IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bold Alliance, *et al.*,	)	
Plaintiffs,	)	Case No. 17-cv-01822-RJL
	)	
v.	)	Judge Richard J. Leon
	)	
Federal Energy Regulatory Commission, *et al.*,	)	
Defendants.	)	

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

Plaintiffs now frame their complaint as no more than a set of "facial challenges" targeting "the Commission's certificate program and the eminent domain powers that flow thereunder." *See, e.g.*, Response at 2, 10, 17. It does not target any specific Commission orders, they say. *See id*. at 17. So, they insist that, should they prevail, "the result will not overturn any specific certificate orders," though they acknowledge that it "may have consequences for particular pipelines . . . ." *Id*. at 13-14; *see also id.* at 16 (distinguishing district court cases cited by Commission because those cases "attacked specific Commission orders or sought relief that would have resulted in changing or invalidating those orders").

But their complaint tells a different tale: "As relief, Plaintiffs ask the Court to declare the MVP and ACP certificates unlawful under the [Natural Gas Act] and the United States Constitution and to enjoin MVP and ACP from proceeding with eminent-domain actions under the unlawful FERC certificates." First Amended Compl. ¶ 6; *see also id.* ¶ 13 ("This Court has jurisdiction to entertain the Plaintiffs' claims *which specifically challenge the statutory and constitutional soundness of the MVP and ACP certificates* . . . .") (emphasis added); *id*. ¶ 147

(prayer for relief seeking, among other things, an injunction "preventing MVP and ACP from proceeding with development of their respective projects or moving forward with eminent-domain actions under their constitutionally and statutorily deficient certificates").

As with the district court complaint recently dismissed for lack of jurisdiction in *Berkley*, Plaintiffs' complaint here demonstrates that their claims are not "wholly collateral" to the Natural Gas Act's exclusive review provision—"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, slip op. at 13 (W.D. Va. Dec. 11, 2017), *on appeal*, 4th Cir. No. 18-1042; *see also id.* at 14 ("[I]f [plaintiffs] were successful on their constitutional claims, the FERC order would be invalidated . . . .").

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 issues (including constitutional ones) related to such decisions, solely with the courts of appeals. Statement In Support of Federal Defendants' Motion to Dismiss ("FERC Motion") at 10, 13-15; *see, e.g.*, *Berkley*, slip op. at 13; *Lovelace v. U.S.*, No. 15-cv-30131, slip op. at 2-3 (D. Mass. Feb. 18, 2016) ("It is well established that the Natural Gas Act 'forecloses judicial review of a FERC certificate in district court.' . . . [I]t 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 process would be entirely undermined if unhappy parties could come to district courts, seeking relief under the Fifth Amendment.") (quoting *Town of Dedham v. FERC*, No. 15-12352, 2015 WL 4274884, at *1 (D. Mass. July 15, 2015)); *Urban v. FERC*, No. 5:17-cv-01005-JRA, slip op. at 4 (N.D. Ohio Dec. 19, 2017) (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); *Adorers of the Blood of Christ v. FERC*, No. 17-3163, slip op. at 8 (E.D. Pa. Sept. 28, 2017) ("Plaintiffs' [religious exercise] claims clearly 'inhere in the controversy' between plaintiffs and FERC. Moreover, plaintiffs would have had an opportunity to present their [religious exercise] claims in a judicial proceeding before the appropriate Court of Appeals had they first sought a rehearing before FERC. . . . [P]laintiffs simply may not bypass the specific procedure established by Congress . . . by bringing a . . . suit against FERC in this [c]ourt."), *on appeal*, 3rd Cir. No. 17-3163; *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.'") (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958)).[1]

To avoid the broad reach of the Natural Gas Act's exclusivity provision, Plaintiffs rely on several cases that allowed district courts to exercise jurisdiction over certain constitutional claims notwithstanding statutory schemes of administrative adjudication. Response at 9-11. Those cases are inapposite here.

[1] 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 Nat. Gas Co. v. City of Okla. City*, 890 F.2d 255, 261 (10th Cir. 1989) (noting that Natural Gas Act section 19, governing agency rehearing and judicial review, is "nearly identical" to Federal Power Act section 313).

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 provides for exclusive, meaningful judicial review in the courts of appeals. *See Berkley*, slip op. at 14 ("[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)), *cert. pet. pending*. Plaintiffs are not deprived of a forum to air their constitutional claims because (Plaintiffs claim) "federal district courthouse doors" are closed (Response at 19); 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*, slip op. at 5-9 (discussing cases interpreting "broad reach" of Natural Gas Act provision vesting exclusive jurisdiction in courts of appeals), *with Nat'l Ass'n of Mfrs. v. Dep't of Defense*, No. 16-299, slip op. at 19 (S. Ct. Jan. 22, 2018) ("Although [Clean Water Act] § 1369(b)(1) does not authorize immediate circuit-court review of all national rules under the Act, it does permit federal appellate courts to review directly certain effluent and other limitations and individual permit decisions. *It is true that*

Congress could have funneled all challenges to national rules to the courts of appeals, but it chose a different tack here: It carefully enumerated the seven categories of EPA action for which it wanted immediate circuit-court review and relegated the rest to the jurisdiction of the federal district courts.") (emphasis added, internal citation omitted).

Moreover, the cases cited by Plaintiffs involved constitutional challenges "'entirely independent of any agency proceedings, whether actual or prospective.'" *Time Warner Entm't Co. v. FEC*, 93 F.3d 957, 965 (D.C. Cir. 1996), discussed in *Berkley*, slip op. at 12; *see also 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), discussed in *Berkley*, slip op. at 11; *Gen. Elec. Co. v. EPA*, 360 F.3d 188, 191 (D.C. Cir. 2004) (CERCLA provisions that precluded federal court jurisdiction over two discrete categories of EPA actions and orders did not bar a constitutional challenge to statute itself, as the lawsuit "does not challenge any particular action or order by EPA"); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 856 (D.C. Cir. 2002) (holding that district court had jurisdiction to hear "broad-scale attack" on agency regulations because statutory provision on appellate review applied only to "orders" issued after an adjudicatory process and "was silent on how review of regulations was to be accomplished").

But the same cannot be said of Plaintiffs' claims here—their complaint explicitly asks this Court to invalidate specific Commission orders. *See, e.g.*, First Amended Compl. ¶¶ 6, 13, 147; *see also Gen. Elec. Co.*, 360 F.3d at 193 ("To the extent that other courts have concluded a constitutional claim is barred by [CERCLA] § 113(h), they have done so in cases involving challenges to specific EPA orders and actions."). Plaintiffs ask too much: By congressional

edict, only the courts of appeals may judge the validity of those orders. *See, e.g.*, *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.").

Plaintiffs' assertion that this Court's jurisdiction is warranted because FERC does not have the expertise or authority to address constitutional claims (Response at 18) does not help them either. Even if that assertion were true, it would not change the statutory mandate, 15 U.S.C. § 717r, that only a court of appeals may exercise jurisdiction to address Plaintiffs' constitutional claims. *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). And, in fact, 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*, slip op. at 15. Here, FERC has expertise in interpreting the very 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 Delaware 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.

Rehearing remains pending at the agency. Plaintiffs are not exempt from the Natural Gas Act's requirement to exhaust administrative remedies merely because they 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* Response at 21; FERC Motion at 9-10, 17.

That process permits an aggrieved party to obtain appellate review only after FERC acts on any requests for rehearing. 15 U.S.C. §§ 717r(a)-(b); *Berkley*, slip op. at 4-5; *American Energy*, 622 F.3d at 605; *see also 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 allowing the Commission the opportunity to address requests for rehearing is a "needless hoop[]," Response at 21, it nevertheless is one that Congress deemed necessary.

For these reasons, as well as those addressed in the Statement in Support of Federal Defendants' Motion to Dismiss, Plaintiffs' First Amended Complaint should be dismissed for lack of subject matter jurisdiction. Plaintiffs seek relief in the wrong court at the wrong time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 29, 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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