, the agency will consider and address the argument. Judicial review of the Commission's decision would be available at the appropriate time in the courts of appeals. *See* Motion to Dismiss at 18-19.

Finally, there is no “non-statutory basis” for the Court to exercise jurisdiction here. Plaintiffs argue that the Court may exercise jurisdiction because there is a “readily observable usurpation of power not granted to the agency by Congress.” Response at 14 (citing *Greater Detroit Res. Recovery Auth. v. EPA*, 916 F.2d 317, 323 (6th Cir. 1990)). There can be no “usurpation of power” when the Commission has taken no action on the pipeline application at issue. In any event, Congress has entrusted FERC with administering the Natural Gas Act. In particular, as discussed at pages 18-19 of the Motion to Dismiss, FERC is the guardian of the public interest in deciding whether the public interest supports approval of a natural gas pipeline. *See Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 7 (1961); *Rockies Exp. Pipeline LLC v. 4.895 Acres of Land, More or Less*, 734 F.3d 424, 431 (6th Cir. 2013). In that capacity, the Commission is entrusted with balancing “our nation’s increasing demand for natural gas” and the interests of landowners, businesses and all stakeholders potentially affected by a proposed pipeline. *Minisink Residents for Env't'l Preservation and Safety v. FERC*, 762 F.3d 97, 100 (D.C. Cir. 2014).

When a quorum of Commissioners is restored, the Commission will conscientiously carry out the responsibilities assigned to it by statute, and Plaintiffs, if still aggrieved, will have the opportunity to seek judicial review in the court of appeals at the appropriate time. Until then, Plaintiffs cannot sidestep the Congressionally-designed judicial review provisions of the Act by prematurely seeking review in this Court.

CONCLUSION

As explained above and in the Motion to Dismiss, Plaintiffs' complaint should be dismissed in its entirety under Federal Rules of Civil Procedure 12(b)(1) and/or 12(b)(6).

Respectfully submitted,

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July 26, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on July 26, 2017, 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/ Susanna Y. Chu

Susanna Y. Chu

Attorney