

Federal Energy Regulatory Commission

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

New Jersey Conservation Foundation,)	
170 Longview Road)	
Far Hills, NJ 07931,)	
Plaintiff,)	Case No. 3:17-cv-11991
)	
v.)	Judge Freda L. Wolfson
)	
Federal Energy Regulatory Commission,)	Motion day: April 2, 2018
<i>et al.</i> ,)	
888 First Street, N.E.)	
Washington, D.C. 20426,)	
Defendants.)	

**FEDERAL DEFENDANTS’ MOTION TO DISMISS
THE COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION**

Defendants Federal Energy Regulatory Commission, Commissioner Neil Chatterjee, Commissioner Cheryl A. LaFleur, and Commissioner Robert F. Powelson, in their official capacities, respectfully move this Court to dismiss the Complaint in the above-captioned proceeding for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. A statement in support is attached.

Respectfully submitted,

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**STATEMENT IN SUPPORT OF FEDERAL DEFENDANTS’
MOTION TO DISMISS THE COMPLAINT FOR
LACK OF SUBJECT MATTER JURISDICTION**

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INTRODUCTION

The Complaint filed by Plaintiff New Jersey Conservation Foundation asks this Court to preemptively resolve issues pending in an ongoing proceeding before the Federal Energy Regulatory Commission (“FERC” or the “Commission”). In the pending administrative proceeding, the Commission is still considering requests for rehearing of its order granting certificates of “public convenience and necessity” under the Natural Gas Act, 15 U.S.C. § 717f (the “Act”), to PennEast Pipeline Company, LLC (“PennEast”), to construct and operate an interstate natural gas pipeline.

On January 19, 2018, the Commission issued an order granting the requested certificates to PennEast, conditioned on PennEast’s compliance with numerous environmental and operating conditions. *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053 (“Certificate Order”). But the agency process is not yet complete—the Natural Gas Act permits “[a]ny person . . . aggrieved” by a FERC order to seek rehearing before the Commission within thirty days after the order’s issuance. 15 U.S.C. § 717r(a). Indeed, several parties to the agency proceeding, including Plaintiff, have sought rehearing before the agency. Those rehearing requests are currently pending before the agency. The judicial review process cannot yet commence—as the Natural Gas Act first requires FERC issuance of a

rehearing order; only then can “any party . . . aggrieved” by that order seek judicial review in the appropriate court of appeals. 15 U.S.C. § 717r(b).

The Act entrusts the Commission with exclusive authority to determine whether a natural gas pipeline should be certificated; the Commission has not yet made a final determination subject to judicial review. The Act also vests exclusive jurisdiction in the United States Courts of Appeals to review final Commission orders and all matters inhering in a pipeline certificate proceeding at the end of such a proceeding. Every court that has addressed the issue has interpreted the Act’s exclusive jurisdiction provision to bar district courts from granting injunctive or declaratory relief relating to ongoing FERC certificate proceedings. As the courts recognize, to the extent a party finds it necessary to seek immediate, extraordinary relief prior to the conclusion of FERC proceedings, such relief must be sought from the Commission itself or the appropriate court of appeals.

Accordingly, the Complaint must be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure because Plaintiff seeks relief in the wrong court at the wrong time. Specifically, as explained below: (1) this Court lacks subject matter jurisdiction because the Natural Gas Act vests exclusive jurisdiction in the courts of appeals regarding all matters inhering in FERC pipeline certificate proceedings; and (2) Plaintiff has not exhausted its administrative remedies.

BACKGROUND

I. Statutory and Regulatory Background

FERC is an independent regulatory commission comprising 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); *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1169 (D.C. Cir. 2016).

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 jurisdiction” over the “transportation and sale of natural gas in interstate commerce.” *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988) (Act is a “comprehensive scheme of federal regulation”); *see also Del. Riverkeeper*

Network v. FERC, 243 F. Supp. 3d 141, 144 (D.D.C. 2017), *appeal docketed*, No. 17-5084 (D.C. Cir. Apr. 24, 2017). Section 7 of the Act governs the process for natural gas companies to obtain a certificate authorizing the construction, extension, or abandonment of natural gas pipeline facilities. 15 U.S.C. § 717f. *See also Del. Riverkeeper*, 243 F. Supp. 3d at 144-45 (describing FERC certification process); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1307-08 (D.C. Cir. 2015). The Commission may issue a certificate only if it finds the proposed facility “is or will be required by the present or future public convenience and necessity,” and may attach to the certificate “such reasonable terms and conditions as the public convenience and necessity may require.” 15 U.S.C. § 717f(e).

II. PennEast Pipeline Certificate Proceeding

In September 2015, PennEast submitted an application under the Natural Gas Act, 15 U.S.C. § 717f(c), to construct and operate an interstate natural gas pipeline extending from Pennsylvania to New Jersey. Application, FERC Docket No. CP15-558 (describing proposed pipeline project).¹ Numerous interested

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

parties, including the Plaintiff here, intervened in the Commission proceeding and/or submitted comments on the application to the Commission.

Upon the filing of PennEast's application, the FERC Office of Energy Projects ("Commission staff") initiated an environmental review process in accordance with the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* ("NEPA"), to study the potential impact of the proposed pipeline. The environmental review process included, among other things, notice of the agency's intention to prepare an environmental impact statement in the Federal Register, transmittal of that notice to over 4,300 parties (including federal, state, and local agencies, elected officials, environmental and public interest groups, Native American tribes, potentially affected landowners, local libraries and newspapers, and other stakeholders), and numerous public scoping meetings. Certificate Order P 93; Final Environmental Impact Statement at ES-2-3, Docket No. CP15-558 (Apr. 7, 2017).

The U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, and U.S. Department of Agriculture's Natural Resources Conservation Service participated as cooperating agencies in the environmental review process. The process culminated in Commission staff's filing of the Final Environmental Impact Statement, which assessed project impacts and potential mitigation measures, in particular: geology; soils; public land and recreational impacts; threatened,

endangered, and special status species; water resources; vegetation, wildlife, and aquatic resources; socioeconomic concerns; air quality and noise; public safety; and cumulative impacts. Final Environmental Impact Statement at ES-3; Certificate Order P 97. Moreover, Commission staff evaluated a “no-action” alternative, system alternatives, route alternatives, and an alternative compressor station location to the proposed pipeline. Final Environmental Impact Statement at ES-16.

Commission staff concluded that the proposed PennEast pipeline “would result in some adverse effects,” but such effects would be reduced to “less-than-significant levels” with the implementation of certain mitigation measures. *Id.* at ES-18. Commission staff recommended that its proposed mitigation measures be attached as conditions to any authorization. *Id.* at § 5.2, 5-19 – 5-31 (FERC Staff’s Recommended Mitigation). As the FERC docket reflects, numerous parties filed comments upon Commission staff’s release of the Final Environmental Impact Statement.

On January 19, 2018, the Commission issued its Certificate Order, with one Commissioner dissenting, affirming Commission staff’s findings and granting the requested certificate to PennEast, subject to compliance with numerous environmental and operating conditions. Numerous parties—including Plaintiff in this case—filed requests for agency rehearing. Some of those parties, again

including Plaintiff, also moved to stay the Certificate Order. On February 22, 2018, the Commission's Deputy Secretary issued a tolling order granting rehearing for the limited purpose of affording the Commission time to consider the rehearing requests. *PennEast Pipeline Co., LLC*, Docket No. CP15-558-001, Accession No. 20180222-3037.

The Commission has not yet issued an order addressing the merits of the rehearing requests. Thus, the agency rehearing process is not yet complete.

ARGUMENT

In this Circuit, a district court “has ‘substantial authority’ to ‘weigh the evidence and satisfy itself as to the existence of its power to hear the case.’” *See Stango v. Twp. of Lower, N.J.*, No. 14-1973, 2018 WL 354600, at *2 (D.N.J. Jan. 10, 2018) (quoting *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977)). In evaluating a motion to dismiss under Rule 12(b)(1) that challenges the court’s “very power to hear the case,” the court may consider and weigh evidence outside the pleadings as it deems appropriate to resolve the question of whether it has subject matter jurisdiction. *See Mortensen*, 549 F.2d at 891; *U.S. ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007). As to these sorts of factual challenges to the court’s jurisdiction, “no presumptive truthfulness attaches to plaintiff’s allegations, and the existence of

disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” *Mortensen*, 549 F.2d at 891.

I. The Natural Gas Act Vests Exclusive Jurisdiction in the Courts of Appeals

This is the latest in a series of recent district court challenges to the natural gas pipeline certificate process administered by FERC under the Natural Gas Act. All four district courts that have addressed such recent challenges have concluded uniformly that they lack subject matter jurisdiction to hear such claims because, under section 19 of the Act, 15 U.S.C. § 717r, the U.S. Courts of Appeals have exclusive jurisdiction to review all matters inhering in natural gas pipeline certificate proceedings before FERC. *See Berkley v. Mountain Valley Pipeline, LLC*, No. 7:17-cv-00357, 2017 WL 6327829 (W.D. Va. Dec. 11, 2017) (dismissing constitutional challenge to Natural Gas Act’s eminent domain provisions and the Commission’s review of a pipeline certificate application), *appeal docketed*, No. 18-1042 (4th Cir. Jan. 11, 2018); *Urban v. FERC*, No. 5:17-cv-01005, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017) (dismissing constitutional challenge to the Natural Gas Act and the Commission’s review of a pipeline certificate application); *Adorers of the Blood of Christ v. FERC*, No. 17-3163, 2017 WL 4310369, at *2-3 (E.D. Pa. Sept. 28, 2017) (dismissing religious organization’s religious exercise challenge to FERC certificate order, noting “the law in this area is particularly well-settled,” and citing case law demonstrating that the courts of

appeals have jurisdiction over all matters inhering in natural gas pipeline certificate cases) (citations omitted), *on appeal*, 3d Cir. No. 17-3163 (filed Sept. 29, 2017; injunction denied Oct. 13, 2017; argument held Jan. 19, 2018); *Lovelace v. United States*, No. 15-cv-30131, 2016 WL 10826764, at *1 (D. Mass. Feb. 18, 2016) (dismissing constitutional challenge to Natural Gas Act's eminent domain provisions because "it is well established that the Natural Gas Act forecloses judicial review of a FERC certificate in district court") (citations and internal quotation marks omitted); *Town of Dedham v. FERC*, No. 15-12352, 2015 WL 4274884, at *1-2 (D. Mass. July 15, 2015) (finding district court lacked subject matter jurisdiction to enjoin construction of pipeline pending Commission consideration of rehearing requests).

As recognized by the courts in *Berkley*, *Urban*, *Adorers*, *Lovelace*, and *Dedham*, the Natural Gas Act prescribes a "highly reticulated procedure for obtaining, and challenging, a FERC certificate to build an interstate pipeline." *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) (citing 15 U.S.C. §§ 717r(a) and (b)). First, once the Commission issues an order on a pipeline certificate request, an aggrieved party must seek rehearing before the Commission. 15 U.S.C. § 717r(a). If the Commission denies rehearing, an aggrieved party "may obtain a review of such order in the court of appeals." 15 U.S.C. § 717r(b) (D.C. Circuit or circuit in which the relevant 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 [FERC’s] order in whole or in part.’” *Am. Energy*, 622 F.3d at 605 (quoting 15 U.S.C. § 717r(b)).

Section 19 of the Natural Gas Act, 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.” *Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951, 957 (4th Cir. 1979) (internal citation omitted); *see also id.* at 958 (same); *Am. Energy*, 622 F.3d at 605 (“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 (10th Cir. 1989) (“As the statutory language plainly states, the special judicial review provisions of [Natural Gas Act] § 19 are exclusive.”).

The Natural Gas Act’s exclusive jurisdiction provision forecloses district court review of natural gas pipeline certificate proceedings, whether the litigation arises before or after FERC has issued a certificate order. *See Me. Council of Atl. Salmon Fed’n v. Nat’l Marine Fisheries Serv.*, 858 F.3d 690, 693 (1st Cir. 2017) (Souter, J. (ret.), sitting by designation) (“The Supreme Court has made it clear that the jurisdiction provided by [Federal Power Act, 16 U.S.C. §] 825l(b) is

‘exclusive,’ not only to review the terms of the specific FERC order, but over any issue ‘inhering in the controversy.’”) (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958));² *Williams*, 890 F.2d at 262 (court “would be hard pressed to formulate a doctrine with a more expansive scope” than section 717r(b), which “preclude[s] *de novo* litigation between the parties of *all issues inhering in the controversy*”) (quoting *Tacoma*, 357 U.S. at 336) (emphasis added by court). *See also Berkley*, 2017 WL 6327829, at *4 (“While it is true that none of the cases relied upon by defendants presented the *precise* constitutional challenges that plaintiffs raise, their challenges are ‘inhering’ in the issuance of the FERC [certificate] order and would fall within the scope of the exclusivity provision. To conclude otherwise would be to conclude that the claims are separate and apart from any FERC proceeding.”) (emphasis in original) (citing *City of Tacoma*, 357 U.S. at 336); *Adorers*, 2017 WL 4310369, at *4 (“Plaintiffs’ [religious exercise] claims clearly ‘inhere in the controversy’ between plaintiffs and FERC. Moreover, plaintiffs would have had an opportunity to present their

² 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.” *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (citations omitted); *see also Williams*, 890 F.2d at 261 (noting that Natural Gas Act section 19, 15 U.S.C. § 717c, governing agency rehearing and judicial review, is “nearly identical” to Federal Power Act section 313, 16 U.S.C. § 825l).

[religious exercise] claims in a judicial proceeding before the appropriate Court of Appeals had they first sought a rehearing before FERC.”) (citing *Williams*, 890 F.2d at 261-62, and *Maine Council*, 858 F.3d at 693); *Urban*, 2017 WL 6461823, at *1 (the Natural Gas Act’s “highly reticulated procedure . . . would be entirely undermined if unhappy parties could come to district courts prior to the issuance of a Certificate to avoid that process”) (internal quotations omitted).

As the D.C. Circuit has explained, “[W]here a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court’s future jurisdiction is subject to the *exclusive* review of the Court of Appeals.” *Telecomms. Res. & Action Ctr. v. FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (emphasis in original); *see also id.* at 77 (explaining that, “[b]y lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power”); *Williams*, 890 F.2d at 262-63 (judicial review of “all issues inhering in the controversy” before FERC is confined to the courts of appeals because “coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts”) (internal citation and quotation marks omitted); *cf. Conoco, Inc. v. Skinner*, 970 F.2d 1206, 1213-14 (3d Cir. 1992) (affirming district court’s dismissal of complaint for lack of jurisdiction in part because Hobbs Act’s exclusive review

provision, 28 U.S.C. § 2342, gave courts of appeals “presumptive[]” jurisdiction over administrative decisions of shipping regulator). With respect to this action, Congress has foreclosed district court review by vesting exclusive jurisdiction to review FERC actions regarding Natural Gas Act certificate applications in the U.S. Courts of Appeals. *Cf. Elgin v. Dep’t of Treasury*, 567 U.S. 1, 9-14, 23 (2012) (district court lacked jurisdiction over plaintiff’s constitutional challenge to statute because it was “fairly discernible” from statutory review provisions that Congress intended for administrative agency and appeals court to exercise exclusive jurisdiction) (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994)); *Berkley*, 2017 WL 6327829, at *5 (“Even if plaintiffs’ constitutional challenges fell outside the scope of the [Natural Gas Act’s] broad exclusivity provision, this court would still lack jurisdiction over their claims based on an application of the so-called *Thunder Basin* framework.”).

Plaintiff here is an active participant in the PennEast pipeline proceeding pending before FERC. It has raised arguments before the Commission and, if aggrieved by a Commission rehearing order issued in that proceeding, it may also do so before the Court of Appeals. Plaintiff may not, however, sidestep the process set forth by Congress in the Natural Gas Act by seeking relief in district court. *See Adorers*, 2017 WL 4310369, at *4 (“[P]laintiffs simply may not bypass the specific procedure established by Congress . . . by bringing a . . . suit against

FERC in this [c]ourt.”); *Am. Energy*, 622 F.3d at 605 (making “short work” of plaintiff’s efforts to “sidestep” the Natural Gas Act’s exclusive judicial review scheme by seeking injunctive and declaratory relief in district court); *Consol. Gas*, 611 F.2d at 958 (holding that “district court was without jurisdiction to interfere with the Commission’s proceedings through the issuance of an injunction”); *see also Berkley*, 2017 WL 6327829, at *7 (“Indeed, *Thunder Basin*, *Elgin*, and [*Bennett v. SEC*, 844 F.3d 174, 178 (4th Cir. 2016)] all stand for the proposition that meaningful judicial review is available under a statutory scheme similar to the one here” in the Natural Gas Act).³

Although Plaintiff frames its complaint as a constitutional challenge to FERC processes under the Natural Gas Act, such a challenge remains subject to the exclusive jurisdiction scheme set forth in that statute. And in light of that exclusive jurisdiction framework, no district court in the country has agreed to hear complaints raising these sorts of challenges against FERC certificate orders. In *Berkley*, a district court in Virginia recently dismissed, for lack of jurisdiction, a

³ *See also Hunter v. FERC*, 569 F. Supp. 2d 12, 15 (D.D.C. 2008) (dismissing declaratory judgment action relating to FERC investigation of energy market manipulation because claim was “so intertwined” with FERC order that it “must be construed as an attack” on the order itself); *Pub. Util. Dist. No. 1 of Snohomish Cty. v. FERC*, 270 F. Supp. 2d 1, 5 (D.D.C. 2003) (finding district court lacked subject matter jurisdiction over action seeking disqualification of two FERC commissioners because review of Commission orders is committed by statute to court of appeals’ exclusive jurisdiction).

similarly-framed complaint against another pipeline. As the court explained, “although plaintiffs claim they are simply raising a general constitutional challenge, the effect of a ruling in their favor would be to modify or set aside the FERC order in whole or in part.” *Berkley*, 2017 WL 6327829, at *7. “By the very text of the statute, the authority to do that lies only with a court of appeals.” *Id.*; *see also id.* at *4 (“[P]laintiffs’ own complaint—and their standing arguments—make clear that they are concerned not with some abstract constitutional violation, but with the fact that their land will be affected by [the] proposed pipeline.”).

In *Lovelace*, a district court in Massachusetts reached the same conclusion, dismissing a complaint similar to the one here for lack of jurisdiction. The *Lovelace* complaint alleged “that a portion of the Natural Gas Act is unconstitutional because it permits taking private property by eminent domain in a manner that does not serve the public use.” *Lovelace*, 2016 WL 10826764, at *1 (internal citation omitted). The plaintiffs there sought preemptive “injunctive relief declaring a portion of the Natural Gas Act unconstitutional and enjoining any federal agencies from considering approval of the pipeline.” *Id.* The federal defendant moved to dismiss for lack of subject matter jurisdiction because the courts of appeals had exclusive jurisdiction over the matter, the plaintiffs had failed to exhaust their administrative remedies, and for lack of ripeness. The district court granted the defendant’s motion on all three grounds. *Id.*

On the issue of the courts of appeals' exclusive jurisdiction, the court noted that "it is well established that the Natural Gas Act 'forecloses judicial review of a FERC certificate in district court.'" *Id.* (quoting *Dedham*, 2015 WL 4274884, at *1). The court found that "it is simply clear beyond dispute that the district court has no role in litigation of this kind. The 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, seeking relief under the Fifth Amendment." *Id.* Instead, the court found, "[p]laintiffs' arena to seek consideration for their claims is within the administrative process and, ultimately, with the Court of Appeals." *Id.* The same is true of Plaintiff's claims here. *See also Elgin*, 567 U.S. at 29-30 (dismissing constitutional challenge to statute in light of statutory exclusive jurisdiction provision); *Bush v. Lucas*, 462 U.S. 367, 368 (1983) (declining to allow constitutional claim brought by government employee because it arose out of an employment relationship "governed by comprehensive procedural and substantive provisions" enacted by Congress).

Section 7 of the Natural Gas Act provides district courts limited jurisdiction to hold eminent domain proceedings, if necessary, after FERC issues a certificate

under the Natural Gas Act. *See* 15 U.S.C. § 717f(h).⁴ An eminent domain proceeding, however, “does not provide challengers with an additional forum to attack the substance and validity of a FERC order.” *Williams*, 890 F.2d at 264; *see also Transw. Pipeline Co. v. 17.19 Acres of Property Located in Maricopa Cty.*, 550 F.3d 770, 778 n.9 (9th Cir. 2008) (same); *Columbia Gas Transmission, LLC v. 76 Acres More or Less*, No. ELH-14-110, 2014 WL 2919349, at *3 n.3 (D. Md. June 25, 2014) (“[F]ederal courts across the country have recognized that FERC certificates are immune from collateral attack, as the propriety of FERC’s findings and conditions is not subject to review.”). “The district court’s function under the statute is not appellate but, rather, to provide for enforcement.” *Williams*, 890 F.2d at 264; *see also Transw.*, 550 F.3d at 778 n.9 (same).⁵

While relief is not available in this Court, aggrieved parties to the Commission proceeding may seek redress under the ordinary process established in the Natural Gas Act, 15 U.S.C. § 717r(a). Plaintiff in this case is concurrently

⁴ 15 U.S.C. § 717f(h) provides that: “When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line . . . it may acquire the same by the exercise of eminent domain in the district court of the United States for the district in which such property may be located”

⁵ The general jurisdictional language contained in 15 U.S.C. § 717u does not confer jurisdiction on a district court either. *See, e.g., Dedham*, 2015 WL 4274884, at *2 (section 717u “is simply an enforcement provision, not an open-ended grant of jurisdiction to the district courts”).

availing itself of that process through its request for agency rehearing, which is pending before the Commission. Moreover, if it believes it can establish extraordinary circumstances, an aggrieved party may seek—and, in fact, some (including Plaintiff) have already sought—a Commission stay of the order granting the certificate; if the Commission were to deny that request, the aggrieved party may then seek a stay or other extraordinary relief from a court of appeals. *See* 15 U.S.C. § 717r(c);⁶ *Tenn. Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 109 (D. Mass. 1998) (“The [Natural Gas Act] itself directs that an order by FERC not be stayed unless either FERC itself—in the context of a rehearing—or the reviewing Court of Appeals specifically orders a stay.”); *Dedham*, 2015 WL 4274884, at *2 (finding it “not within the enforcement authority given to the district courts” to stay pipeline construction); *Tenn. Gas Pipeline Co. v. 104 Acres of Land More or Less*, 749 F. Supp. 427, 431 (D.R.I. 1990) (“Rather than seeking relief from this Court, [the aggrieved party’s] remedy is to ask for a stay from the Commission or from the Court of Appeals.”). *See also* *Dedham*, 2015 WL 4274884, at *2 (a party aggrieved by the Commission’s initial

⁶ 15 U.S.C. § 717r(c) provides that: “The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order. The commencement of proceedings under subsection (b) of this section [i.e., an aggrieved party’s filing of a petition for review in the court of appeals] shall not, unless specifically ordered by the court, operate as a stay of the Commission’s order.”

approval order can seek, in extraordinary circumstances, immediate ancillary relief from a court of appeals “in aid of its future jurisdiction” under the All Writs Act, 28 U.S.C. § 1651).

II. Plaintiff Has Failed to Exhaust Its Administrative Remedies

Alternatively, the Complaint should be dismissed because Plaintiff has not exhausted its administrative remedies. “The doctrine of exhaustion of administrative remedies[, which] is well established in the jurisprudence of administrative law[,] . . . provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” *Woodford v. Ngo*, 548 U.S. 81, 88-89 (2006) (internal quotation marks and citation omitted).

As described above, *supra* pp. 9-10, 13, the Natural Gas Act provides a specific process parties must exhaust before they may resort to the courts of appeals. *See Sierra Club v. FERC*, 827 F.3d 59, 69 (D.C. Cir. 2016) (“The purpose of the exhaustion requirement in [15 U.S.C.] § 717r is to give the Commission the first opportunity to consider challenges to its orders and thereby narrow or dissipate the issues before they reach the courts. The Natural Gas Act’s jurisdictional provisions are stringent.”) (internal citations omitted); *Lynchburg Gas Co. v. Fed. Power Comm’n*, 284 F.2d 756, 760 (3d Cir. 1960) (“[I]t is evident that by providing for mandatory application for rehearing before the Commission,

Congress [in the Natural Gas Act] contemplated situations where the Commission on reconsideration would have the opportunity of correcting a previous order if necessary.”). Here, agency proceedings are ongoing. The Commission has issued a certificate order on the application at issue here, and numerous parties have requested agency rehearing of that order.

In these circumstances, Plaintiff plainly has not exhausted its administrative remedies. Indeed, Plaintiff’s claims, even if raised now in a court of appeals, would be “incurably premature” because the Natural Gas Act, 15 U.S.C. § 717r(b), authorizes judicial review of claims associated with pipeline certificate proceedings only after the Commission has acted on a request for rehearing. *See Council Tree Commc’ns, Inc. v. FCC*, 503 F.3d 284, 287 (3d Cir. 2007) (“We have no jurisdiction to consider an incurably premature petition for review. A petition to review a non-final agency order is incurably premature. An agency order is non-final as to an aggrieved party whose petition for reconsideration remains pending before the agency.”) (internal citations omitted); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111 (D.C. Cir. 2002) (petition for judicial review while petitioner’s request for agency rehearing is pending is “incurably premature” and must be dismissed); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) (“[B]ecause FERC has not yet issued a ruling on the merits of the [rehearing] petition, this court is without jurisdiction.”).

The Commission's administrative process has been open to Plaintiff from its outset, and Plaintiff is participating in that process. To the extent Plaintiff properly intervened and presented its issues and arguments to the Commission, but was not satisfied that the Commission addressed them in its January 19, 2018 certificate order, it had the opportunity to seek rehearing before the agency. And it did so. The Commission will address all issues properly raised to it on rehearing. If Plaintiff remains aggrieved following issuance of a final Commission order, it will have the opportunity to challenge the Commission's orders in a court of appeals, following the judicial review path intended in the Natural Gas Act.

Plaintiff's complaint rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all," and thus is not ripe for judicial determination. *See Wyatt, Virgin Islands, Inc. v. Gov't of Virgin Islands*, 385 F.3d 801, 806 (3d Cir. 2004) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)); accord *Novo Nordisk Inc. v. Mylan Pharms. Inc.*, No. 09-2445, 2010 WL 1372437, at *6, 13 (D.N.J. Mar. 31, 2010); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (basic rationale of ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties"); *Nextel*

Commc'ns of Mid-Atl., Inc. v. City of Margate, 305 F.3d 188, 194 (3d Cir. 2002) (noting Third Circuit ripeness precedent requiring “both immediate and significant” hardship on the complaining party from the postponement of judicial review) (internal quotation marks omitted); *Naik v. Renaud*, 947 F. Supp. 2d 464, 472 (D.N.J. 2013) (holding that case was not fit for judicial decision because there was no final agency action, and thus plaintiff’s claim rested upon contingent and uncertain future events). Any future impact on Plaintiff from a future final order thus remains wholly speculative—the Commission ultimately may deny any requests for rehearing, perhaps with additional explanation, or it may grant them. Immediate review could deprive the reviewing court of the agency’s additional explanation in its rehearing order. *See Peachlum v. City of York, Pa.*, 333 F.3d 429, 434 (3d Cir. 2003) (“Where a dispute arises under circumstances that permit administrative review, as in the case here, final administrative determination is favored under the ripeness doctrine.”).

In particular, it is for the Commission to address Plaintiff’s claim that FERC’s assessment of certificate applications improperly fails to consider whether the proposed project serves a public use. *See, e.g.*, Compl. ¶¶ 9-11, 43, 49, 72-73, 77. As a district court recently found, the argument “that the project is not for the ‘public use’ . . . could have, and more importantly, should have been taken up with FERC in the first instance.” *Transcontinental Gas Pipe Line Co. v. Permanent*

Easements for 5.67 Acres, No. 4:17-cv-00544, 2017 WL 3412374, at *3 (M.D. Pa. Aug. 9, 2017); *see also Transcontinental Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres*, Nos. 17-715, *et al.*, 2017 WL 3624250, at *4 (E.D. Pa. Aug. 23, 2017) (challenge whether project serves a public purpose “belongs in front of FERC” and then in the court of appeals); *Lovelace*, 2016 WL 10826764, at *1 (dismissing complaint raising virtually identical “public use” claim because, among other reasons, “Plaintiffs’ failure, so far, to exhaust their administrative remedies, as set forth in the Natural Gas Act, is fatal to their claim.”). *Cf. Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017) (affirming FERC finding that public need for pipeline established by contracts for pipeline capacity).

If the Commission’s Certificate Order impacts Plaintiff during the agency rehearing process, any such impact flows from the statutory framework that Congress established. *See* 15 U.S.C. § 717r(c) (“The filing of an application for rehearing under [15 U.S.C. § 717r(a)] shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order.”); *Pub. Citizen*, 839 F.3d at 1174 (explaining in the context of the analogous FERC-administered Federal Power Act that, where judicial review is limited due to an operation of law, “[a]ny unfairness associated with this outcome inheres in the very text of the [statute]. Accordingly, it lies with Congress, not this Court, to provide the remedy.”).

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed for lack of jurisdiction.

Respectfully submitted,

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March 1, 2018

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

New Jersey Conservation Foundation,)	
Plaintiff,)	Case No. 3:17-cv-11991
)	
v.)	Judge Freda L. Wolfson
)	
Federal Energy Regulatory Commission,)	Motion day: April 2, 2018
<i>et al.</i> ,)	
Defendants.)	

[PROPOSED] ORDER

Upon consideration of Federal Defendants' Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction, it is hereby ORDERED that the motion is GRANTED. Plaintiff's Complaint is hereby DISMISSED with prejudice.

Hon. Freda L. Wolfson

CERTIFICATE OF SERVICE

I hereby certify that, on March 1, 2018, 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/ Anand R. Viswanathan
Anand R. Viswanathan
Attorney