

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Adorers of the Blood of Christ, <i>et al.</i> ,)	
)	
<i>Plaintiffs-Appellants,</i>)	
)	
v.)	No. 17-3163
)	
Federal Energy Regulatory Commission,)	
<i>et al.</i> ,)	
)	
<i>Defendants-Appellees.</i>)	

**RESPONSE IN OPPOSITION TO APPELLANTS’
MOTION FOR AN INJUNCTION PENDING APPEAL**

The motion for an injunction pending appeal filed by Plaintiffs-Appellants the Adorers of the Blood of Christ (“Adorers”) seeks an order enjoining Defendant-Appellee Transcontinental Gas Pipeline Co., LLC (“Transco”) from commencing construction on the Adorers’ property pending the Court’s resolution of the appeal. The Adorers’ motion argues that the District Court erred in dismissing the action below because, the Adorers allege, it has jurisdiction to hear the Adorers’ claim against Transco under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* (“RFRA”). *See* Motion at 5, 12.

The motion does not seek to halt the ongoing proceeding before Defendant-Appellee the Federal Energy Regulatory Commission (“FERC” or the “Commission”) regarding Transco’s Atlantic Sunrise pipeline project (FERC

Docket No. CP15-138),¹ in which the Adorers concededly are not participating. See Motion at 12. Nor does the motion seek to stay the District Court order or the FERC Certificate Order, 158 FERC ¶ 61,125 (Feb. 3, 2017), which authorized Transco’s proposed pipeline route, a portion of which is located on the Adorers’ property. See *Nken v. Holder*, 556 U.S. 418, 428-29 (2009) (“A stay pending appeal . . . temporarily suspend[s] the source of authority to act—the order or judgment in question,” but does not “direct[] an actor’s conduct,” unlike an injunction pending appeal).² The motion does not contend that the Commission did anything wrong in issuing the Certificate Order, or that the agency is doing

¹ Filings in FERC proceedings are available on FERC’s website, at <https://www.ferc.gov/docs-filing/elibrary.asp>.

² In the past six years, courts have uniformly denied all 14 emergency requests for stays of FERC’s natural gas certificate orders: *Sierra Club, et al. v. FERC*, No. 16-1329 (D.C. Cir. Nov. 17, 2016); *City of Boston Delegation, et al. v. FERC*, No. 16-1081 (D.C. Cir. Oct. 28, 2016); *Catskill Mountainkeeper, et al. v. FERC*, No. 16-345 (2d Cir. Feb. 24, 2016); *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015); *In re Del. Riverkeeper Network*, No. 15-1052 (D.C. Cir. Mar. 19, 2015); *In re Clean Air Council*, No. 15-2940 (3d Cir. Dec. 8, 2015); *Town of Dedham v. FERC*, 2015 WL 4274884, No. 1:15-cv-12352 (D. Mass. July 15, 2015); *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015); *Minisink Residents for Env’t Pres. and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013); *Feighner v. FERC*, No. 13-1016 (D.C. Cir. Feb. 9, 2013); *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013); *In re Minisink Residents for Env’t Pres. and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012); *Coal. for Resp. Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012); and *Summit Lake Paiute Indian Tribe and Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28, 2011 & Feb. 22, 2011).

anything wrong now in considering requests for rehearing of the Certificate Order filed by other parties.

Although the Adorers' motion focuses on Transco's conduct and does not appear to address the District Court's dismissal of the Adorers' claims against FERC, the Commission nevertheless respectfully submits that the motion should be denied because the Adorers cannot, in particular, establish the threshold requirement of likelihood of success on the merits. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017) ("movant for preliminary equitable relief must meet the threshold for the first two most critical factors: it must demonstrate that it can win on the merits . . . and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief") (citations and internal quotation marks omitted).

The Commission's position all along has been to enforce the special review provisions of the Natural Gas Act, 15 U.S.C. § 717r. *See* Dist. Ct. Order at 4-5. As the District Court properly recognized, Congress did not anticipate separate strands of litigation arising from pipeline certificate applications. Rather, in enacting the Natural Gas Act, Congress provided explicitly for all arguments to be presented, first, to the Commission and, subsequently, to a single reviewing court at one time. That one court is the court of appeals, not the district court. And that

one time is at the conclusion of the agency proceeding, not during the middle. There is no RFRA-specific exception.

I. The District Court Correctly Dismissed the Action for Lack of Subject Matter Jurisdiction, and Thus, the Adorers Cannot Establish Likelihood of Success on the Merits

The District Court correctly concluded that the Adorers’ claims, although framed as religious exercise claims under RFRA, amounted to a “collateral” attack on the FERC Certificate Order authorizing Transco’s proposed pipeline route. Dist. Ct. Order at 5. The Commission did not challenge the sincerity of the Adorers’ religious beliefs in the District Court, and does not do so now. However, under the Natural Gas Act, 15 U.S.C. § 717r, any objection to an interstate natural gas pipeline route under FERC review—whether based on religious, environmental, or other grounds—must be raised to FERC in the agency proceeding. Failure to do so forecloses judicial review of the FERC Certificate Order approving the pipeline route. *Id.*

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 Env’tl. Prot.*, 833 F.3d 360, 367-68 (3d Cir. 2016). The routing of interstate natural gas pipelines thus falls within FERC’s exclusive jurisdiction. *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”).

As the District Court observed, it is “particularly well-settled” that the Natural Gas Act, 15 U.S.C. § 717r, forecloses district court review of FERC certificate proceedings. Dist. Ct. Order at 4 (citing cases). Under this exclusive jurisdiction provision, any objections to the route of a proposed pipeline must be brought to the agency, and judicial review of such objections lies exclusively in the U.S. Courts of Appeals upon the conclusion of the agency proceeding (i.e., after issuance of a FERC certificate order and an order on rehearing). 15 U.S.C. § 717r(a)-(b); *Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951, 957 (4th Cir. 1979) (15 U.S.C. § 717r “vests exclusive jurisdiction to review all decisions of the Commission in the circuit court of appeals; there is no area of review, whether relating to final or preliminary orders, available in the district court. And, this has been the uniform construction given the statute.”); *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) (“Exclusive means exclusive, and the Natural Gas Act nowhere permits an aggrieved party otherwise to pursue collateral review of a FERC certificate in state court or federal district court.”); *Williams Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 261-62 (10th Cir. 1989) (court “would be hard pressed to formulate a doctrine with a more expansive scope” than the Natural Gas Act’s exclusive jurisdiction scheme).

Prior to the issuance of the FERC Certificate Order at issue here, the agency provided notice to the public and numerous opportunities for comment regarding the agency's review of the Transco pipeline application. Certificate Order, 158 FERC ¶ 61,125, PP 68-75. The proceeding was open to all interested parties, and numerous parties formally intervened and/or provided comments to the agency regarding the proposed project and pipeline route. *See* FERC Docket No. CP15-138 and Certificate Order, Appendices A and B (listing intervenors).

Yet the Adorers did not submit comments or participate in any way in the FERC proceeding. Thus, at the time FERC issued the Certificate Order, it was unaware that the Adorers had religious concerns regarding Transco's proposed pipeline route. FERC first learned of the Adorers' concerns when the Adorers filed suit in district court, alleging, among other things, that the FERC Certificate Order violated their rights under RFRA.

As FERC pointed out in the District Court, it would be manifestly prejudicial to the Commission to allow the Adorers to prosecute a case alleging that the Certificate Order violates RFRA, when the Commission did not learn of the Adorers' concerns regarding the pipeline route until the filing of the lawsuit—approximately five months after the Certificate Order issued, and outside the normal (and exclusive) statutory process for rehearing of that Order.

As the District Court stated: “[P]laintiffs do not dispute that they not only failed to apply for a rehearing before FERC, but failed to present their RFRA claims in any manner to . . . FERC, and ultimately to the appropriate Court of Appeals. Having failed to do so, plaintiffs are barred by 15 U.S.C. §§ 717r(a) and 717r(b) from pursuing what amounts to collateral review of the FERC [Certificate] Order before this Court.” Dist. Ct. Order at 5; *id.* at 8 (Adorers’ claims “inhere in the controversy” pending before FERC).

In particular, the District Court correctly concluded that RFRA does not provide the Adorers with an alternative path to judicial redress by conferring jurisdiction on the District Court despite the Natural Gas Act’s exclusive jurisdiction provision. Dist. Ct. Order at 6-7 (citing *Radio Luz v. FCC*, 88 F. Supp. 2d 372 (E.D. Pa. 1999), *aff’d*, 213 F. 3d 629 (3d Cir. 2000) (unpublished), and *La Voz Radio de la Comunidad v. FCC*, 233 F.3d 313 (6th Cir. 2000)).

The courts in *Radio Luz* and *La Voz Radio* specifically found that a claim under RFRA “does not trump a specific jurisdictional provision adopted by Congress for review of an agency action.” *Radio Luz*, 88 F. Supp. 2d at 374-76; *see also La Voz Radio*, 223 F.3d at 319 (RFRA “does not provide” that a person alleging a prohibited “burden” on religious exercise “must be in the district court as opposed to a designated court of appeals” pursuant to a statutory review scheme).

By contrast, the Adorers have not cited any statutory provision of RFRA or any relevant precedent demonstrating that RFRA supersedes a statute with an exclusive jurisdiction provision such as the Natural Gas Act’s 15 U.S.C. § 717r. As one court has observed, “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.” *Gen. Finance Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983).

II. The Public Interest Weighs Against Granting an Injunction Pending Appeal

The Commission also submits that the public interest weighs against granting the motion. In the normal course of pipeline certificate proceedings, parties potentially affected by FERC decisions must participate in agency proceedings leading to the issuance of a FERC Certificate Order, seek rehearing before FERC if they are “aggrieved” by that Order, and, only then, obtain judicial review by the U.S. Court of Appeals, if appropriate. 15 U.S.C. § 717r.

Here, the Adorers seek to halt construction activities authorized by a valid FERC Certificate Order and subsequent Notice to Proceed (*see* Motion at 20) issued in the course of a proceeding in which they concededly did not seek to participate. Granting injunctive relief pending appeal would effectively permit the Adorers to sidestep the highly specific, Congressionally-designed statutory review scheme set forth in the Natural Gas Act—while other parties to FERC proceedings

appropriately await the conclusion of Commission processes to obtain judicial review. Those other parties, with their own theories and arguments, may be just as eager as the Adorers to obtain redress from the courts. But the Adorers, under their theory of judicial review, would bypass agency review and cut to the front of the line, leaving other parties to wait for a rehearing order from the Commission before exercising their statutory right under the Natural Gas Act to petition the appropriate U.S. Court of Appeals for review.³

As the D.C. Circuit 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 Residents for Env’t Preservation and Safety v. FERC, 762 F.3d 97, 100 (D.C. Cir. 2014).

³ In the agency proceeding at issue, several parties have prematurely filed petitions for review of the Certificate Order in the U.S. Court of Appeals for the D.C. Circuit. See *Allegheny Defense Project, et al. v. FERC*, D.C. Cir. Nos. 17-1098, *et al.* FERC and intervenors have filed motions to dismiss the petitions because requests for rehearing of the Certificate Order—including requests filed by the *Allegheny* petitioners—remain pending before the agency; thus, agency proceedings are not yet final. On September 21, 2017, the D.C. Circuit referred the motions to dismiss to the merits panel.

In order for the Commission to carry out its statutory responsibilities, the Natural Gas Act's statutory review scheme must be upheld. The public interest weighs in favor of denying the Adorers' motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 10, 2017, 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.

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