UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TOWN OF DEDHAM, by and through its BOARD OF SELECTMEN, Plaintiff, v. FEDERAL ENERGY REGULATORY COMMISSION and ALGONQUIN GAS TRANSMISSION, LLC, Defendants.	)	No. 1:15-cv-12352-GAO

DEFENDANT ALGONQUIN GAS TRANSMISSION, LLC'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Anita Rutkowski Wilson, *pro hac vice*
Michael B. Wigmore, *pro hac vice*
Jeremy C. Marwell, *pro hac vice*
Vinson & Elkins LLP
2200 Pennsylvania Ave., NW
Suite 500 West
Washington, DC 20037
(202) 639-6778
awilson@velaw.com
mwigmore@velaw.com
jmarwell@velaw.com

James T. Finnigan (BBO# 549620)
Rich May, P.C.
176 Federal Street
Boston, MA 02110
(617) 556-3872
Jfinnigan@richmaylaw.com

Attorneys for Defendant Algonquin Gas Transmission, LLC

July 1, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page(s)**

Cases—Continued: **Page(s)**

Cases—Continued: **Page(s)**

Statutes:

Other Authorities: **Page(s)**

Rules:

INTRODUCTION

The Plaintiff in this case, the Town of Dedham, Massachusetts ("Dedham" or the "Town"), seeks the "drastic and extraordinary remedy," *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), of an injunction commanding the Federal Energy Regulatory Commission ("FERC") to stay construction of a critical, fully approved, natural gas pipeline infrastructure project. As defendant Algonquin Gas Transmission, LLC ("Algonquin") explained in its pending Motion to Dismiss, this Court lacks subject-matter jurisdiction to adjudicate this Complaint, which also fails to state a valid claim for relief.

In any event, the Court should not issue a preliminary injunction. Dedham's vague and unsupported allegations of potential effects on "public health and welfare" boil down to transient (and already mitigated) effects of ordinary road repair and utility work that occurs routinely in Dedham and throughout the Commonwealth—far short of showing the Town "*will suffer*" imminent, actual, and "irreparable harm." *Corporate Techs., Inc. v. Harnett*, 731 F.3d 6, 9 (1st Cir. 2013) (emphasis added). Nor has Dedham shown any likelihood of success on the merits. An open-ended stay would inflict serious harms on Algonquin, which has begun construction and irrevocably committed significant human and financial resources. A stay would also disserve the public interest, potentially jeopardizing the in-service date for a Project whose capacity is already fully subscribed, and whose benefits, FERC specifically concluded, outweigh any adverse effects that remain after the extensive mitigation that is already in place.

STATEMENT OF THE CASE

I. The Natural Gas Act Creates A Comprehensive Federal Regulatory Scheme for Interstate Natural Gas Pipeline Infrastructure Projects.

Recognizing that "[f]ederal regulation in matters relating to the transportation [and sale] of natural gas . . . in interstate and foreign commerce [wa]s necessary in the public interest,"

Congress enacted the Natural Gas Act ("NGA") to establish a comprehensive federal regulatory scheme. 15 U.S.C. § 717; *see also Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988). "[N]atural gas companies are subject to the exclusive jurisdiction of [FERC]," *Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 84 (2d Cir. 2006), and may not "construct[]" or "operate" any facilities subject to FERC's jurisdiction unless they have received "a certificate of public convenience and necessity issued by [FERC] authorizing such acts or operations." 15 U.S.C. § 717f(c). The certificate proceeding is the "heart" of the NGA, and requires FERC "to evaluate all factors bearing on the public interest." *Atlantic Refining Co. v. Pub. Serv. Comm'n of the State of N.Y.*, 360 U.S. 378, 388, 391 (1959).

FERC has promulgated detailed regulations concerning certificate applications. *See generally* 18 C.F.R. Parts 2, 157, 380 & 385. Among other things, an applicant must submit extensive data about the proposed project, detailing its purpose and need. FERC can only issue a certificate if it finds that the applicant can "conform" to the requirements of the NGA and any conditions FERC imposes in the certificate, and that the proposed facility "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e).

Under the National Environmental Policy Act ("NEPA"), if action by FERC will "significantly affect[] the quality of the human environment," FERC must prepare an environmental impact statement analyzing potential effects. 42 U.S.C. § 4332(C). However, "NEPA itself does not mandate particular results." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "Instead, NEPA imposes only procedural requirements to ensur[e] that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Winter v. NRDC, Inc.*, 555 U.S. 7, 23 (2008) (internal quotation marks omitted). So long as an agency has taken a "'hard look at

environmental consequences,'" a court's review is at an end. *Methow Valley*, 490 U.S. at 350 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976)). Under NEPA, courts "grant[] substantial deference to the agency's choices regarding methodology and technical analyses." *Advocates For Transp. Alts., Inc. v. U.S. Army Corps of Eng'rs*, 453 F. Supp. 2d 289, 304 (D. Mass. 2006). "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the [agency]." *Town of Norfolk v. U.S. Army Corps of Eng'rs*, 968 F.2d 1438, 1446 (1st Cir. 1992).

II. After Lengthy Review and a Comprehensive Environmental Impact Statement, FERC Authorized Algonquin to Construct and Operate the AIM Project.

Following years of pre-filing and certificate proceedings, the preparation of an exhaustive Environmental Impact Statement, and a lengthy period of public input and comment, FERC issued a Certificate Order authorizing Algonquin to construct and operate the AIM Project ("Project") on March 3, 2015. The Project involves replacing 29.2 miles of existing pipeline, installing 8.2 miles of new pipeline, upgrading six existing compressor stations, constructing three new metering stations, and modifying numerous existing metering facilities in New York, Connecticut, Rhode Island, and Massachusetts. *See* Certificate Order ¶¶ 4-6 (attached hereto as Exhibit 2). The Project will enable Algonquin to transport up to 342,000 dekatherms of natural gas daily from New Jersey facilities to various delivery points in Connecticut, Rhode Island, and Massachusetts, to meet increased demand, serve critical need, and improve infrastructure reliability. Affidavit of David Neal ¶¶ 7-8 (attached hereto as Exhibit 1).

As part of the AIM Project, Algonquin will install 4.1 miles of 16-inch diameter pipeline and 0.8 miles of 24-inch diameter pipeline in the Towns of Westwood and Dedham and the

West Roxbury section of the City of Boston. Collectively, these segments are colloquially known as the "Lateral" or the "West Roxbury Lateral." Neal Aff. ¶ 7.

Dedham intervened in the FERC proceedings, opposing the Project as unnecessary and proposing alternate routes. In issuing the Certificate Order, FERC addressed the Town's concerns by exhaustively considering (and rejecting as disadvantageous) alternative routes, and by requiring Algonquin to take specific measures (e.g., consulting with municipalities, providing construction schedules, preparing traffic management plans, and arranging police details) to reduce "[construction] impacts to less than significant levels." Certificate Order ¶¶ 92-96, 131-34. FERC addressed safety concerns raised about the Project's eventual operation, confirming that Algonquin will comply with rules issued by the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), which has express statutory responsibility for pipeline safety.

The Town filed a request for rehearing on April 2, 2015, raising narrower arguments about the "scope of review of alternatives to the Project," specific mitigation measures, the adequacy of FERC's review of safety hazards, and FERC's finding of public convenience and necessity. *See* Dkt. No. 3, Ex. 3. On May 1, 2015, FERC granted Dedham's request for a rehearing only "to afford additional time for consideration" and "for the limited purpose of further consideration." *See* May 1, 2015 Order [Dkt. No. 3, Ex. 4]. FERC has not yet taken any final action on Dedham's (or any other) request for rehearing.

On June 8, 2015, Algonquin requested a Notice to Proceed from FERC, to allow it to start construction of certain segments of the AIM Project. *See* Dkt. No. 3, Ex. 5. Over the Town's opposition, *see* Dkt. No. 3, Ex. 6, FERC issued a Partial Notice to Proceed on June 11, 2015, *see* Dkt. No. 3, Ex. 7. At no point in these proceedings has the Town sought an

administrative stay from FERC. Instead, Dedham filed this lawsuit, seeking an "injunction, ordering FERC to immediately . . . stay construction . . . during the pendency of FERC's consideration of the Town's Request for Rehearing." Complaint 6. The Town also requests a "declaration that the right [of judicial review] afforded under the [NGA] . . . obligates FERC to exercise its authority to stay construction." Dedham Mem. 1 [Dkt. No. 3].

ARGUMENT

I. This Court Lacks Subject-Matter Jurisdiction Over this Lawsuit.

For the reasons set forth in Algonquin's Motion to Dismiss, this Court lacks authority to grant declaratory or injunctive relief because it does not have subject-matter jurisdiction. *See generally* Dkt. 26-1 at 5-16. The First Circuit, like other courts, understands the Natural Gas Act ("NGA") as vesting the U.S. Courts of Appeals with exclusive jurisdiction to review FERC certificate orders. *See* 15 U.S.C. § 717r. The Town's lawsuit is also incurably premature under the statutory timeframe for review, and the claim to injunctive relief is barred to the extent it relies on arguments the Town did not raise in rehearing before FERC. *See generally* Dkt. 26-1.

II. Dedham Has Not Shown Entitlement to the "Drastic and Extraordinary" Remedy of Injunctive Relief.

"A plaintiff seeking a preliminary injunction must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter*, 555 U.S. at 20. The "party seeking injunctive relief 'bears the burden of establishing that the four pertinent factors weigh in its favor.'" *Jobs First Indep. Expenditure Political Action Comm. v. Coakley*, No. 14-cv-14338, 2014 WL 7180465, at *7 (D. Mass. Dec. 17, 2014) (quoting *Esso Std. Oil Co. v. Monroig-Zayas,* 445 F.3d 13, 18 (1st Cir. 2006)). Dedham has not carried its burden as to any of these factors.

A. The Town's vague and speculative assertions do not show that it is likely to suffer irreparable harm absent intervention by this Court.

1. The Town is not exempt from the requirement to show irreparable harm.

Perhaps recognizing the difficulty of proving irreparable harm from transient and mitigated construction effects, the Town claims it need not show irreparable harm at all. That proposition is foreclosed by settled precedent. *See, e.g.*, *Winter*, 555 U.S. at 20 (plaintiff must show "that [it] is likely to suffer irreparable harm in the absence of preliminary relief"); *Town of Burlington v. Dep't of Educ. of Mass.*, 655 F.2d 428, 432 (1st Cir. 1981) (in case involving federal law, affirming denial of preliminary injunction because "the Town has not shown a danger of immediate irreparable injury"); *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 743 (1st Cir. 1996) (in federal enforcement action, holding that "EEOC—like any other suitor—must meet the familiar four-part test for preliminary injunctive relief," including "irreparable harm").

Against the weight of precedent, Dedham cites one case: *United States v. D'Annolfo*, 474 F. Supp. 220 (D. Mass. 1979). *D'Annolfo* is no longer valid, because in the intervening 35 years, the Supreme Court has repeatedly identified irreparable harm as a mandatory element of claims for injunctive relief, including in cases (like this one) where a plaintiff alleges violations of NEPA. *See, e.g.*, *Winter*, 555 U.S. at 20; *Monsanto*, 561 U.S. at 156-57. When this Court recently granted an injunction based on a rationale similar to *D'Annolfo*, the First Circuit promptly vacated, among other things reaffirming the "familiar four-part test for preliminary injunctions," which includes irreparable harm. *See Long Term Care Pharmacy Alliance v. Ferguson*, 362 F.3d 50, 53 (1st Cir. 2004).

In any event, *D'Annolfo* is easily distinguishable, as it involved a suit "brought by the United States" in its enforcement capacity under the federal Clean Water Act, seeking "an order restraining the defendants" from further violating that Act. *See* 474 F. Supp. at 220; *accord*

United States v. Hayes Int'l Corp., 415 F.2d 1038, 1045 (5th Cir. 1969). That key distinction, omitted from the Town's brief, forecloses reliance on *D'Annolfo* here. Courts that have allowed some dilution of the irreparable-harm requirement have relied on "'the statutory imprimatur [that Congress has] given [the government's] enforcement proceedings,'" when an agency brings suit to enforce a statute within its purview. *See SEC v. Pinez*, 989 F. Supp. 325, 333 (D. Mass. 1997) (quoting *SEC v. Mgmt. Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975)). Even for enforcement suits brought by the United States, however, the First Circuit has rejected attempts to avoid the irreparable-harm requirement where (as here) "[t]here is nothing in the language of [the applicable statute] that can fairly be read" to support that result, explaining that "this [C]ourt has consistently emphasized the importance of a showing of irreparable harm in the calculus of injunctive relief." *Astra U.S.A.*, 94 F.3d at 743.

There can be no suggestion that the Town of Dedham is acting here to enforce any laws that it has authority to administer. The Town lacks any responsibility for implementing the Natural Gas Act or NEPA. Rather, Dedham stands in the shoes of any private plaintiff, challenging the way that a federal agency has acted pursuant to federal statutes that Congress charged that agency with administering. Nor is there any evidence in NEPA or the NGA that Congress intended to exempt even the United States (never mind private plaintiffs) from the bedrock requirement to show irreparable harm to obtain injunctive relief.

2. The availability of alternate remedies forecloses an injunction here.

Dedham cannot show that denying an injunction will cause it irreparable harm, because it has multiple other remedies. To begin with, Dedham has *never even asked* FERC for an administrative stay of construction—the very relief it now seeks in this Court. But under the NGA's judicial review provisions, before "review[ing] the NGA claim . . . [the challenger] must have properly exhausted its administrative remedies." *S. Union Gathering Co. v. FERC*, 687

F.2d 87, 90 (5th Cir. 1982); 15 U.S.C. § 717r; *see generally McKart v. United States*, 395 U.S. 185, 193 (1969) ("no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted" (internal quotation marks omitted)).

Dedham may also (a) seek a writ of mandamus from the First Circuit directing FERC to act on the rehearing requests; (b) seek a stay pending disposition of a timely petition for judicial review; or (c) absent a stay, obtain a remand for FERC to modify the conditions of the Certificate Order (which govern construction and operation) including additional mitigation measures, if the First Circuit agrees with Dedham on the merits. Dedham gives no reason to believe those remedies are inadequate. *Cf. Auburn News Co. v. Providence Journal Co.*, 659 F.2d 273, 277 (1st Cir. 1981) (plaintiffs "cannot secure preliminary injunctive relief unless they can show that an adequate remedy at law is not present").

3. The Town has not shown it will likely suffer irreparable harm absent an injunction.

In any event, the Town's conclusory and unsupported allegations cannot meet the stringent standard for injunctive relief. "To establish irreparable harm" sufficient for a preliminary injunction, a plaintiff must show "an actual, viable, presently existing threat of serious harm" that is not "remote or speculative," but rather "actual and imminent." *Sierra Club v. Larson*, 769 F. Supp. 420, 422 (D. Mass. 1991) (citing *Mass. Coalition of Citizens with Disabilities v. Civil Def. Agency & Office of Emergency Preparedness,* 649 F.2d 71, 74 (1st Cir. 1981) and *United States v. W.T. Grant Co.,* 345 U.S. 629, 633 (1953)); *accord O'Neill v. Mass.*, No. 02-cv-10233, 2002 WL 342675, at *1 (D. Mass. Mar. 1, 2002) (O'Toole, J.) ("imminent irreparable harm") (citing *Langlois v. Abington Housing Auth.*, 207 F.3d 43, 47 (1st Cir. 2000)). "Irreparable injury in the preliminary injunction context means an injury that cannot adequately be compensated" by other remedies. *Rio Grande Cmty. Health Ctr., Inc. v. Rullan,* 397 F.3d 56,

76 (1st Cir. 2005); *see also Arborjet, Inc. v. Rainbow Treecare Scientific Advancements, Inc.*, 63 F. Supp. 3d 149, 158 (D. Mass. 2014) ("A plaintiff alleging irreparable injury must show more than a 'tenuous or overly speculative forecast of anticipated harm.'" (quoting *Ross-Simons of Warwick v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996))).

Faced with this substantial burden, Dedham offers only vague and unsubstantiated references to unspecified concerns about "human health and welfare" it believes will be associated with ongoing construction, and eventual operation of the AIM Project beginning in November 2016. Tellingly, the relevant section of its brief to this Court is one paragraph. *See* Dedham Mem. 10; *see also id.* at 8 (passing reference to construction impacts on "traffic, noise, and operation of local business"); *id.* (concern about unspecified "inadequate safety measures," "if the pipeline is completed and put in use before final action is taken").

To begin with, courts routinely deny injunctive relief despite far more weighty showings of harm. *See, e.g.*, *Friends of Merrymeeting Bay v. U.S. Dep't of Commerce*, 810 F. Supp. 2d 320, 326 (D. Me. 2011) (no irreparable harm from FERC order authorizing construction of hydroelectric dam, despite potential effects from demolition and construction, including inhibiting fish passage, increasing suspended sediment, direct injury and mortality to endangered species, and spilling toxic substances); *Food & Water Watch, Inc. v. U.S. Army Corps of Eng'rs*, 570 F. Supp. 2d 177, 192 (D. Mass. 2008) (no irreparable harm where plaintiffs alleged threats to environment and wild fish population from installation of fish containment structure); *Micro Networks Corp. v. HIG Hightec, Inc.*, 188 F. Supp. 2d 18, 22 (D. Mass. 2002) (no irreparable harm in suit to recover millions of dollars from venture capital firm, despite possibility that firm would distribute gains to shareholders, thereby requiring extraordinary effort by plaintiff to recover any judgment).

Dedham's brief asserts that unspecified "harms attendant to construction" are "irreparable." But the Town makes no effort to identify or substantiate those "harms," which appear to be no different than the impacts of other routine utility work (e.g., water, sewer, gas) and routine road maintenance and repairs, all of which occur frequently in Dedham and every other town in the Commonwealth.[1] Nor does the Town substantiate any of its concerns with evidence or affidavits, or explain why these transient effects cannot be remedied through statutory review procedures. *See* Dedham Mem. 10; *cf. Food & Water Watch*, 570 F. Supp. 2d at 192 (finding no irreparable harm where the "[p]laintiff lacks any affidavits from scientists or experts proving that the Project presents a real threat of irreparable [environmental] harm").

The Town also refers in passing to possible harms from pipeline *operation*. But the Town concedes that such harms will occur only "if the pipeline is completed and put in use before final action is taken on [its] Request [for Rehearing]." Dedham Mem. 8. The Project's projected in-service date is *November 2016*; Dedham gives no reason to believe that FERC will take 16 months to act on the rehearing requests. Any harms related to operations will only become imminent and non-hypothetical if and when the pipeline is put in service. At that time, Dedham can file a mandamus petition, or seek a stay from FERC or the First Circuit pending a timely petition for review.

4. FERC's Certificate Order and Environmental Impact Statement show that any effects from construction or operation are far from irreparable.

FERC's Environmental Impact Statement ("EIS") and Certificate Order discuss construction-related effects at length, and demonstrate that such harms are not significant, have

[1] *See, e.g.*, Town of Dedham, *Recommended Pavement Improvements for FY2016-2018* (Jan. 19, 2015) (reporting 42,344 feet of approved 2015 repairs and improvements on Town Roads, and 50,995 feet of completed work in 2014, including "[m]ill and [o]verlay," "[p]reventative maintenance" and "[r]eclamation"), available at http://goo.gl/nDpdTs.

been subject to extensive mitigation, and are by no means irreparable. *See generally* EIS Excerpts (attached hereto as Exhibit 3); Certificate Order. The EIS explains that "disturbances during construction" would be limited to "*temporary* impacts" such as "inconvenience caused by noise and dust," "disruption to access of homes," "increased localized traffic," "disturbance of lawns, landscaping, and visual character" and "potential damage to existing septic systems." EIS 4-143 (emphasis added). The Certificate Order recognizes that while construction "will result in temporary to short-term increases in traffic levels," Algonquin has "prepared Traffic Management Plans," which include "measures to address motor vehicles," "parking," and "pedestrians, bicycles, and construction workers during construction." Certificate Order ¶ 92.

The Certificate Order requires Algonquin to "consult with each municipality along the project corridor to address potential traffic-related impacts, and [to] obtain road crossing permits from the applicable [authorities]," including Dedham. FERC further required Algonquin to "file a detailed construction schedule . . . that includes the proposed construction timeframes . . . working hours, and any restricted working hours." *Id.* With respect to one intersection in Dedham at which traffic might experience significant congestion, FERC directed Algonquin to take specific measures—i.e., limiting "construct[ion] [to] during nighttime hours" and arranging "police details" to "monitor traffic conditions and make adjustments as required"—to reduce any adverse "impacts to less than significant levels." *Id.* at 7. As the Certificate Order notes, "at the request of the Town of Dedham," Algonquin will only "construct [at that intersection] during nighttime hours (i.e., 7:00pm to 5:00am)" to avoid effects on rush hour traffic. *See* Certificate Order ¶ 95; *but cf.* Dedham Mem. 4 (now complaining that construction will "take place during the day and night"). Dedham does not

even *acknowledge* FERC's detailed findings on these points, or the mitigation measures FERC has imposed—never mind show how any remaining harms are truly irreparable.

B. Dedham has not shown any likelihood of success on the merits.

Dedham has also failed to show "that [it] is likely to succeed on the merits" of its underlying claims. *Winter*, 555 U.S. at 20. The gravamen of the Town's claim is that "absent a stay of construction during the pendency of the Rehearing process," it will be deprived of "meaningful" judicial review of its underlying NEPA and NGA claims. Dedham Mem. 7. In addition to the lack of jurisdiction, Dedham cannot succeed on the merits of any of these claims.

1. The Town is barred from seeking judicial review of any issues not raised on rehearing.

To the extent Dedham seeks to protect a "right" to judicial review of issues outside its request for rehearing, it is categorically barred from recovery. *See* 15 U.S.C. § 717r(a) ("No proceeding to review any order of [FERC] shall be brought by any person unless such person shall have made application to [FERC] for a rehearing thereon"); Dkt. No. 3, Ex. 3 at 4. In contrast to vague concerns about construction and operational effects in its briefs to this Court, Dedham's rehearing request was limited to four specific issues: (1) alleged NEPA violations associated with review of alternatives, (2) an alleged failure to resolve and define mitigation measures, (3) allegedly inadequate review of safety hazards from the completed pipeline, and (4) an alleged erroneous conclusion that public convenience and necessity require the Project. Any claims beyond these four cannot provide the predicate for injunctive relief.

2. Dedham has not shown any likelihood of success on the merits of its "meaningful judicial review" claim.

To the extent Dedham's injunctive claim rests on a right to "meaningful judicial review" under the NGA (*see* Dedham Mem. 6; Complaint 6), it has not shown any likelihood of success. Dedham has not cited, and Algonquin is not aware of, any case in 80 years of NGA

jurisprudence even to *suggest* that FERC's rehearing process threatens the integrity of the statutory review procedures. To the contrary, the First Circuit and its sister courts have consistently upheld FERC's use of "tolling orders" on rehearing without suggesting that they infringe access to judicial review. *E.g.*, *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988); *Cal. Co. v. Fed. Power Comm'n*, 411 F.2d 720 (D.C. Cir. 1969); *General Am. Oil Co. of Tex. v. Fed. Power Comm'n*, 409 F.2d 597 (5th Cir. 1969). Recently, the Second Circuit summarily denied mandamus where a party sought to force FERC to act on a rehearing request or deem the request denied. *See In re: Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015), ECF No. 50.[2]

Nor has Dedham explained why existing remedies—unlike this lawsuit, contemplated under 15 U.S.C. § 717r—are inadequate to ensure meaningful judicial review: a writ of mandamus to address any unreasonable delay; a stay of the Certificate Order from FERC or the Court of Appeals, or relief on final judgment requiring Algonquin to undertake additional mitigation measures or imposing new conditions on operation—even if, as Dedham fears, the pipeline is under construction or even in operation by the time an appeal is decided.

3. *FERC fully complied with NEPA in determining the scope of its alternatives review.*

To the extent Dedham would justify an injunction based on its rehearing arguments, the Town again fails to show any meaningful likelihood of success. Dedham's rehearing request

[2] Dedham is wrong to suggest that the tolling order indicates the Town's claims are "meritorious." Dedham Mem. 8. As FERC explained, the Tolling Order was only issued to "afford additional time for consideration of the matters raised" and "for the limited purpose of further consideration." May 1, 2005 Order. FERC routinely issues tolling orders for this purpose, and then denies rehearing. The First Circuit understands tolling orders in just this way. *See Kokajko*, 837 F.2d at 524 ("It is clear that the . . . order granting rehearing for purpose of further consideration was issued so as to give FERC more time to consider the merits of the petition for rehearing and to avoid a denial of the petition by silence."); *accord Valero Interstate Transmission Co. v. FERC*, 903 F.2d 364, 369 (5th Cir. 1990) ("FERC's tolling order . . . made clear that FERC had not yet made a final decision in the proceeding.").

asserted that FERC did not "evaluate[] reasonable alternatives" to the West Roxbury Lateral or West Roxbury M&R Station. Dkt. No. 3, Ex. 3 at 4. This assertion is contradicted by the record and plainly fails under NEPA's deferential standard of review. *E.g.*, *Town of Norfolk*, 968 F.2d at 1446. The EIS examined available alternatives and reasonably determined, with ample record support, that they were not preferable to the proposed route. *See* EIS 3-25. Dedham has also argued that the minor changes to the proposed West Roxbury Lateral route indicate a failure to fully evaluate other alternatives. Dkt. No. 3, Ex. 3 at 4. But FERC analyzed two significant alternate routes in depth, and determined that both were inferior. EIS 3-25 to 3-29. FERC also evaluated six alternatives or route variations for the West Roxbury Lateral. EIS 3-34 to 3-43. With respect to the West Roxbury M&R Station, FERC carefully considered an alternative site (located on residential land), but determined that it was neither technically feasible nor environmentally preferable. EIS 3-55. Far from merely "'tinkering at the margins' of the Project," [Dkt. No. 3, Ex. 3 at 7], FERC meaningfully analyzed alternatives.

Dedham has also argued that FERC failed to examine adequately the Town's suggested alternative route. Dkt. No. 3, Ex. 3 at 7. But FERC conducted an in-depth analysis of that route. *See* EIS 3-27 to 3-29. And contrary to Dedham's suggestion that FERC dismissed this alternative simply because it was inconsistent with the policies of the Massachusetts Department of Transportation, FERC considered other disadvantages as well: e.g., the alternate route's location parallel to an interstate highway would limit construction workspace, require removal of existing sound abatement walls, and affect several houses. EIS 3-27. FERC reasonably concluded that "the potential impacts on residences and businesses, as well as constraints associated with the installation of the pipeline adjacent to an interstate highway . . . [mean that the alternate route] would not be preferable . . . or provide an environmental

advantage." *Id.* at 3-29. That FERC considered the conflict with Massachusetts DOT policy is neither improper nor a basis to disturb FERC's reasonable and well-supported conclusions.

4. FERC appropriately resolved and defined mitigation measures.

On rehearing, Dedham also argued that instead of issuing an Order with "open-ended conditions and undefined mitigation measures, FERC should have withheld the Order until it was possible to include all mitigation measures and modifications within the Project approval." *See* Dkt. No. 3, Ex. 3 at 9. The Town complains that (what it views as) a "conditional" approach reflected a "rushed" review. *Id.* at 8-9. This argument plainly lacks merit. Congress explicitly authorized FERC "to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and *conditions* as the public convenience and necessity may require." 15 U.S.C. § 717f(e) (emphasis added).

The Certificate Order reflects FERC's longstanding practice of delegating responsibility for addressing compliance with mitigation measures to the Director of the Office of Energy Projects. *See Weaver's Cove Energy, LLC*, 133 FERC ¶ 61,054, at 61,226-27 (2010); *see also Rockies Express Pipeline, LLC*, 128 FERC ¶ 61,045, at P 21 (2009); *E. Tenn. Natural Gas Co.*, 106 FERC ¶ 61,159, at P 11-12 (2004), *aff'd,* 433 F.3d 830 (D.C. Cir. 2005) (affirming Commission delegation to staff to promote efficiency). This delegation ensures a more efficient allocation of FERC resources and creates "time to devote to the more complex issues of law and policy that come before it and benefits both the regulated entities and the public interest." *E. Tenn. Natural Gas Co.*, 106 FERC ¶ 61,159 at P 11. Dedham has not shown that FERC was required to establish every detail of mitigation before the Certificate Order issued.

5. FERC fully complied with NEPA in assessing potential safety hazards.

Dedham also argued on rehearing that FERC inadequately reviewed safety hazards from the completed AIM Project, criticizing as inadequate FERC's reliance on existing "Federal

safety standards." *See* Dkt. No. 3, Ex. 3 at 9. It is well-settled, however, that FERC may reasonably rely on PHMSA to oversee pipeline safety, given Congress's express delegation of authority to that agency to regulate in that field. Additional analysis or mitigation measures are unnecessary where, as here:

> [the project applicant] has designed and will construct, operate, monitor, and maintain the project in accordance with the federal pipeline safety regulations at Title 49 of the U.S. Code of Federal Regulations, Part 192 (49 CFR 192), which are protective of public safety. The Commission has a *Memorandum of Understanding on Natural Gas Transportation Facilities* with the U.S. Department of Transportation, which has exclusive authority to promulgate federal safety standards used in the transportation of natural gas.

Transcontinental Gas Pipe Line Co., LLC, 149 FERC ¶ 61,258, at P 115 (2015); *accord Tennessee Gas Pipeline Co., LLC*, 140 FERC ¶ 61,120, at P 29 (2012). Algonquin has designed and will construct, operate, monitor, and maintain the AIM Project in accordance with PHMSA's pipeline safety regulations. Algonquin provided a certification to that effect as part of its AIM Project certificate application. Accordingly, FERC reasonably concluded that no additional safety standards were necessary. EIS 4-264.

Contrary to Dedham's allegations of "inadequate review," the EIS extensively discusses safety-related effects of the West Roxbury Lateral. The EIS discusses potential public safety impacts in general (§ 4.12.3), concerns related to blasting operations near the West Roxbury Crushed Stone Quarry (§ 4.13.1; *see also* Certificate Order ¶¶ 61-66), and identifies a potential blast radius (EIS Table 4.12.3-1) treated as a high consequence area by PHMSA.

6. FERC reasonably concluded that public convenience and necessity require the Project.

Finally, on rehearing the Town also questioned FERC's conclusion that public convenience and necessity support construction of the Project. The Town criticized FERC for considering whether "local utilities are willing to purchase the product"—as opposed to

whether, "on a regional basis," Algonquin's "individual projects will, in combination, address regional needs in a comprehensive and cost-efficient manner." *See* Dkt. No. 3, Ex. 3 at 11.

To begin with, the AIM Project is fully subscribed—i.e., Algonquin has signed binding precedent agreements for 100% of the Project's available capacity. Agreements for long-term firm capacity are widely understood as important evidence of market demand. *E.g.*, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227, at 61,744 (1999), *order clarifying Statement of Policy*, 90 FERC ¶ 61,128 (2000), *order further clarifying Statement of Policy*, 92 FERC ¶ 61,094 (2000). The agreements here were reviewed or approved by relevant state commissions and municipal bodies that oversee the natural gas distribution systems of the Project customers—which made similar determinations about need for the Project capacity.[3]

Furthermore, whether a regional natural gas facility has available capacity does not negate the need for the Project. Natural gas imports are one available option for meeting demand, but the shippers here chose to subscribe to the AIM Project to access abundant domestic supplies of natural gas to meet their respective load growth needs. Those Project shippers are local distribution companies and municipal utilities operating in Connecticut, Rhode Island, and Massachusetts. Neal Aff. ¶ 9. The existence of natural gas capacity in Massachusetts does not, by itself, provide for transportation to the Project shippers' city gates. Because the Algonquin system is fully subscribed, additional capacity would still be necessary to transport volumes to and from any such import terminal.

[3] For instance, in September 2013, Bay State Gas, National Grid and NSTAR sought approval from the Massachusetts Department of Public Utilities ("DPU") of their AIM Project precedent agreements with Algonquin. With the support of the Massachusetts Office of the Attorney General and Department of Energy Resources, DPU approved all of those agreements in January 2014, finding that they were in the public interest. *E.g.*, Order, *Boston Gas Co./Colonial Gas Co. dba National Grid*, Mass. D.P.U. No. 13-157 (Jan. 31, 2014).

C. A stay of construction would inflict significant harm on Algonquin.

The Town's desired stay of construction would also inflict significant financial and practical harms on Algonquin, its Project shippers, and end users. Pursuant to FERC's authorization, Algonquin began construction on the West Roxbury Lateral on June 16, 2015. *See* Neal Aff. ¶ 12. Like other natural gas pipelines, construction will be accomplished in linear segments, with different crews performing different functions, and each crew following the one ahead of it from one end of the pipeline segment to the next. Specialty crews are necessary for certain tasks, such as crossing I-95 and MBTA railroad tracks. *Id.* ¶ 14. Construction requires close coordination of both human and other resources. For instance, Algonquin's pipelines are hydrostatically tested before being placed in service, which requires securing an appropriate volume of water to fill the pipeline. *Id.* ¶ 16.

The practical and financial effects of a stay would be significant. Algonquin has entered into a contract with Boston Gas that requires completion of the West Roxbury Lateral by November 1, 2016—the unofficial start date for the winter heating season. If Algonquin is unable to meet that deadline, it will incur lost revenue for each day it does not transport gas for Boston Gas. Neal Affidavit ¶ 20. Furthermore, because of winter construction moratoriums, Algonquin must stop installation of the pipeline in the Dedham streets and Route 1 by mid-November 2015, and cannot resume construction until April 1, 2016. Algonquin has also entered into an agreement with the Town of Dedham itself, in which it agreed to install the pipeline in Gonzales Field between November 9, 2015 and April 15, 2016, to avoid effects on seasonal recreational use. *Id.* Thus, any substantial suspension of construction in Dedham could affect Algonquin's ability to complete construction of the AIM Project by November 1, 2016, with associated delay of benefits to Project shippers and ultimately harms to end users of the Project's increased natural-gas capacity. *Id.* ¶ 21.

A stay would impose serious and direct financial costs on Algonquin. Algonquin has entered into a contract with Bond Brothers, Inc. ("Bond") to construct the West Roxbury Lateral. In the event that Bond's construction crews are unable to install the pipe anywhere in Dedham, Algonquin will incur delay charges that will range between $60,000 to $130,000 per day—or up to approximately $3 million a month. (The precise sum will depend on whether, and to what extent, construction can alternatively proceed in Westwood or West Roxbury.) Algonquin has also engaged approximately a dozen Construction Inspectors to be present daily on West Roxbury Lateral construction sites. If construction is stayed, Algonquin would have to pay some of these Inspectors unless it can assign them to other sites, up to approximately $200,000 per month.[4] *Cf.* Fed. R. Civ. P. 65(c) (court may issue preliminary injunction "only if the movant gives security in an amount . . . to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained").[5]

D. The public interest does not favor a stay.

This Court must also consider "whether the public interest would be better served by issuing than by denying the injunction." *Allman v. Padilla*, 979 F. Supp. 2d 205, 213 (D.P.R. 2013) (citing *Citizens with Disabilities,* 649 F.2d at 74). "The public interest" in question is "the public's interest in the issuance *of the injunction itself.*" *Dunkin' Donuts Franchised Rests. LLC v. Wometco Donas Inc.*, 53 F. Supp. 3d 221, 232 (D. Mass. 2014). Here, the public interest

[4] Algonquin has also entered into contracts with land services companies to provide Right-of-Way agents for the AIM Project. Currently, three such Agents and one Right-of-Way Project Manager are assigned to the West Roxbury Lateral. If construction is suspended indefinitely, Algonquin will be forced to pay those amounts for several weeks, up to $20,000 per week.

[5] *See also Global Naps, Inc. v. Verizon New England, Inc.*, 489 F.3d 13, 20 (1st Cir. 2007) ("Since a preliminary injunction may be granted on a mere probability of success on the merits, generally the moving party must demonstrate confidence in his legal position by posting bond in an amount sufficient to protect his adversary from loss in the event that future proceedings prove that the injunction issued wrongfully." (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982)).

weighs strongly against staying construction. Following years of pre-filing and certificate proceedings, extensive public review and comment, and a comprehensive EIS, FERC specifically concluded that public convenience and necessity require the Project, and that any potential negative effects (including effects on landowners such as the Town) are outweighed by the Project's benefits. Certificate Order ¶ 26. Delaying construction would harm not only those tasked with constructing, operating, and subscribing to the pipeline, but also the general public, by delaying the efficient conveyance of a commodity in high demand.

CONCLUSION

For the foregoing reasons, the Court should deny the Town's Motion for a Preliminary Injunction.

ALGONQUIN GAS TRANSMISSION, LLC

By its attorneys,

/s/ James T. Finnigan

James T. Finnigan (BBO# 549620)
Rich May, P.C.
176 Federal Street
Boston, MA 02110
(617) 556-3872
Jfinnigan@richmaylaw.com

Anita Rutkowski Wilson (*pro hac vice*)
Michael B. Wigmore (*pro hac vice*)
Jeremy C. Marwell (*pro hac vice*)
Vinson & Elkins LLP
2200 Pennsylvania Ave., NW
Suite 500 West
Washington, DC 20037
(202) 639-6778
awilson@velaw.com
mwigmore@velaw.com
jmarwell@velaw.com

July 1, 2015