UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BOB KEENAN, *et al.*	)	
Plaintiffs,	)	
v.	)	No. 15-cv-1440 (RCL)
NORMAN C. BAY, in his official capacity, *et al*.	)	
Defendants.	)	

DEFENDANTS' STATEMENT IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants, sued in their official capacities regarding a September 1, 2015, order of the Federal Energy Regulatory Commission ("Commission" or "FERC"), move to dismiss the Complaint filed by Plaintiffs, for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). Subject-matter jurisdiction to review any objection connected to a Commission order under the Federal Power Act lies exclusively in the U.S. Courts of Appeals. A district court lacks authority to amend or qualify – including through issuance of a preliminary injunction – such a Commission order.

The partial transfer to add Energy Keepers as the co-licensee for the Kerr Hydroelectric Project (Kerr Project) was the result of decades of agency proceedings implementing a federal license issued in 1985. The Confederated Salish and Kootenani Tribes (Tribes) have been co-licensees for 30 years. Throughout that time, the Tribes have fulfilled the terms of the license. Yet the Plaintiffs now apparently believe that the Commission's partial transfer to Energy Keepers – a wholly owned subsidy of the Tribes – is defective.

But Congress limited the jurisdiction to challenge Commission orders under the Federal Power Act – a process the Plaintiffs must follow. The Plaintiffs must seek rehearing before the Commission. Once the Commission acts upon rehearing, if Plaintiffs are aggrieved by a final agency order, they can petition for judicial review – but only before the courts of appeals. And if Plaintiffs believe immediate action is necessary they may file for an administrative stay – an action Plaintiffs failed to take here – and, if that request is denied, they can seek a writ of mandamus from the court of appeals.

But what Plaintiffs cannot do is obtain a preliminary injunction from a district court because only a court of appeals has subject matter jurisdiction to review any objections to a Commission order. And if the Plaintiffs' actual challenge is to the 1985 Commission order granting the license to the Tribes, the Court lacks jurisdiction to consider such an impermissible collateral attack on a decades-old, long final, Commission order. The Plaintiffs' complaint was filed at the wrong time and in the wrong court and should be dismissed.

FACTUAL BACKGROUND

On July 17, 1985, the Commission issued a new, joint 50-year license to Montana Power Company and the Tribes. *See Confederated Salish and Kootenai Tribes*, 152 FERC ¶ 62,140, at P 2 (2015) (September 1 Order) (citing *Order Approving Settlement and Issuing License*, 32 FERC ¶ 61,070 (1985)).[1] The 1985 license, which approved a settlement agreement among various parties, provided that Montana Power would own and operate the project for the first 30 years of the license term. *Id.* After 30 years, the Tribes, upon payment of a specified sum, would become the owner and sole licensee of the project. *Id.* The 1985 license mandated that

[1] For a fuller recounting of the facts, *see* Defendants' Response to the Plaintiffs' Motion for a Preliminary Injunction, filed September 17, 2015, contemporaneously filed with this Motion.

the Kerr Project be conveyed to the Tribes upon NorthWestern's receipt of the estimated conveyance price on September 5, 2015, without any further Commission action. *See* September 1 Order at n.15 (citing License Article C(1)).

Montana Power's interest in the license was partially transferred to PPL Montana on July 7, 1999, *Order Approving Transfer of License*, 88 FERC ¶ 62,010 (1999), and to NorthWestern on July 24, 2014. *Order Approving Transfer of License*, 148 FERC ¶ 62,072 (2014). Plaintiff Verdell Jackson intervened in the 2014 transfer filing proceeding before the Commission and sought rehearing (but not judicial review) of that order. *See* Comp. at ¶¶ 45-47.

Energy Keepers is a corporation wholly owned by the Tribes. *See Application for Approval of Partial Transfer of License and Co-Licensee Status of the Confederated Salish and Kootenai Tribes*, Docket P-5-098 (filed Apr. 15, 2015), available at file:///C:/Users/rrfgc12/Downloads/20150414-5248(30491182).pdf. On April 15, 2015, the Tribes petitioned to add Energy Keepers as a co-licensee. *See* September 1 Order, 152 FERC ¶ 62,140 at P 1. Plaintiffs intervened in the agency proceeding to oppose the transfer. *Id.* at P 11.

On September 1, 2015, the Commission approved the partial transfer. *Id.* The Commission found that the Federal Power Act contemplates licensing hydropower projects to Native American tribes. *Id.* at P 12. Likewise, Energy Keepers – as a corporation established under federal law – was entitled to hold the license. *Id.* The Commission found that Energy Keepers satisfied the public interest standard for a transfer and nothing raised doubts about Energy Keepers' ability to comply with the terms of the license. *Id.* at PP 11, 15.

The Commission further found that, to the extent Plaintiffs as interveners were objecting to the Tribes' fitness to hold the license, such arguments were impermissible collateral attacks on the Commission's 1985 order. *Id.* at P 11. The Tribes remained jointly and severally liable for

compliance with all license obligations, and there were no allegations the Tribes had failed to comply with the license. *See id.* And the Commission found that it may set a hydropower matter for a hearing based on the written record. *Id.* at P 13 & n.22 (citing *Cascade Power*, 74 FERC ¶ 61,240 at 61,822 and n.16 (1996); *Sierra Ass'n v. FERC*, 744 F.2d 661, 661-62 (9th Cir. 1984)).

On September 3, 2015 – two days before the conveyance provided for in the 1985 license became effective – the Plaintiffs brought this complaint for a temporary restraining order, preliminary injunction, and declaratory relief. (Doc. # 2). On September 4, 2015, this Court denied Plaintiffs' motion for a temporary restraining order. (Doc. # 20). The Court declined to address subject matter jurisdiction, given the "complex nature of this case and the short time frame within which to rule on this motion." *Id.* at n.1.

ARGUMENT

Federal Rule of Civil Procedure 12(b)(1) permits a court to dismiss a complaint for lack of subject matter jurisdiction at any time. Although the court must indulge all reasonable inferences in favor of the non-moving party, the party asserting a claim must establish subject matter jurisdiction. *See Olaniyi v. Dist. of Columbia*, 763 F.Supp.2d 70, 84 (D.C. Cir. 2011) (citing *Moore v. Bush*, 535 F.Supp.2d 46, 47 (D.D.C. 2008)). A court may look beyond the pleadings to determine jurisdiction. *See Olaniyi*, 763 F.Supp.2d at 84 (quoting *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005)).

The United States has sovereign immunity unless it consents to be sued, *Olaniyi*, 763 F.Supp.2d at 87, and "the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Mitchell*, 445 U.S. 535, 538 (1980). "The government's consent to be sued must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34

(1992). Without an "unequivocally expressed" consent, a court lacks subject matter jurisdiction. *Mitchell*, 445 U.S. at 538.

The Federal Power Act, 16 U.S.C. § 791 *et seq.*, governs the process for granting hydroelectric dam licenses. Under the Act, an entity proposing to operate a hydroelectric dam subject to the Federal Power Act must obtain a license from the Commission. *Id.* § 817(b)(1). Although the Federal Power Act does not set forth a specific standard for the transfer of a license, the Commission has held that a license may be approved on a showing that the transferee is qualified to hold the license and operate the project, and that the transfer is in the public interest. *See* September 1 Order at P 15 (citing *Gallia Hydro Partners and Rathgar Associates*, LLC, 110 FERC ¶ 61,237 at P 10 & n.12 (2005)).

A. The Federal Power Act Vests Exclusive Jurisdiction In The Courts Of Appeals

Once the Commission acts upon a licensing request, Section 825 of the Federal Power Act prescribes a specific method for agency rehearing and judicial review. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-340 (1958) (Congress may prescribe the procedures and conditions for judicial review of administrative orders – including by limiting what courts may consider those challenges). An aggrieved party must first seek rehearing before the Commission. 16 U.S.C. § 825*l*(a). If a party disagrees with the Commission's decision on rehearing, the Act provides that any party "'aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States Court of Appeals for any circuit [where the licensee is located or has its principal place of business]. . . or in the United States Court of Appeals for the District of Columbia .'" *Public Util. Dist. No. 1 of Snohomish Cty. v. FERC*, 270 F.Supp.2d 1, 4 (D.D.C. 2003) (quoting 16 U.S.C. § 825*l*(b)). The court of appeals then has "'exclusive jurisdiction to review such orders.'" *Snohomish*, 270 F.Supp.2d at 5

(quoting *City of Tacoma*, 357 U.S. at 336); *see also American Energy Corp v. Rockies Exp. Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) ("The relevant court of appeals thereafter has 'exclusive' jurisdiction to 'affirm, modify, or set aside FERC's order in whole or in part.'") (quoting 15 U.S.C. § 717r(b) (Natural Gas Act).[2]

"Exclusive jurisdiction" has been universally interpreted as "written in simple words of plain meaning and leaves no room to doubt" that judicial review of a Commission order can only be had in the courts of appeals. *City of Tacoma*, 357 U.S. at 335-36. *Accord Skokomish Indian Tribe v. U.S.*, 332 F.3d 551, 560 (9th Cir. 2003) ("[A]ny dispute over FERC's decision belongs first before FERC and then the circuit courts, not the district courts."); *Municipal Elec. Utilities Ass'n v. Conable*, 577 F.Supp. 158, 162 (D.D.C. 1983) ("the Court of Appeals has the sole jurisdiction to hear a party's challenge to a final decision of FERC"); *see also Am. Energy Corp.*, 622 F.3d at 605 ("exclusive means exclusive"). As the Supreme Court has long held, it "can hardly be doubted that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had." *City of Tacoma*, 357 U.S. at 336. And in Section 825*l*(b), Congress "prescribed the specific, complete, and exclusive judicial review of the Commission orders." *Id.*

The Federal Power Act's exclusive jurisdiction provision applies to "any objection" to a Commission order. *Id.* at 335. This includes claims for injunctive relief. In *Snohomish*, this Court denied a preliminary injunction request against the Commission seeking to recuse two Commissioners because the Plaintiff "in essence" sought for the Court to review a Commission

[2] Because the relevant provisions of the FERC-administered Federal Power Act and the Natural Gas Act "are in all material respects substantively identical," courts "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) (citation omitted).

order in contravention of the exclusive jurisdiction vested in the courts of appeals. 270 F.Supp.2d at 5.

Likewise, in *Steamboaters v. FERC*, a plaintiff sought to enjoin the construction of a hydroelectric dam based on alleged National Environmental Policy Act violations. 572 F.Supp. 329 (D. Ore. 1983). The District Court dismissed the motion for a preliminary injunction, finding that, to rule in favor of the Plaintiff, the Court would "necessarily have to review the various substantive and procedural errors charged by the Plaintiff" in contravention of the exclusive jurisdiction in the courts of appeals. *Id.* *Accord Hunter v. FERC*, 569 F.Supp.2d 12, 15 (D.D.C. 2008) (dismissing a declaratory judgment action against the Commission for lack of subject matter jurisdiction because the claim was "so intertwined" with the order that it "must be construed as an attack" on the order itself); *Southwest Center for Biological Diversity v. FERC*, 967 F. Supp. 1166, 1172 (D. Ariz. 1997) (in dismissing a motion for a preliminary injunction, the court held that it lacked subject matter jurisdiction to consider the claim against FERC "no matter how artfully pleaded").

As the *Snohomish* Court held, under the Federal Power Act, a district court cannot exercise jurisdiction "in an area where Congress has vested exclusive jurisdiction in the Court of Appeals." *Snohomish*, 270 F.Supp.2d at 5; *accord Hunter*, 569 F. Supp. at 15 (challenges to the manner in which the Commission has exercised its statutory authority "do not generally overcome the prohibition on district court review."). As the Tenth Circuit found, "it would be hard pressed to formulate a doctrine with a more expansive scope" than the rule that "judicial review . . . is exclusive in the courts of appeals once the FERC [order] issues." *Williams Natural Gas Co. v. City of Okla. City*, 890 F.2d 255, 262 (10th Cir. 1989).

B. Section 825p (Enforcement) Of The Federal Power Act Does Not Provide An Independent Grant Of Jurisdiction

In response, Plaintiffs seemingly allege that 16 U.S.C. § 825p provides this Court jurisdiction. But Section 825p of the Federal Power Act only provides federal jurisdiction to enforce a party's compliance with tariffs and responsibilities under the Federal Power Act. *See Northeastern Rural Elec. Membership Corp. v. Wabash Valley Power*, 707 F.3d 883, 891-92 (7th Cir. 2013) (court lacked jurisdiction under Section 825p because the plaintiff was not seeking to enforce the defendant's obligations under a federally-filed tariff); *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold*, 524 F.3d 1090, 1100 (9th Cir. 2008) (court lacked jurisdiction because Section 825p of the Federal Power Act and Section 717u of the (substantively identical enforcement provision) of the Natural Gas Act only provide jurisdiction to enforce a private party's compliance with federal law); *see also Columbia Gas Trans. v. Singh*, 707 F.3d 583, 591 (6th Cir. 2013) (holding that Section 717u does not provide jurisdiction beyond that provided by 28 U.S.C. § 1331) (citing *Pan American Petroleum Corp. v. Superior Ct. of Delaware for New Castle Cnty.*, 366 U.S. 656, 662-664 (1961)).

Section 825p of the Federal Power Act has never been interpreted to provide a district court authority to address objections to a Commission order. Indeed, just two months ago, on July 15, 2015, Judge O'Toole of the United States District Court for the District of Massachusetts dismissed a claim asserting that similarly-worded Section 717u of the Natural Gas Act provided the district court jurisdiction over the Plaintiff's request for preliminary injunctive relief to stay construction of a natural gas pipeline authorized by a FERC order while the Plaintiff's request for rehearing was pending. *Town of Dedham v. FERC*, No. 15-cv-12352 (Doc # 47) (filed Jul. 15, 2015) (*Dedham*), Attachment A.

Judge O'Toole found that Section 717u "is simply an enforcement provision, not an

open-ended grant of jurisdiction to the district courts." *Id.* at 3. Dedham was not seeking to enforce an order or rule of the Commission. *Id.* Instead, the Plaintiff was trying to undo the effect of the Commission order. *Id.*

> In seeking a stay despite the notice to proceed, Dedham *is* effectively asking for review of that notice. It is asking the Court to override the notice. That is not within the enforcement authority given to the district courts by 717u. Review of FERC orders is placed in the courts of appeals.

Id. Judge O'Toole continued that although full review was not yet available in the court of appeals, Dedham could seek immediate relief. "Under the All Writs Act, Dedham may apply to the Courts of Appeals for, and that Court may grant, ancillary relief in aid of its future jurisdiction." *Id.* at 4 (citations omitted). But Dedham could not seek such relief in the district court, and its complaint was therefore dismissed for lack of subject matter jurisdiction. *Id.*

Courts have likewise held that "all disputes concerning the licensing of hydroelectric projects" are governed by Federal Power Act's Section 825*l*(b)'s review provisions, and that plaintiffs cannot artfully plead to avoid the courts of appeals' exclusive jurisdiction. *Skokomish Indian Tribe*, 332 F.3d at 559 (citing *California Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911-912 (9th Cir. 1989)). For instance, in *City of Tacoma*, the Supreme Court held that a state court lacked jurisdiction to determine whether the city could condemn land for a hydroelectric project. 357 U.S. at 329. This is because "all objections to the [Commission] order, to the license it directs to be issued, and to the legal competence of the licensee to execute its terms, must be made in the Court of Appeals or not at all." *Id.*

In *Skokomish*, the plaintiff did not explicitly seek to modify, rescind, or set aside the Commission's licensing order. 332 F.3d at 560. Instead, the plaintiff asked the district court to find that the defendant's operation of a dam pursuant to its federal license gave rise to a damages action based upon alleged Fifth and Fourteenth Amendment violations. *Id.* But the plaintiff's

allegations would have still required the district court "to conclude that FERC erred when it found that the license would not interfere with the purpose for which the reservation was created," leading the Ninth Circuit to affirm the dismissal of the United States as a defendant for lack of subject matter jurisdiction. *Id.* *See also Muni. Elec. Util. Ass'n of New York*, 577 F. Supp. at 163 (addition of 28 U.S.C. § 1983 claim did not provide district court jurisdiction over a claim challenging the Commission's handling of proceedings).

C. The Plaintiffs Bring Objections To The Commission's September 1 Order, So Their Complaint Must Be Dismissed For Lack Of Subject Matter Jurisdiction

In counts one and two, the Plaintiffs seek injunctive relief alleging that the Commission's September 1 Order violated its "Project Acquisition and License Transfer Rules and Regulations" and "Notice and Comment and Public Hearing Rules." In count five, Plaintiffs assert a Fifth Amendment violation. As in *Dedham*, to determine that the Plaintiffs are correct would require this Court to review the Commission's September 1 Order "for various substantive and procedural errors" and find the Commission erred in granting the partial license transfer. *Steamboaters*, 572 F.Supp. at 329. Any objections to a Commission licensing decision must be pursued consistent with Section 825*l*(b)'s direct review provisions – including alleged constitutional harms resulting from the Commission's order. *See City of Tacoma*, 357 U.S. at 329; *Skokomish Indian Tribe*, 332 F.3d at 559.

So the Plaintiffs, if aggrieved from the Commission's September 1 Order, must first seek rehearing of that order. 16 U.S.C. § 825*l*(a). If they remain aggrieved from the rehearing decision, they may petition the Ninth or D.C. Circuit courts of appeals for relief. *Id.* § 825*l*(b). Mr. Jackson sought rehearing of the Commission's 2014 transfer order, *see* Compl. at ¶¶ 45-47, demonstrating Plaintiffs' familiarity with Section 825*l*'s requirements.

And if the Plaintiffs believe that emergency relief is necessary, they can seek an

administrative stay. *See* 5 U.S.C. § 705 (providing for administrative stays). After seeking an administrative stay – as Judge O'Toole recently held in *Dedham*, *see Supra* at 11-12 – the Plaintiffs can seek an emergency writ of mandamus from the courts of appeals – but only from the court of appeals – under the All Writs Act. Because the D.C. and other Circuits hold that "where a statute commits review of final agency action to the court of appeals, any suit seeking relief that might affect the court's future jurisdiction is subject to its exclusive review." *Pub. Util. Comm. of Ore. v. Bonneville Power Admin.*, 767 F.2d 622, 626 (9th Cir. 1985) (citing *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984); *Air Line Pilots Ass'n, Int'l v. CAB*, 750 F.2d 81 (D.C. Cir. 1984)).

But as *Snohomish* and other courts hold, what Plaintiffs cannot do is attempt to avoid the Federal Power Act's direct review provisions by seeking a preliminary injunction in district court based upon objections to a Commission order. Not only did the Plaintiffs incorrectly name individual Commissioners of FERC, the Secretary of the Department of Interior, the Assistant Secretary of the Bureau of Indian Affairs, and the Director of the U.S. Fish and Wildlife Services – rather than the Commission – as defendants regarding a Commission order where jurisdiction is asserted under the Federal Power Act. S*ee* 16 U.S.C. § 825*l*(b) (petition for review of an "order of the Commission," not actions of Individual Commissioners). If the Commission (or Commissioners) were dismissed, it would be an absurd result for Interior officials to be left defending a Commission order. But worse, unlike *Dedham*, the Plaintiffs failed to even seek Commission rehearing, let alone seek review in the court of appeals. The Plaintiffs' complaint must be dismissed for lack of subject matter jurisdiction.

D. Plaintiffs' Cannot Collaterally Challenge The Commission's Long-Final 1985 Order

Nor can the Plaintiffs use this suit to challenge the propriety of granting the 1985 license to the Tribes or any Commission decision prior to the September 1 Order. Section 825*l*(b) permits a party to obtain review of a Commission order in the proper court of appeals within sixty days after the Commission's denial of rehearing. The D.C. Circuit has repeatedly held that the sixty-day limitation is jurisdictional. *See Pacific Gas & Elec. Co. v. FERC*, 533 F.3d 820, 825 (D.C. Cir. 2008) (collecting cases). "With few exceptions, a challenge made outside the statutory period is a collateral attack over which we have no jurisdiction." *Id.* (citing *Sacramento Mun. Util. Dist. v. FERC*, 428 F.3d 294, 299 (D.C. Cir. 2005)). Nor can a plaintiff premise jurisdiction on the fact it previously failed to raise an argument in the courts of appeals when it could have brought such a petition. *See Tacoma*, 357 U.S. at 339.

Here, Plaintiffs appear to predicate count four and other allegations on objections to the Commission's 1985 order granting the Tribes a license and subsequent decisions prior to the September 1 Order. *See* Compl. at ¶¶ 120-122. As the Commission found in the September 1 Order, to the extent Plaintiffs object to the Tribes receiving the license or fitness to maintain the license, such arguments are impermissible collateral attacks. 152 FERC ¶ 62,140 at P 11.

Nor can Plaintiffs salvage their complaint by asserting they would have challenged the prior orders but failed to do so. As noted, *see Supra* at 4, Plaintiff Jackson intervened in the 2014 Commission proceedings, sought rehearing – and yet failed to exhaust his judicial remedies – demonstrating not only an awareness of prior Commission proceedings, but also a failure to advance objections until this eleventh-hour complaint. As such, to the extent Plaintiffs object to prior Commission orders, not only did they bring their Complaint in the wrong court – they brought their Complaint at the wrong time.

CONCLUSION

For the reasons stated, this Court should dismiss the Plaintiffs' petition for lack of subject matter jurisdiction.

Respectfully submitted,

Dated: September 17, 2015

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ATTACHMENT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 15-12352-GAO

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

v.

FEDERAL ENERGY REGULATORY COMMISSION and ALGONQUIN GAS TRANSMISSION, LLC,
Defendants.

OPINION AND ORDER
July 15, 2015

O'TOOLE, D.J.

This action stems from defendant Algonquin Gas Transmission, LLC's plan to build a high-pressure gas pipeline through the Town of Dedham. Dedham has sued for declaratory and injunctive relief, seeking to postpone the commencement of construction pending further proceedings before the Federal Energy Regulatory Commission ("FERC"). Algonquin and FERC have opposed the Town's motion for a preliminary injunction and have moved to dismiss Dedham's complaint.

I. Background

In March 2015, FERC issued a certificate authorizing Algonquin to construct a pipeline through areas in New York, Connecticut, Rhode Island, and Massachusetts, including Dedham. In early April, Dedham requested a rehearing before the FERC. FERC granted a rehearing "for the limited purpose of further consideration" of the issues raised by the request. (Order Granting Rehearing at 1 (dkt. no. 3-4).) Neither the request itself nor FERC's limited grant operated to suspend the efficacy of the certificate.

On June 8, 2015, Algonquin requested FERC's authorization to begin construction of a portion of the pipeline that will run through Dedham. Dedham opposed Algonquin's request the next day and requested that FERC stay construction of the pipeline. On June 11, FERC granted Algonquin's request and issued it a partial notice to proceed. Concerned that the ongoing construction will effectively deny it any meaningful opportunity for reconsideration of FERC's issuance of the certificate, Dedham seeks a preliminary injunction staying construction. Algonquin and FERC join in arguing that, under the Natural Gas Act ("NGA"), this Court lacks jurisdiction over Dedham's suit.

II. Discussion

When considering whether to issue a preliminary injunction, a court must weigh the following four factors:

> (1) the plaintiff's likelihood of success on the merits; (2) the potential for irreparable harm in the absence of an injunction; (3) whether issuing an injunction will burden the defendants less than denying an injunction would burden the plaintiffs (i.e., a balancing of the equities); and (4) the effect, if any, on the public interest.

United States v. Weikert, 504 F.3d 1, 5 (1st Cir. 2007) (citing Bl(a)ck Tea Soc'y v. City of Boston, 378 F.3d 8, 11 (1st Cir. 2004)). The first of these factors is usually the most important and determinative, and that is the case here.

Under the relevant portion of the NGA, the courts of appeals are given exclusive jurisdiction to review FERC decisions. 15 U.S.C. § 717r(b). It is well-settled that § 717r's exclusivity provision forecloses judicial review of a FERC certificate in district court. 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.");

Williams Nat. Gas Co. v. City of Okla. City, 890 F.2d 255, 262 (10th Cir. 1989) ("Judicial review under § 19(b) is exclusive in the courts of appeals once the FERC certificate issues.").

Dedham argues it is not seeking review of the FERC certificate decision in this action, but simply a stay of construction while FERC addresses the request for reconsideration. This is nothing more than a preservation of the status quo pending adjudication, it says, a common purpose of temporary injunctions. Recognizing that this Court does not have jurisdiction under § 717r, it invokes a different NGA provision, § 717u, which provides:

> 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 of duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.

The Town's argument is unpersuasive. In the first place, § 717u is simply an enforcement provision, not an open-ended grant of jurisdiction to the district courts. See Tenn. Gas Pipeline Co. v. Massachusetts Bay Transp. Auth., 2 F. Supp. 2d 106, 109-10 (D. Mass. 1998) (explaining that "[t]his Court's role is one of mere enforcement"); Panhandle E. Pipe Line Co. v. Utilicorp United Inc., 928 F. Supp. 466, 474 (D. Del. 1996) (holding that § 717u gives district courts "jurisdiction to enforce . . . liability" but "[a]ny alleged infirmity with the FERC's ruling involving the merits or its authority to so rule needs to be passed upon by the [court of appeals]"). Dedham is not seeking by this suit to enforce an order or rule of the Commission. To the contrary, it is trying to undo the effect of an order – the notice to proceed.

And that leads to the corollary point: in seeking a stay despite the notice to proceed, Dedham *is* effectively asking for review of that notice. It is asking this Court to override the notice. That is not within the enforcement authority given to the district courts by § 717u. Review of FERC orders is placed in the courts of appeals by § 717r.

While full review of the Commission's action is not yet available under § 717r pending the outcome of the reconsideration process, Dedham is not without an avenue to the immediate relief it seeks. Under the All Writs Act,[1] Dedham may apply to the Court of Appeals for, and that Court may grant, ancillary relief in aid of its future jurisdiction. Telecomms. Research & Action Ctr. v. F.C.C., 750 F.2d 70, 79 (D.C. Cir. 1984); accord Sea Air Shuttle Corp. v. United States, 112 F.3d 532, 538 (1st. Cir. 1997) (explaining that appellant "could have pursued a writ of mandamus from the court of appeals" when faced with "agency inaction").

The defendants are correct that this Court lacks subject matter jurisdiction to give the Town the relief it seeks.

III. Conclusion

For the foregoing reasons, the plaintiff's Motion for a Preliminary Injunction (dkt. no. 2) is DENIED and the Motions to Dismiss (dkt. nos. 26, 39) are GRANTED. The action is DISMISSED.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
United States District Judge

[1] "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

Dated: September 17, 2015

/s/ *Ross R. Fulton*
ROSS R. FULTON
Attorney