UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.A. NO. 15-CV-12352

TOWN OF DEDHAM, by and through its BOARD OF SELECTMEN,

Plaintiff

v.

FEDERAL ENERGY REGULATORY COMMISSION and ALGONQUIN GAS TRANSMISSION, LLC

Defendants

OPPOSITION TO MOTION TO DISMISS OF ALGONQUIN GAS TRANSMISSION, LLC

The plaintiff Town of Dedham ("Town") addresses the arguments set forth in the Motion to Dismiss filed by defendant Algonquin Gas Transmission, LLC ("Algonquin"), as follows:

1. The Town Requested a Stay from FERC

Algonquin's repeated contention that the Complaint should be dismissed because the Town is seeking a stay of construction "without even having asked FERC in the first instance" (see Motion to Dismiss (hereafter, "Motion"), pp.1, 5, 17-18), is inaccurate. As set forth in the Memorandum supporting the Town's Motion for Preliminary Injunction, the Town filed an Opposition to Algonquin's request for a Notice to Proceed with construction of the project on June 9, 2015, a day after Algonquin filed the request. See Town's Memorandum, Exhibit F thereto. In its Opposition, the Town explicitly requested that FERC "exercise its authority by imposing a stay on the issuance of further notices to proceed for the Project," until FERC issues a decision on the Town's Request for Rehearing – i.e. the identical request the Town now makes of this Court. Exhibit F, pp.2-3. The Town requested the stay based on the same arguments set forth in its Complaint and Motion for Preliminary Injunction in this matter: To wit, allowing

construction to proceed will subject the Town to the very harms that it raised in its Request for Rehearing, even while the possibility exists that FERC may modify or even revoke its order approving the construction. See Town's Memorandum, Exhibit F, p.2 ("in order for the review to be meaningful, Algonquin should not be allowed to proceed with construction during this review period"). On June 11, 2015, FERC issued the Notice to Proceed. See Town's Memorandum, Exhibit G thereto.

Accordingly, Algonquin's contention that the Complaint should be dismissed because the Town did not exhaust its administrative remedies by requesting a stay from FERC (see Motion, §II:B, pp.17-18) must be rejected.

2. The Town Has A Right of Action Under the Natural Gas Act, and This Court Has Jurisdiction Over the Town's Action

Algonquin argues both that the Town's request for declaratory relief is not actionable at all, because 15 U.S.C. §717u does not provide for such action (see Motion, §II:C, pp.18-19); and, if the request is actionable, it must be heard by the Court of Appeals, pursuant to the exclusivity provision in 15 U.S.C. §717r(b) (see Motion, §I:A-C and E, pp.5-12, 13-15). Neither proposition is correct, for the reasons that follow.

a. The Town's Action is Cognizable Under 15 U.S.C. §717u

15 U.S.C. §717u provides, in relevant part:

> The District Courts of the United States … shall have exclusive jurisdiction of violations of this chapter or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder. … No costs shall be assessed against the Commission in any judicial proceeding by or against the Commission under this chapter.

To the extent Algonquin argues that no private right of action exists under the statute at all (see Motion, pp.8, 14, 18), such argument conflicts not only with the explicit terms of the

statute, but also with cases in which private parties have been afforded relief in actions brought pursuant to 15 U.S.C. §717u. See, e.g., Panhandle E. Pipeline Co. v. Utilicorp United Inc., 928 F.Supp. 466, 473 (D.Del. 1996); Columbia Gas Transmission Corp. v. Burke, 768 F.Supp. 1167, 1170 (N.D.W.Va. 1990).

To the extent Algonquin argues that a private right of action exists only to enable private parties to enforce aspects of FERC orders against other private parties, rather than to enforce FERC's own duties (see Motion, §1:E, pp.13-15), its position cannot be reconciled with the final sentence of 15 U.S.C. §717u, which provides that "[n]o costs shall be assessed against the Commission in any judicial proceeding … by or against the Commission under this chapter" (emphasis added). Any further argument that this provision is limited to actions challenging FERC's issuance of a Certificate of Public Convenience and Necessity (hereafter, "Certificate"), brought under 15 U.S.C. §717r(b), would not make sense: If that were the case, the provision would appear in §717r, not §717u.

To the extent Algonquin argues that the Complaint fails because FERC does not have a duty "to provide meaningful judicial review" (see Motion, §II:C p.18), the argument distorts the Town's claim. The Town has a right to rehearing by FERC, and a right to judicial review of a final decision by FERC on rehearing. See 15 U.S.C. §§717r(a)-(b). Clearly implied is a right that the rehearing and judicial review be meaningful; thus the statute obligates FERC to protect, or at least not interfere with, that right. Contrary to Algonquin's suggestion (see Motion, p.18), the Town is not claiming that the Order Granting Rehearing (i.e., the tolling order) itself violates the Town's right to meaningful rehearing and review; rather, the Town claims that FERC's refusal to stay construction while the tolling order is in effect interferes with the right. The Town also disputes Algonquin's suggestion that the Order Granting Rehearing is essentially

meaningless (see Motion, p. 19 (the order "does not indicate [the Town's] claims are viable")); however, if Algonquin is correct in this regard, then FERC is not just failing to protect the Town's right to meaningful review, it is affirmatively interfering with the right by needlessly delaying action that is necessary to trigger the Town's right to judicial review.[1] Further, the Town disputes Algonquin's contention that a refusal to stay construction will not violate a duty to ensure meaningful review (see Motion, §II:D, pp.19-20), since the harms associated with construction (and possible completion) of the pipeline may already be realized by the time the Town obtains its right to rehearing and review.

Finally, Algonquin's argument that the Town invokes §717u merely to "end-run" the exclusive jurisdiction of the Court of Appeals set forth in 15 U.S.C. §717r (see Motion, §1:E, pp.13-14) fails. As explained below and as also argued by Algonquin (see Motion, §1:D, pp.12-13), jurisdiction over the Town's claim is not vested in the Court of Appeals because FERC has not taken final action on the Request for Rehearing, a necessary prerequisite for direct review. See 15 U.S.C. §717r(b).

b. The District Court Has Jurisdiction Over the Town's Action

In arguing that the District Court lacks jurisdiction over the Town's claim for declaratory relief, Algonquin reframes the Town's Complaint into something that it is not. First, the Complaint does not seek review of any aspect of the Certificate issued to Algonquin, in contrast to the complaints at issue in several cases cited in its Motion. See Williams Natural Gas Co. v. City of Oklahoma City, 890 F.2d 255 (10th Cir. 1989) (request that state court enjoin gas

[1] Further, Algonquin's contention that the Courts have upheld FERC's use of tolling orders without suggesting they deny meaningful judicial review (see Motion, p. 18) was addressed in the Memorandum supporting the Town's Motion for Preliminary Injunction, p.9. In short, the cases cited by Algonquin all dealt with alleged economic harms that could be remedied upon judicial review, no matter how long such review was delayed. Indeed, Kokajko emphasized that point. See 837 F.2d 524, 526. The harms at issue here are not economic, but affect the public health and welfare.

company from proceeding with construction under Certificate comprised collateral attack on Certificate itself); American Energy Corp. v. Rockies Express Pipeline LLC, 622 F.3d 602, 605 (6th Cir. 2010) (petitioners' challenge to gas company's exercise of eminent domain powers under Certificate essentially claimed that issuance of the Certificate was in error); Millennium Pipeline Co. v. Certain Permanent & Temp. Easements, 777 F.Supp.2d 475, 481 (W.D.N.Y. 2011) (district court's reference to its role being "circumscribed by statute" was in reference to its powers to enforce pipeline company's eminent domain authority under 15 U.S.C. §717h.); Kansas Pipeline Co. v. A 200 Foot by 250 Foot Piece of Land, 210 F.Supp 2d 1253, 1255-56 (landowners' counterclaim to pipeline company's eminent domain action under §717h was based on alleged errors in issuance of Certificate); The Steamboaters v. FERC, 572 F.Supp. 329, 329 (D.Or., 1983) (to entertain petitioner's request to enjoin construction of hydroelectric dam, Court would "necessarily have to review the various substantive and procedural errors charged by plaintiff against FERC in its action which approved the hydropower project").

The Town's Complaint cannot, in any fair manner, be read as seeking review of FERC's decision to issue the Certificate, or of any aspect of the Certificate itself. Indeed, the gravamen of the Complaint is the Town's contention that FERC is already reconsidering its issuance of the Certificate, or at least aspects of it, by granting the Town's Request for Rehearing, but that this reconsideration may be rendered meaningless (as may eventual judicial review) if the project is allowed to proceed in the meantime.[2] As such, Algonquin's contentions regarding the Court of Appeals' exclusive jurisdiction over review of a FERC Certificate order itself are inapposite.

[2] To the extent the Town's Motion for Preliminary Injunction cites to concerns the Town raised regarding the Certificate in its Request for Rehearing, it clearly does so only to illustrate that these concerns relate to the public health and welfare, rather than economic harms, and thus may not be remediable if construction of the pipeline is permitted to proceed (and perhaps be completed) during FERC's Rehearing process.

Nor does the Town's Complaint: (1) ask that the Court order FERC to take any particular action on its Request for Rehearing, contrast Consolidated Gas Supply Corp. v. FERC, 611 F.2d 951 (4th Cir. 1979) and U.S. Commodity Futures v. Amaranth, 523 F.Supp.2d 328 (S.D.N.Y. 2007) (petitioners in both cases asked District Court to enjoin administrative proceedings against them being conducted by FERC); (2) allege unreasonable delay by FERC, or ask the Court to order FERC to act on the Request for Rehearing at a particular time, contrast In re Sierra Club, 2013 WL 1955877 (1st Cir. 2013), Sea Air Shuttle Corp. v. U.S., 112 F.3d 532 (1st Cir. 1997), Kokajko v. FERC, 837 F.2d 524 (1st Cir. 1998), In re Stop the Pipeline, No. 15-926 (2nd Cir. 2015), and Telecommunications Research & Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984) (all cases alleging unreasonable delay); or (3) otherwise interfere with FERC's action on the Town's Request, in contrast to the Complaints at issue in the above cases cited by Algonquin.

Instead, the Complaint seeks to enjoin proceedings by Algonquin, in order to preserve the right to meaningful review that is afforded the Town by the Natural Gas Act. As such, Algonquin's contentions regarding the Court of Appeals' exclusive jurisdiction over suits that allege unreasonable delay, improper exercise of jurisdiction, or other improper action by FERC are inapposite

The Town submits that its claim falls within the class of claims recognized as appropriate for District Court review in Merritt v. Shuttle, Inc., 245 F.3d 182 (2nd Cir. 2001), which addressed the exclusivity provision of the Federal Aviation Act, 49 U.S.C. §46110. In Merritt, a pilot who was suspended by an order of the National Transportation Safety Board (NTSB) for his actions during an airplane accident sued in District Court, alleging that the negligence of FAA employees in failing to alert him to bad weather conditions caused the accident. Although the FA Act provided for further administrative review of the suspension order by the NTSB (a

course the pilot eschewed), and then for judicial review of the NTSB's final decision exclusively in the Court of Appeals, 49 U.S.C. §46110, the Second Circuit held that the pilot's negligence claim could proceed in the District Court.

The Second Circuit explained that, since exclusivity provisions provide for exclusive jurisdiction over claims challenging an agency's underlying *order*, District Courts are precluded from hearing claims that are "inescapably intertwined" with review of that order. See Merritt, 245 F.3d at 186-89 (emphasis in original). A claim is "inescapably intertwined" if it alleges that the plaintiff was injured by the underlying order, and the Court of Appeals has authority to hear the claim being presented to the District Court on direct review of that order. Id., at 187. The pilot's claim could proceed because, first, it alleged injury separate from the suspension order – i.e. that FAA employees committed negligence which caused the accident – and, further, because the Court of Appeals could not hear the negligence claim on direct review of the suspension order, since pursuant to the FA Act, the NTSB itself (the agency that issued the suspension) was precluded from hearing such a claim during its proceedings. Id., at 189-90.

Here, the injury alleged in the Town's Complaint is the loss of its right to meaningful rehearing by FERC and meaningful judicial review by the Court of Appeals, due to FERC's refusal to stay pipeline construction while it considers the Town's Request for Rehearing, an injury which is separate from the injury caused by issuance of the Certificate itself. The Court of Appeals does not have authority to hear this claim on direct review of the order issuing the Certificate, because, as Algonquin points out (see Motion, p.12), the Court of Appeals can act only after FERC has taken final action on the Town's Request for Rehearing. See 15 U.S.C. 717r(b). Thus, the Town's claim is not "inescapably intertwined" with review of the underlying order issuing the Certificate, making jurisdiction in the District Court appropriate. See also

Telecommunications Research & Action Ctr. v. FCC, 750 F.2d at 78 (there is a "small category of cases in which the underlying claim is not subject to the jurisdiction of the Court of Appeals," for which District Court review is appropriate).[3]

The Town's Complaint seeks to address a gap in the Natural Gas Act, as to what FERC's duties are when a Request for Rehearing has neither been denied (nor "deemed denied" pursuant to 15 U.S.C. §17r(a)), nor substantively acted upon. While the Act explicitly states that the mere filing of a Request for Rehearing does not operate as a stay of the Certificate (15 U.S.C. §717r(c)), the statute is silent as to what FERC's duties are in the event it grants rehearing for the purpose of "further consideration" of the matters raised in the rehearing (an action that itself is not contemplated in the statute). As the Town's Complaint addresses this gap in the explication of FERC's duties under the statute, it is appropriate for review under 15 U.S.C. §717u.

3. The Issues Raised by the Town in this Suit Were Raised in its Request for Rehearing

Algonquin's contention that the Town is attempting to preserve its ability to appeal issues that it failed to raise in its Request for Rehearing is refuted by simply comparing the issues the Town cited in its Motion for Preliminary Injunction, and the issues cited in its Request for Rehearing. Indeed, the Town's Memorandum merely paraphrased the concerns raised in the Request, and cited to it. See Town's Memorandum, pp.7-8 and Exhibit C thereto. Algonquin's attempt to differentiate between the issues raised in the Town's Request and the issues raised in the Town's Motion is curious, given that even Algonquin's own characterization of the issues raised in each demonstrates that they are, in fact, the same. See Motion, p.16.

[3] Algonquin is incorrect that the Town must demonstrate a likelihood of success on the merits of a "future appeal" of the underlying Certificate in order to obtain its requested injunction. (See Motion, p.10). The Town must prove a likelihood of success on the merits of the Complaint underlying *this* matter, not a future case. The cases cited by Algonquin do not support its contention.

WHEREFORE, the Town requests that Algonquin's Motion to Dismiss be denied.

TOWN OF DEDHAM, by and through its Board of Selectmen,

By its attorneys,

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CERTIFICATE OF SERVICE

I, Jackie Cowin, certify that the above document will be served upon any party or counsel of record who is not a registered participant of the Court's ECF system, upon notification by the Court of those individuals who will not be served electronically. /s/Jackie Cowin