UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Adorers of the Blood of Christ, *et al.*, Plaintiffs,	)	Case No. 5:17-cv-03163-JLS
v.	)	Judge Jeffrey L. Schmehl
Federal Energy Regulatory Commission, *et al.*, Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

As this Court recently stated in rejecting a party's due process claims relating to a FERC certificate order, "[i]t is widely accepted that the validity of a FERC Order can only be challenged in front of FERC, and then in the United States Court of Appeals . . . . " *Transcontinental Gas Pipe Line Co., LLC v. Permanent Easement for 2.14 Acres*, Nos. 17-715, *et al.*, 2017 WL 3624250, at *3 (E.D. Pa. Aug. 23, 2017) (condemnation proceeding). Thus, "this Court lacks the jurisdiction to address any sort of attack on the FERC order itself, constitutional or otherwise." *Id.* at *4. The Court's reasoning in the Transcontinental Gas condemnation proceeding applies with equal force here.

Plaintiffs the Adorers of the Blood of Christ ("Adorers") frame their action as a claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"). However, their claim is in fact an impermissible collateral attack on a FERC certificate order. Consistent with this Court's reasoning in the condemnation proceeding, and as discussed in the Commission's Motion to Dismiss at pages 5-9, such collateral attacks are barred by the Natural Gas Act, 15 U.S.C. § 717r, which vests exclusive jurisdiction to review Commission certificate orders in the U.S. Courts of Appeals.

Contrary to the Adorers' contentions, neither the text of RFRA nor any relevant precedent supports the proposition that RFRA supersedes the Natural Gas Act's exclusive jurisdiction provision in this context. Indeed, a court in this district has decisively rejected the argument that RFRA supersedes another federal statute with an exclusive jurisdiction provision, and the Third Circuit Court of Appeals has affirmed. *Radio Luz v. FCC*, 88 F. Supp. 2d 372 (E.D. Pa. 1999), *aff'd*, 213 F.3d 629 (3d Cir. 2000). In *Radio Luz*, the district court dismissed for lack of jurisdiction a RFRA and First Amendment challenge to a Federal Communications Commission regulation. As in this case, *Radio Luz* involved a federal statute that vested exclusive jurisdiction over certain matters in a federal agency, with subsequent judicial review in the U.S. Court of Appeals. 88 F. Supp. 2d at 374-75 (discussing the Federal Communications Act, 47 U.S.C. § 402).

The *Radio Luz* court observed that "[i]t is well established that a special statute vesting jurisdiction in a particular court cuts off the jurisdiction other courts might otherwise have under a more general statute." *Id.* at 376 (citation and internal quotation marks omitted). "The scheme provided in the Federal Communications Act, 47 U.S.C. § 402, is a specific jurisdictional provision. Thus, [section] 402 cuts off this court's jurisdiction over plaintiffs' actions." *Id.* The Natural Gas Act likewise is an exclusive jurisdiction statute, similarly cutting off all district court review of FERC certificate decisions. *See* Motion to Dismiss 5-9 (citing statute and cases).

As the *Radio Luz* court stated, "[t]his result does not undermine RFRA, which provides that an aggrieved party may obtain review 'in a judicial proceeding . . . . " 88 F. Supp. 2d at 376 (citing 42 U.S.C. § 2000bb-1(c)). This is because "[j]udicial review of plaintiffs' claim under RFRA is available in the court of appeals on appeal from an adverse FCC order." *Id.*; *see also id.* at 375 ("Nowhere does [RFRA] specifically confer jurisdiction on federal district courts to

hear all RFRA claims."). *See also La Voz Radio de la Comunidad v. FCC*, 223 F.3d 313, 319 (6th Cir. 2000) (affirming district court dismissal of RFRA claim in light of Federal Communications Act's specific jurisdictional provision, explaining, "[RFRA] provides that a person who believes that his 'religious exercise' has been 'burdened' in violation of RFRA 'may assert that violation as a claim or defense in a judicial proceeding . . . . ' It does not provide that the 'judicial proceeding' must be in the district court as opposed to a designated court of appeals.").

By contrast with this precedent, the cases cited by the Adorers in support of their argument that RFRA does not require administrative exhaustion, Opp. Br. 16, do not address the interaction between RFRA and a statute with an exclusive jurisdiction provision, such as the Natural Gas Act. *See, e.g., Oklevueha Native Am. Church v. Holder*, 676 F.3d 829, 838 (9th Cir. 2012) (RFRA claim concerning seizure of marijuana under Controlled Substances Act; no exclusive jurisdiction provision raised or discussed); *Singh v. Carter*, 168 F. Supp. 3d 216, 225-26 (D.D.C. 2016) (exercising jurisdiction over officer's RFRA challenge to Army order requiring him to submit to specialized training to obtain religious accommodation; no exclusive jurisdiction provision raised or discussed, apart from "requirements of administrative exhaustion of military personnel decisions generally").

The Adorers' reliance on 28 U.S.C. § 1343(a)(4) and related case law, Opp. Br. 24, is also misplaced. Like 28 U.S.C. § 1331 (federal question jurisdiction), the general grant of jurisdiction to federal district courts over civil rights claims in 28 U.S.C. § 1343 does not supersede the specific jurisdictional provisions contained in the Natural Gas Act. *Cf. Radio Luz*, 88 F. Supp. 2d at 375-76 ("The general jurisdictional grant of [28 U.S.C.] § 1331 . . . does not trump a specific jurisdictional provision adopted by Congress for review of an agency action.")

(citation omitted); *see also Gen. Finance Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983) ("You may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court . . . ; the specific statutory method, if adequate, is exclusive.").

The cases cited by the Adorers are not to the contrary. *See* Opp. Br. 24-25 (citing *Rogers v. United States*, 14 Cl. Ct. 39, 50 (1987); *Persico v. Sebelius*, 919 F. Supp. 2d 622, 624 (W.D. Pa. 2013); *De'lonta v. Johnson*, No. 11-CV-00175, 2012 WL 2921762, at *1 (W.D. Va. July 17, 2012); *Ben-Kushi v. Kautzky*, No. 03-CV-40038, 2005 WL 8141552, at *1-2 (S.D. Iowa July 8, 2005)). None of the cited cases supports the Adorers' theory that the District Court may exercise jurisdiction in the presence of the Natural Gas Act's exclusive jurisdiction provision. Indeed, two of the cases found plaintiff prisoners' civil rights claims to be barred because plaintiffs failed to exhaust administrative remedies, as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a). *See De'lonta*, 2012 WL 2921762, at *5 (granting summary judgment to defendants because, among other things, plaintiff failed to exhaust administrative remedies); *Ben-Kushi*, 2005 WL 8141552, at *3-5 (declining to consider issues as to which plaintiff failed to exhaust administrative remedies).

As this Court has observed with respect to the precedents addressing the Natural Gas Act's exclusive jurisdiction scheme, "[i]t is important that this precedent be followed so large pipeline projects cannot be challenged in many forums, so as to establish a sole final arbiter for the decisions." *Transcontinental Gas Pipe Line*, 2017 WL 3624250, at *3 (citing cases). *See also Radio Luz*, 88 F. Supp. 2d at 377 (allowing RFRA claim to go forward in district court "would defeat the [exclusive] jurisdictional scheme" of the Federal Communications Act).

These considerations are especially pertinent here. The Adorers concede in their opposition to the Motion to Dismiss that they failed to raise any objections to the proposed pipeline to the Commission, and failed to participate in the Commission proceedings leading to the issuance of the Commission's Certificate Order. Opp. Br. 12. It would be manifestly prejudicial to the Commission to allow the Adorers to prosecute a case alleging that the Commission's Certificate Order violates RFRA, when the Commission did not learn of the Adorers' concerns regarding the siting of the pipeline until the filing of this lawsuit, approximately five months after the Certificate Order issued, and outside the normal (and exclusive) statutory process for rehearing of that Order.

The Adorers argue that they could not have asserted their RFRA claims before the Commission issued a certificate, because it would have been "impossible" to assert a RFRA claim without Article III standing. Opp. Br. 19. This argument is meritless. The Adorers object to a pipeline route. Pipeline route objections must necessarily be brought to FERC, the agency responsible for the siting of interstate natural gas pipelines. *See Millennium Pipeline Co., LLC v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017) (in matters pertaining to natural gas pipeline construction, "all roads lead to FERC"). Moreover, Article III standing is not required to participate in a FERC proceeding. FERC's regulations establish criteria for interested individuals to intervene and become parties to the proceeding. *See* 18 C.F.R. § 385.214(c) (if a motion to intervene is unopposed, movant becomes a party 15 days after filing motion; if motion is opposed or untimely, movant becomes a party after the motion is granted). In the proceeding

at issue, numerous parties timely intervened as parties in the FERC proceeding; late intervention motions were also granted. Certificate Order P 13, App. A and B (listing intervenors).[1]

In short, the Adorers could and should have voiced their pipeline route objections to the Commission during the agency proceeding, so the Commission could have addressed the Adorers' concerns and considered the feasibility of an alternative route, with judicial review in the U.S. Courts of Appeals at the appropriate time. *See* Motion at 9-12 (discussing *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1213-15 (9th Cir. 2008) (affirming FERC order addressing RFRA claims raised by tribe in hydroelectric relicensing proceeding)). Having failed to raise their objections to the Commission, the Adorers may not pursue a challenge to the Commission's Certificate Order in the District Court.

The action should be dismissed.

Respectfully submitted,

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[1] The Commission has a liberal policy of accepting late interventions in natural gas certificate proceedings, provided the motion to intervene is filed before the order on the certificate application issues. *See Dominion Transmission, Inc.*, 155 FERC ¶ 61,106, at P 9 (2016) ("The Commission's practice in certificate proceedings has generally been to grant motions to intervene filed prior to issuance of the Commission's order on the merits.").

CERTIFICATE OF SERVICE

I hereby certify that, on September 19, 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
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