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.	)	

FEDERAL DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

Defendants Federal Energy Regulatory Commission and Commissioner Cheryl A. LaFleur, in her official capacity, respectfully move this Court to dismiss the Amended Complaint in the above-captioned proceeding under Rules 12(b)(1) and/or 12(b)(6) of the Federal Rules of Civil Procedure. A Memorandum in Support is attached.

Respectfully submitted,

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August 17, 2017

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v.	)	Judge Jeffrey L. Schmehl
	)	
Federal Energy Regulatory Commission, *et al.*,	)	
Defendants.	)	

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

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INTRODUCTION

The complaint filed by Plaintiffs, the Adorers of the Blood of Christ, *et al*. ("Adorers"), challenges the route of a proposed interstate natural gas pipeline to be constructed and operated by intervenor Transcontinental Gas Pipe Line Company, LLC ("Transco"). Under the Natural Gas Act ("NGA" or the "Act"), however, any concerns regarding a pipeline's proposed route—whether based on religious, environmental, or other grounds—must first be raised to Defendant, the Federal Energy Regulatory Commission ("FERC" or "Commission"), and, subsequently, to the U.S. Courts of Appeals. The appellate courts' jurisdiction to review pipeline certificate decisions of the Commission is exclusive; review in this Court is foreclosed. 15 U.S.C. § 717r.

The Adorers did not raise their pipeline siting concerns to the Commission, or otherwise participate in the FERC proceeding. Because the Adorers seek relief in the wrong court, at the wrong time—i.e., (1) in district court, rather than before FERC and then the court of appeals, and (2) prior to issuance of a final Commission order on rehearing concerning Transco's proposed pipeline—the complaint must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

It is not necessary to reach the Adorers' religious exercise claim because it is jurisdictionally barred. As discussed below, however, the complaint fails to state a valid claim for a violation of the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq*. ("RFRA"). Even assuming the FERC-issued certificate could be considered final agency action—which it is not, pending agency action on rehearing—approval by the Commission of a pipeline company's proposed project does not violate RFRA. Thus, the Court may also dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

BACKGROUND

I. Statutory and Regulatory Background

FERC is an independent regulatory commission consisting of up to five members appointed by the President, with the advice and consent of the U.S. Senate. *See* Department of Energy Organization Act, 42 U.S.C. § 7171(a)-(b) (establishing the Commission and transferring authority to it). Commissioners serve for up to five-year terms, and no more than three members of the Commission may be members of the same political party. *Id.* § 7171(b)(1). Each member of the Commission, including the Chairman, has one vote, and actions of the Commission are determined by majority vote. *Id.* § 7171(e). Pursuant to statute, "a quorum for the transaction of business shall consist of at least three members present." *Id.* § 7171(e); *accord* 18 C.F.R. § 375.101(e).

Under various statutes, the Commission regulates the interstate transmission and wholesale sale of electricity and natural gas, and licenses the construction and operation of hydropower projects and natural gas pipelines and infrastructure. As relevant here, the Natural Gas Act confers on the Commission "exclusive authority to regulate sales and transportation of natural gas in interstate commerce." *Del. Riverkeeper Network v. Sec'y, Pa. Dep't of Envtl. Prot.*, 833 F.3d 360, 367-68 (3d Cir. 2016). The routing of interstate natural gas pipelines thus falls within FERC's exclusive jurisdiction. *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n*, 894 F.2d 571, 579 (2d Cir. 1990) ("Congress placed authority regarding the location of interstate pipelines . . . in the FERC . . . . ").

The Natural Gas Act governs the process for natural gas companies to obtain a "certificate of public convenience and necessity" authorizing the construction, extension, or abandonment of natural gas facilities. 15 U.S.C. § 717f. The Commission may issue such a

certificate only if it finds the proposed facility "is or will be required by the present or future public convenience and necessity." *Id.* § 717f(e). In evaluating whether a project serves the public convenience and necessity, the Commission "review[s] a number of factors, such as the project's impact on competition for the transportation of natural gas, the possibility of overbuilding or subsidization by existing customers, avoidance of unnecessary disruptions to the environment, the applicant's responsibility for unsubscribed capacity, and the avoidance of unnecessary exercise of eminent domain." *Del. Riverkeeper*, 833 F.3d at 367-68; *see also* Order Issuing Certificate, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, PP 20-21[1] (Feb. 3, 2017) ("Certificate Order") (describing FERC policy governing issuance of certificates for pipeline projects), *reh'g pending*. The holder of a FERC certificate may obtain the necessary right of way through eminent domain, if the holder does not reach agreement with a property owner regarding appropriate compensation. 15 U.S.C. § 717f(h); *see also Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less*, 768 F.3d 300, 304 (3d Cir. 2014).

II. Procedural Background

In March 2015, Transco applied to FERC for a certificate authorizing the construction and operation of its proposed Atlantic Sunrise Project in Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina. Certificate Order P 1. Transco's application initiated administrative proceedings at FERC governed by the Natural Gas Act, 15 U.S.C. § 717f(c).

As part of the proceedings, Commission staff issued a Notice of Intent to Prepare an Environmental Impact Statement for the Planned Atlantic Sunrise Expansion Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings. Certificate Order

[1] "P" or "PP" indicates the paragraph number in a FERC order. A copy of the Certificate Order is included in the attached Addendum.

P 68. The notice was published in the Federal Register and mailed to nearly 2,500 interested parties, including federal, state, and local government representatives and agencies, elected officials, environmental and public interest groups, Native American tribes, affected property owners, other interested parties, and local libraries and newspapers. *Id.* Commission staff also issued a letter to over 300 landowners potentially affected by the proposed project. *Id.* P 70. The proceeding was open to all interested parties, and numerous parties formally intervened. *See* Certificate Order, Appendices A and B (listing intervenors). The Commission also received numerous public comments regarding the proposed project. *Id.* PP 69-75. Among other things, various parties expressed concerns relating to the proposed pipeline's impact on land use, *id.* PP 99-105, and cultural resources, *id.* PP 109-112. The Adorers did not intervene, or otherwise participate, in the proceeding.

Upon review of the extensive public comments and the Environmental Impact Statement prepared by the Commission's Office of Energy Projects, the Commission issued a certificate on February 3, 2017, authorizing Transco to construct and operate the proposed project, subject to compliance with numerous environmental and operational conditions. *Id.* PP 172-74 and ordering paragraphs.

Subsequently, multiple parties requested rehearing of the Certificate Order, including affected landowners. *See* FERC docket, CP15-138.[2] The Commission has not yet addressed the merits of the requests for rehearing. Because of the pending rehearing requests, agency proceedings are not yet final. Still, several parties filed petitions for review of the Certificate Order in the U.S. Court of Appeals for the D.C. Circuit. *Allegheny Defense Project, et al. v.*

[2] Filings in FERC proceedings are available on FERC's website, at https://www.ferc.gov/docs-filing/elibrary.asp.

FERC, D.C. Cir. No. 17-1098 (petition filed Mar. 23, 2017); *see also* Nos. 17-1127 and 17-1128 (petitions filed May 10 and 12, 2017). The Commission filed motions to dismiss the *Allegheny* petition pending the outcome of agency proceedings (and to apply the court's disposition of the *Allegheny* motion to dismiss to the two later-filed petitions). The D.C. Circuit may properly review Commission actions concerning pipeline certificate applications once the Commission acts with finality on rehearing, but, as explained in the *Allegheny* motion, a petition for judicial review filed before an agency rehearing order issues is "incurably premature" and "must be dismissed." Motion to Dismiss for Lack of Jurisdiction, D.C. Cir. No. 17-1098, filed April 28, 2017 (citing 15 U.S.C. § 717r(b), *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002), and similar cases). That motion (and related motions) remain pending before the D.C. Circuit.

ARGUMENT

I. The Complaint Must Be Dismissed for Lack of Subject Matter Jurisdiction

A. The District Court Lacks Jurisdiction to Consider the Adorers' Complaint, Which Was Filed in the Wrong Court, at the Wrong Time

The Adorers ask the district court to grant injunctive and declaratory relief relating to the FERC certificate order, while requests for rehearing remain pending before the agency. Because it is well established that the Natural Gas Act "forecloses judicial review of a FERC certificate in district court," *Town of Dedham v. FERC*, No. 15-12352, 2015 WL 4274884, at *1 (D. Mass. July 15, 2015) (citing cases), the Adorers' complaint must be dismissed for lack of jurisdiction.

The Natural Gas Act prescribes a specific method for seeking judicial review of a FERC certificate order. *See Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 262 (10th Cir. 1989) (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-40 (1958)) (Congress may prescribe the procedures and conditions for judicial review of administrative orders—

including by limiting what courts may consider those challenges). Specifically, a party aggrieved by the Certificate Order must first seek rehearing before the Commission. *See* 15 U.S.C. § 717r(a). If the Commission denies rehearing, the Act provides that any party "aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals." *Id.* § 717r(b) (providing for judicial review in the D.C. Circuit or in the circuit where the natural gas company is located or has its principal place of business). The court of appeals then "has 'exclusive' jurisdiction 'to affirm, modify, or set aside such order in whole or in part.'" *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) (quoting 15 U.S.C. § 717r(b)).

As one court of appeals has stated, "it would be hard pressed to formulate a doctrine with a more expansive scope" than the rule that "judicial review . . . is exclusive in the courts of appeals once the FERC certificate issues." *Williams*, 890 F.2d at 262. *Accord Am. Energy*, 622 F.3d at 605 ("exclusive means exclusive"); *Constitution Pipeline Co., LLC v. A Permanent Easement*, No. 14-2119, 2015 WL 1638428, at *1 (N.D.N.Y. Feb. 21, 2015) ("Once a FERC certificate is issued, judicial review of the FERC certificate itself is only available in the circuit court."). *See also City of Tacoma*, 357 U.S. at 335-36 (with respect to the similar, FERC-administered Federal Power Act, Congress "prescribed [that] the complete and exclusive mode for judicial review of the Commission's orders" lies with the courts of appeals).

As confirmed by all courts that have considered requests for injunctive and declaratory relief prior to the conclusion of FERC proceedings (i.e., prior to the issuance of a final order on rehearing), such requests are barred by the express terms of the Act. *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 for lack of ripeness, where company

sought to "preemptively challenge a FERC order that may never be issued"); *Am. Energy Corp.*, 622 F.3d at 605 (making "short work" of rejecting a claim brought in district court for injunctive relief); *Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951, 957-58 (4th Cir. 1979) (vacating district court order granting preliminary injunction against a preliminary FERC order, explaining that the Act's exclusive jurisdiction provision leaves "no area of review" available in district court); *Lovelace v. United States*, No. 15-30131, slip op. 2 (D. Mass. Feb. 18, 2016) ("While the court does not question the sincerity of Plaintiffs or their counsel, it is simply clear beyond dispute that the district court has no role in litigation of this kind.") (decision reproduced in Addendum); *Dedham*, 2015 WL 4274884, at *2 (denying request to stay construction of pipeline pending the Commission's consideration of plaintiff's request for rehearing); *Hunter v. FERC*, 569 F. Supp. 2d 12, 15 (D.D.C. 2008) (dismissing declaratory judgment action against the Commission for lack of subject matter jurisdiction because the claim was "so intertwined" with the FERC order that it "must be construed as an attack" on the order itself); *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. FERC*, 270 F. Supp. 2d 1, 5 (D.D.C. 2003) (denying preliminary injunction because plaintiff in essence sought district court review of a Commission order—in contravention of the courts of appeals' exclusive jurisdiction); *Sw. Center for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1172 (D. Ariz. 1997) (dismissing motion for preliminary injunction against FERC because court lacked subject matter jurisdiction to consider the claim no matter how "artfully pleaded").

Although "full review" of a FERC-issued certificate order is not yet available, 15 U.S.C. § 717r, the Adorers may—if they can establish extraordinary circumstances—try to seek "immediate . . . ancillary relief" from an appropriate court of appeals "in aid of its future jurisdiction" under the All Writs Act, 28 U.S.C. § 1651(a). *See, e.g.*, *Dedham*, 2015 WL

4274884, at *2. As the Tenth Circuit has observed, judicial review over "all issues inhering in the controversy" before FERC is confined to the court of appeals because "coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts." *Williams*, 890 F.2d at 262-63 (citation omitted). *See also Louisville & Nashville R.R. Co. v. Donovan*, 713 F.2d 1243, 1246 (6th Cir. 1983) ("[I]f there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies. Moreover, there is a strong presumption against the availability of simultaneous review in both the district court and the court of appeals.") (citation and internal quotation marks omitted).

With respect to FERC certificate proceedings, the only jurisdiction provided to district courts under the Natural Gas Act relates to eminent domain proceedings in connection with a valid, FERC-issued certificate. *See* 15 U.S.C. § 717f(h) (holder of a FERC certificate that is unable to reach agreement with affected landowners regarding compensation for the necessary right-of-way may initiate an eminent domain proceeding in "the district court of the United States for the district in which such property may be located"). As one court of appeals has explained, however, the "eminent domain authority granted the district courts under [section 717f(h)] does not provide challengers with an additional forum to attack the substance and validity of a FERC order." *Williams*, 890 F.2d at 264 ("The district court's function under the statute is not appellate but, rather, to provide for enforcement."). *Accord Guardian Pipeline v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 974 (N.D. Ill. 2002) ("The jurisdiction of this court

is limited to evaluating the scope of the FERC [c]ertificate and ordering condemnation as authorized by that certificate. . . . This court's role is mere enforcement.") (citations omitted).[3]

Because the District Court lacks jurisdiction to consider the Adorers' claims, the complaint must be dismissed for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).

B. The Adorers' Religious Exercise Claim Does Not Remove the Jurisdictional Bar

The complaint demonstrates that the Adorers object to the route of the proposed Transco pipeline, as conditionally approved in the FERC certificate. *See* Amended Complaint ¶¶ 84-85, 91-92. The fact that the Adorers assert religious exercise as the basis for their pipeline route objection does not remove the jurisdictional bar. Under the statutory scheme of the Natural Gas Act, parties must raise any route objections to the Commission—whether such objections are based on religious, environmental, or other grounds—before seeking judicial review. *See* 15 U.S.C. § 717r; *see also Clifton Power*, 294 F.3d at 112 (rejecting argument that "the requirement of finality is merely a prudential consideration, with which we may dispense, rather than a jurisdictional prerequisite"). In the usual course of evaluating pipeline certificate applications, the Commission considers and addresses numerous concerns regarding pipeline siting. *See, e.g.*, Certificate Order PP 149-58 (discussing alternative routes).

In particular, the Commission can evaluate—and has evaluated—objections to proposed projects on religious exercise grounds. *See Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207 (9th Cir. 2008) (affirming FERC order addressing tribe's religious objections to relicensing of

[3] The general jurisdictional language contained in 15 U.S.C. § 717u does not confer jurisdiction on the District Court. *See, e.g.*, *Dedham*, 2015 WL 4274884, at *2 (explaining that section 717u "is simply an enforcement provision, not an open-ended grant of jurisdiction to the district courts") (citations omitted).

hydroelectric project); *Ruby Pipeline, LLC*, 134 FERC ¶ 61,020 (2011) (FERC order addressing tribe's request to stay effect of pipeline certificate order on religious and spiritual grounds).

Snoqualmie is instructive here. In that case, the Snoqualmie Tribe complied with statutory and agency requirements for raising concerns to FERC regarding the relicensing of an existing hydroelectric project at Snoqualmie Falls in Washington state, and ultimately obtained judicial review in the court of appeals. The Tribe participated in the FERC administrative proceeding, offering evidence regarding the potential impact of the hydroelectric project (and altered water flows) on their religious practice. *See Snoqualmie*, 545 F.3d at 1213 (noting Tribe's arguments that continued operation of the project would substantially burden the Tribe's religious exercise by "prevent[ing] the Tribe from having necessary religious experiences," in particular, by "eliminat[ing] the mist necessary for the Tribe's religious experiences, and alter[ing] the ancient sacred cycle of water flowing over the Falls").

In response to the Tribe's stated concerns, FERC imposed certain license conditions to enhance water flow for the benefit of the Tribe, but rejected the Tribe's broader argument that continued operation of the project would impose a "substantial burden" on the Tribe's religious exercise under RFRA. *Id.* at 1213-15. On review of the Commission's order on rehearing, the Ninth Circuit agreed with the agency, finding that FERC had in fact evaluated the Tribe's RFRA claim under a more generous standard than that required by the case law. *Id.* at 1215 (citing *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008) (en banc)).

Snoqualmie involved a completed FERC proceeding, followed by appellate review, under the Federal Power Act, which contains judicial review provisions that are substantially identical

to those in the Natural Gas Act.[4] The case illustrates the procedure that parties with religious concerns regarding pending applications must follow in order to obtain agency and judicial review. Specifically, parties must present their concerns to the Commission during the administrative proceeding—and request rehearing if aggrieved by agency action—before petitioning the appropriate court of appeals for review. Here, although the FERC proceeding regarding the Transco certificate application was open to all interested parties,[5] the Adorers failed to intervene in the FERC proceeding.

As this Circuit has explained, it is a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *PennMont Sec. v. Frucher*, 586 F.3d 242, 245 (3d Cir. 2009) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938)). The doctrine "allows the administrative agency to utilize its discretion and apply its expertise; it gives the agency the opportunity to correct its own errors; and it minimizes piecemeal appeals of agency actions." *PennMont*, 586 F.3d at 245 (quoting *First Jersey Secs., Inc. v. Bergen*, 605 F.2d 690, 695 (3d Cir. 1979)).

Indeed, 15 U.S.C. § 717r "reflects the policy that a party must exhaust its administrative remedies before seeking judicial review." *Fed. Power Comm'n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 499 (1955)); *Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1320 (10th Cir. 2004) (same).

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[4] *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (because relevant provisions of the Natural Gas Act and Federal Power Act, both administered by the Commission, "are in all material respects substantially identical," it is "established practice" to cite "interchangeably decisions interpreting the pertinent sections of the two statutes").

[5] Any interested individual or entity may intervene and participate as a party in a FERC certificate proceeding. *See* 18 C.F.R. § 385.214. In this case, numerous parties intervened and filed comments regarding the Transco pipeline application, and the Commission addressed those comments in the Certificate Order. *See* Certificate Order PP 13-18, 34-171.

The Adorers' desired relief—an alternative route to the proposed pipeline—is quintessentially the type of issue considered by FERC in the usual course of pipeline certificate proceedings. Here, the Commission has not had the opportunity to address the Adorers' precise routing concerns because the Adorers failed to participate in the FERC proceeding under the statutory processes set forth under the Act. Having failed to avail themselves of the FERC process, the Adorers may not sidestep the statutory requirements by seeking relief in this Court, which lacks jurisdiction to consider challenges to FERC certificate decisions.

II. The Adorers' Complaint Also Fails to State a Claim on Which Relief Can Be Granted

Because this Court lacks jurisdiction to hear this action, it is not necessary to reach the Adorers' constitutional claim. *See Bell v. Hood,* 327 U.S. 678, 682 (1946) ("Whether the complaint states a cause of action on which relief could be granted is a question of law and . . . must be decided after and not before the court has assumed jurisdiction over the controversy."); *Yillah v. United States*, No. 98-2842, 1998 WL 661545, at *1 (E.D. Pa. Sept. 24, 1998) ("As the basis for the Court's decision is that it lacks subject matter jurisdiction over the instant action, it is unnecessary to reach the merits of the Government's 12(b)(6) challenge.").

In the event the Court proceeds beyond the threshold jurisdictional question, however, the Adorers' complaint should be dismissed for failure to state a claim on which relief can be granted. The complaint alleges that the Commission's issuance of a Certificate Order to Transco will "substantially burden the Adorers' . . . exercise of their deeply held religious beliefs," in violation of RFRA. Amended Compl. ¶ 90. RFRA provides that the government "shall not substantially burden a person's exercise of religion" unless the government "demonstrates that the application of the burden to the person (1) is in furtherance of a compelling governmental

interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b).

The Adorers' complaint demonstrates that they oppose the routing of the Transco pipeline over their land for spiritual and religious reasons. But, as the Ninth Circuit has explained, "the diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of religion." *Navajo Nation*, 535 F.3d at 1070. Rather, "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit [citing *Sherbert v. Verner*, 374 U.S. 398 (1968)] or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions [citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972)]." *Navajo Nation*, 535 F.3d at 1069-70. "Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA, and does not require the application of the compelling interest test set forth in those two cases." *Id. See also La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, No. 11-1478, 2014 WL 12597035 (C.D. Cal. June 20, 2014) ("Central to all of these [RFRA] cases, and to Free Exercise cases generally, are notions of coercion or compulsion to act against religious precepts. Without it, there can be no Free Exercise clause violation—or, in the words of RFRA, no 'substantial burden'—even if the governmental conduct has a significant incidental impact on a person's religious exercise.") (citations omitted).

Established case law demonstrates that government action affecting land having some spiritual or religious significance does not, without more, constitute a "substantial burden" on religious exercise. *See, e.g., Lyng v. Nw. Indian Cemetery Prot. Ass'n*, 485 U.S. 439, 447-49 (1988) (Forest Service's road construction plan that would "diminish the sacredness" of tribal

land and "interfere significantly" with tribal members' ability to practice their religion did not impose a burden "heavy enough" to violate the Free Exercise Clause, where plaintiffs were not "coerced by the Government's action into violating their religious beliefs," nor did the "governmental action penalize religious activity by denying [the tribe] an equal share of the rights, benefits, and privileges enjoyed by other citizens"); *Navajo Nation*, 535 F.3d at 1070 (Forest Service's approval of use of artificial snow from recycled wastewater on portion of mountain considered sacred to tribe did not constitute a "substantial burden" on tribe's religious exercise); *Snoqualmie*, 545 F.3d at 1214-15 (FERC relicensing decision "does not impose a substantial burden under RFRA on [tribal members'] ability to exercise their religion," because FERC order did not "force[] [tribal members] to choose between practicing their religion and receiving a government benefit or coerce[] them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction").

Here, the Adorers allege that FERC's issuance of a certificate will enable Transco to condemn the Adorers' property, and that such condemnation "will force the Sisters to either act in contravention of their deeply held religious beliefs and practices or face legal penalties because the condemnation brings with it civil and criminal sanctions if the Sisters refuse to allow Transco to proceed with its [p]ipeline." Amended Compl. ¶ 79. But the condemnation action initiated by Transco is separate and distinct from the FERC certificate proceeding. FERC is not a party to, or otherwise involved in, the condemnation proceedings. Such proceedings cannot support a RFRA claim against the Commission.

First, "[t]he Commission does not have the discretion to deny a certificate holder the power of eminent domain." *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000). Under the Natural Gas Act, "the courts, not FERC, [will] entertain eminent

domain actions brought by certificate holders." *Rockies Express Pipeline LLC v. 4.895 Acres of Land, More or Less*, 734 F.3d 424, 431 (6th Cir. 2013). Thus, any potential penalties or sanctions that may be imposed for failure to comply with a court order in the Transco condemnation proceeding cannot fairly be attributed to the Commission. *See Del. Riverkeeper Network v. FERC*, No. 16-416, 2017 WL 1080929, at *8 (D.D.C. Mar. 22, 2017), *appeal filed*, D.C. Cir. No. 17-5084 ("[A]ny actual taking of real property related to a FERC proceeding would occur through the process of eminent domain, which would be a separate proceeding from the issuance of a certificate, and which has generated its own due process jurisprudence.").

Moreover, the Commission's issuance of a certificate to Transco does not transform Transco's pipeline implementation activities into "federal action that is the source of the burden on the free exercise of religion." *Village of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 57 (D.C. Cir. 2006) (Chicago airport expansion plan requiring relocation of church cemetery did not violate RFRA, where federal agency merely approved expansion plan to receive federal funds). "[E]ven in instances in which the federal government plays some role, constitutional standards do not attach to conduct by third parties in which the federal government merely acquiesces." *Id.* Thus, any alleged burden on the exercise of religion caused by the route of the proposed Transco pipeline cannot be "fairly attributable" to the Commission. *Id. See also Blum v. Yaretsky*, 457 U.S. 991, 1004-1005 (1982) ("Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives . . . . ").

CONCLUSION

The Commission is sensitive to the religious concerns raised by the Adorers. The statutory scheme of the Natural Gas Act, however, prescribes a specific procedure for raising objections to a pipeline's proposed route. As one district court recently recognized, "[t]he

exclusive jurisdiction of the Court of Appeals to consider objections to pipeline planning, approval, and construction processes would be entirely undermined if unhappy parties could come to district courts" to seek relief. *Lovelace*, slip op. 2-3.

As the D.C. Circuit Court of Appeals has observed:

> Given the choice, almost no one would want natural gas infrastructure built on their block. 'Build it elsewhere,' most would say. The sentiment is understandable. But given our nation's increasing demand for natural gas (and other alternative energy sources), it is an inescapable fact that such facilities must be built somewhere. Decades ago, Congress decided to vest the Federal Energy Regulatory Commission with responsibility for overseeing the construction and expansion of interstate natural gas facilities. And in carrying out that charge, sometimes the Commission is faced with tough judgment calls as to where those facilities can and should be sited.

Minisink, 762 F.3d 97, 100 (D.C. Cir. 2014). In order for the Commission to carry out its statutory responsibilities, the statutory review scheme must be upheld. The Commission must be allowed to make the "tough judgment calls" involved in the siting of natural gas pipelines, with judicial review in the court of appeals at the appropriate time. Because the Adorers have not complied with the Act's statutory requirements, the complaint must be dismissed for lack of jurisdiction. In the alternative, as discussed above, the complaint should be dismissed for failure to state a claim on which relief can be granted.

Respectfully submitted,

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August 17, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on August 17, 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