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

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| New Jersey Conservation Foundation,<br>170 Longview Road<br>Far Hills, NJ 07931,<br>Plaintiff, | ) | Case No. 3:17-cv-11991 |
| v. | ) | Judge Freda L. Wolfson |
| Federal Energy Regulatory Commission, *et al.*,<br>888 First Street, N.E.<br>Washington, D.C. 20426,<br>Defendants. | ) | Motion date: May 7, 2018 |

**REPLY MEMORANDUM IN SUPPORT OF**
**FEDERAL DEFENDANTS' MOTION TO DISMISS COMPLAINT**
**FOR LACK OF SUBJECT MATTER JURISDICTION**

Plaintiff insists repeatedly that its complaint does not challenge any FERC order or "a particular Certificate," only the agency's pattern and practice of purportedly unconstitutional behavior. *See, e.g.*, Response at 4, 10, 14, 22, 32. But its complaint tells a different tale—each cause of action explicitly identifies a specific Commission grant of certificate authorization for a specific pipeline (PennEast) as an essential component of the allegedly unconstitutional behavior. *See* Comp. ¶¶ 73, 77, 83; *see also id.* ¶ 14 (alleging that plaintiff owns property "located along the proposed route of the PennEast pipeline" that "will be subject to eminent domain proceedings once the project is certificated").

Plaintiff's careful insertion of the phrase "or any other pipeline" after its references to the PennEast pipeline does nothing to disguise its underlying challenge to the Commission's grant of certificates of public convenience and necessity to PennEast. Notwithstanding such attempts at artful pleading, the Natural Gas Act's exclusive review provision (15 U.S.C. § 717r) cannot be so easily cast aside. Plaintiff's claims in its Complaint are not "wholly collateral" to that statutory provision (Response at 28-30)—"the effect of a ruling in their favor would be to modify or set aside the FERC order in whole or in part." *See Berkley v. Mountain Valley Pipeline, LLC*, No. 7:17-cv-00357, 2017 WL 6327829, at *7 (W.D. Va. Dec. 11, 2017) (dismissing complaint similarly challenging pipeline approval on constitutional grounds), *on appeal*, 4th Cir. No. 18-1042; *see also id.* at *8 ("[I]f [plaintiffs] were successful on their constitutional claims, the FERC order would be invalidated . . . ."); *Hill v. SEC*, 825 F.3d 1236, 1252 (11th Cir. 2016) (constitutional claims may be wholly collateral to a statutory requirement of administrative review so long as those claims "are not a 'vehicle by which they seek' to prevail on the merits"); *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 755 (2017) ("What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint, setting aside any attempts at artful pleading"); *Shieldalloy Metallurgical Corp. v. N.J. Dep't of Envtl. Prot.*, 743 F. Supp. 2d 429, 442 (D.N.J. 2010) ("Artful pleading cannot confer subject matter jurisdiction on a court.").

Allowing this lawsuit to proceed in federal district court would run counter to section 19 of the Natural Gas Act, 15 U.S.C. § 717r. As courts have uniformly recognized, the text of the Act indicates that Congress chose to entrust judicial review of FERC pipeline decisions, and all related issues (including constitutional ones), solely with the courts of appeals. Statement In Support of Federal Defendants' Motion to Dismiss ("FERC Motion") at 9-10, 14-16, 19; *see, e.g.*, *Berkley*, 2017 WL 6327829, at *7; *Lovelace v. U.S.*, No. 15-cv-30131, 2016 WL 10826764, at *1 (D. Mass. Feb. 18, 2016); *Urban v. FERC*, No. 5:17-cv-01005-JRA, 2017 WL 6461823, at *1 (N.D. Ohio Dec. 19, 2017); *Adorers of the Blood of Christ v. FERC*, 283 F.Supp.3d 342, 347 (E.D. Pa. 2017), *on appeal*, 3rd Cir. No. 17-3163; *see also 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. §] 825*l*(b) is exclusive, not only to review the terms of the specific FERC order, but over any issue inhering in the controversy.") (internal quotation marks omitted).[1] Neither Plaintiff's attempt to avoid mention of the

[1] Courts have found relevant provisions of the Natural Gas Act and Federal Power Act (both administered by FERC) to be "in all material respects substantially identical," and thus have cited decisions interpreting these statutes interchangeably. *See* FERC Motion at 11 n.2. While Plaintiff labors to distinguish these statutes, *see* Response at 15-19, FERC's Motion cites multiple cases

PennEast Certificate Order nor its choice not to raise a constitutional challenge to a statute can sweep away the consensus among multiple courts across the country: that these sorts of claims lie solely in the courts of appeals. *See* Response at 28-29.

To avoid the broad reach of the Natural Gas Act's exclusivity provision, Plaintiff relies on several cases that permitted district courts to exercise jurisdiction over constitutional claims notwithstanding statutory schemes of administrative adjudication. Response at 14, 21-23, 28-30. Those cases are inapposite here.

None involved the Natural Gas Act which, unlike the statutes at issue in the cited cases, does not otherwise foreclose meaningful review. Instead, the Natural Gas Act requires that judicial review take place exclusively in the courts of appeals. *See Berkley*, 2017 WL 6327829, at *7 ("[A] federal appeals court is an Article III court and well versed in addressing constitutional challenges, and it can address the challenges that plaintiffs raise here in due course."); *Total Gas & Power N. Am., Inc. v. FERC*, No. 4:16-1250, 2016 WL 3855865, at *12 (S.D. Tex. July 15, 2016), *aff'd*, 859 F.3d 325 (5th Cir. 2017) ("[T]he [Natural Gas Act] 'does not foreclose all judicial review . . . , but merely directs that judicial review shall occur' in the United States courts of appeals") (quoting *Elgin v. Dep't of Treasury*, 567 U.S. 1, 10 (2012)).

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interpreting the Natural Gas Act's review provision. *See, e.g.*, FERC Motion at 8-10.

Neither Congress nor the Commission has created any "legal 'Bermuda Triangle'" into which constitutional claims disappear "never again to see the light of day" (Response at 1); rather, Congress chose, through the Natural Gas Act, to provide for unitary, and meaningful, review in the courts of appeals as to all issues arising out of FERC certificate proceedings. *Compare Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951, 957 (4th Cir. 1979) (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.") (internal citation omitted), *and Berkley*, 2017 WL 6327829, at *3-5 (discussing cases interpreting "broad reach" of Natural Gas Act provision vesting exclusive jurisdiction in courts of appeals), *with McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991) (holding that federal statute permitted judicial review of denial of certain immigration status only in context of deportation proceedings, which effectively amounted to "a complete denial of judicial review for most undocumented aliens") (cited in Response at 28, 30).

And cases like *Free Enterprise Fund* that involve facial constitutional challenges entirely independent of any actual or prospective agency proceedings do not help Plaintiff. *See Free Enter. Fund v. Pub. Accounting Oversight Bd.*, 561

U.S. 477, 489 (2010) (district court had jurisdiction to hear constitutional challenges to Board's existence because Sarbanes-Oxley Act's exclusive review provision applied only to SEC final orders or rules, and the SEC had not issued any order or rule from which there could be judicial review). Plaintiff's effort here to distance itself from appearing to challenge any particular FERC order does not make this case like *Free Enterprise Fund*—each cause of action in its Complaint explicitly identifies a specific Commission certificate authorization for a specific pipeline, PennEast (Comp. ¶¶ 73, 77, 83); and the effect of a decision in Plaintiff's favor would be to modify or set aside that not-yet-final Certificate Order.

But that is an outcome that may not happen in federal district court. By congressional edict, only the courts of appeals may judge the validity of Commission certificate orders. 15 U.S.C. § 717r(b); *see also 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."); *supra* p.3.

Nor does the Commission's use of procedural "tolling orders" create an avenue by which this Court may exercise jurisdiction. *See* Response at 21-26. Such orders do not evince a denial of meaningful judicial review; rather, they merely indicate that FERC requires additional time to consider and address the

numerous matters raised by parties on rehearing. FERC's use of tolling orders does not signify bad faith or intent to delay review, and has been upheld by every court that has addressed the issue—including one just last month. *See Coal. To Reroute Nexus v. FERC*, No. 17-4302, slip op. at 2-3 (6th Cir. Mar. 15, 2018) (finding that "FERC is authorized to issue tolling orders pursuant to 18 C.F.R. § 375.302(v)," which are "not independently subject to judicial review"); *see also, e.g.*, *City of Glendale v. FERC*, No. 03-1261, 2004 WL 180270, at *1 (D.C. Cir. Jan. 22, 2004); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988).

And Plaintiff's assertion that this Court's jurisdiction is warranted because FERC does not have the expertise or authority to address constitutional claims (Response at 20, 31) does not help it either. Even if that assertion were true, it would not change the statutory command (15 U.S.C. § 717r) that only a court of appeals may exercise jurisdiction to address all claims related to review of FERC pipeline decisions, including constitutional ones. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (explaining that, even if the constitutionality of a statute were beyond the administering agency's jurisdiction, constitutional claims regarding that statute can be meaningfully addressed by a court of appeals on review of final agency order); *Elgin*, 567 U.S. at 17 (same); *Bennett v. SEC*, 844 F.3d 174, 184-85 (4th Cir. 2016) (same); *Total Gas*, 2016 WL 3855865, at *12, 22 (Natural Gas Act's grant of exclusive judicial review to the courts of appeals

includes constitutional issues).

In any event, while "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies, . . . [t]his rule is not mandatory." *Bennett*, 844 F.3d at 184 (quoting *Thunder Basin*, 510 U.S. at 215) (alterations by court; internal citations omitted). The Supreme Court has recognized that many threshold questions may accompany a constitutional claim to which an agency can apply its expertise. *Elgin*, 567 U.S. at 22; *see also Bennett*, 844 F.3d at 187; *Berkley*, 2017 WL 6327829, at *8. Here, FERC has expertise in interpreting the statute it alone administers, and in particular in addressing the "public convenience and necessity standard" at issue in this proceeding, which it also implements under that statute. *See Del. Riverkeeper Network v. FERC*, 857 F.3d 388, 392 (D.C. Cir. 2017); *Office of Consumers' Counsel v. FERC*, 655 F.2d 1132, 1141 (D.C. Cir. 1980); *Total Gas*, 2016 WL 3855865, at *21.

Finally, rehearing remains pending at the agency. The mandatory process under the Natural Gas Act permits an aggrieved party to obtain appellate review only after FERC acts on any requests for rehearing. 15 U.S.C. §§ 717r(a)-(b); *Coal. To Reroute Nexus*, slip op. at 2 ("The statutory requirements of the filing of a request for rehearing, a ruling on that request, and the filing of a petition for review within sixty days are mandatory."); *Berkley*, 2017 WL 6327829, at *3; *American*

*Energy*, 622 F.3d at 605; *see also 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."); *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).

If a party (like Plaintiff here) fails to exhaust its administrative remedies, there is no final agency action for a court to review. FERC Motion at 20. Plaintiff is not exempt from the Act's exhaustion requirement merely because it opted to file a lawsuit in federal district court in contravention of the Act's "highly reticulated" process for seeking review of FERC certificate orders and any issue inhering in the controversy. *See id*. at 9-10, 19-20. Nor is Plaintiff excused from this statutory requirement by its creative reformulation of its challenge to the PennEast Certificate Order as a facial challenge of agency practices. *See* Response at 4, 10, 14, 22, 32; *supra* pp. 1-2; *see also Soundboard Ass'n v. FTC*, No. 17-5093, slip op. at 25 n.6 (D.C. Cir. Apr. 27, 2018) ("Unlike reviewability doctrines developed by

courts, final agency action is a statutory requirement set by Congress. We have found no decision of this Court, and no decision of any other circuit court, holding that the presence of constitutional claims eases the Supreme Court's two-part *Bennett* test for final agency action."); *Soundboard*, slip op. at 11-12 (agency actions are final only "if two independent conditions are met": the action marks the consummation of the agency decisionmaking process and is not merely interlocutory in nature, and determines legal rights or obligations) (citing *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).

Any impacts on Plaintiff while the rehearing process is pending flow 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, Inc. v. FERC*, 839 F.3d 1165, 1174 (D.C. Cir. 2016) (explaining that, where judicial review is limited by statute, "[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.").

For these reasons, as well as those addressed in the Statement in Support of Federal Defendants' Motion to Dismiss, Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction.

Respectfully submitted,

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April 27, 2018

**CERTIFICATE OF SERVICE**

I hereby certify that, on April 27, 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*
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