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 FEDERAL ENERGY REGULATORY COMMISSION'S MEMORANDUM IN OPPOSITION TO PLAINITFF'S REQUEST FOR A PRELIMINARY INJUNCTION AND ITS MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

The Defendant Federal Energy Regulatory Commission ("Commission" or "FERC") opposes the Town of Dedham, Massachusetts ("Dedham" or "Plaintiff") request for a preliminary injunction and hereby moves to dismiss Dedham's complaint for lack of subject matter jurisdiction. Subject-matter jurisdiction to review any objection connected to a Commission certificate order under the Natural Gas 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 or a stay – such a Commission order.

Even if this Court had jurisdiction, Dedham's complaint is premature. The Commission has authority to issue tolling orders to provide it additional time to consider requests for rehearing. Attempts to seek judicial amendment or qualification after a tolling order – but prior to the agency's rehearing decision on the merits – are premature. Indeed, as described below, *see infra* pp. 13-14, circuit courts have dismissed all **nine** attempts in the last five years in other

natural gas infrastructure cases to halt the effectiveness of FERC certificate orders – including dismissing **three** emergency requests for administrative stay or mandamus since March 2015. *See EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015); *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015); *Del. Riverkeeper Network v. FERC*, No. 15-1052 (D.C. Cir. Mar. 19, 2015).

And even if this Court possessed subject matter jurisdiction, and even if Dedham's complaint were timely, Dedham could not demonstrate a preliminary injunction is warranted. The Commission is entrusted with determining whether a natural gas pipeline certificate is in the public interest. Here, the Commission – after an extensive review – determined that the benefits of additional gas service to the Northeast outweighed any adverse effects once numerous conditions were imposed on the project – including conditions minimizing the impacts upon Dedham.

The Natural Gas Act provides Dedham multiple methods to litigate its objections. If Dedham believes immediate action is necessary it may file for an administrative stay – an action Dedham failed to take here – and, if that request is denied, it can seek a stay from the Court of Appeals. Once the Commission acts upon rehearing, if Dedham is aggrieved by a final agency order, it can petition for appellate review. *See* 15 U.S.C. § 717r (agency rehearing and judicial review provision of the Natural Gas Act); *infra* pp.14-15 (listing recent appellate challenges to FERC natural gas pipeline infrastructure determinations).

But what Dedham cannot do is obtain a preliminary injunction from a District Court because only a Court of Appeals has subject matter jurisdiction to review the Commission's Order. Dedham's complaint was filed at the wrong time and in the wrong court and should be dismissed.

FACTUAL BACKGROUND

On February 28, 2014, Algonquin filed an application pursuant to section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to construct, operate, and maintain approximately 37.4 miles of pipeline and related facilities in New York, Connecticut, Massachusetts, and Rhode Island. See *Algonquin Gas Transmission, LLC*, Order Issuing Certificate and Approving Abandonment, 150 FERC ¶ 61,163 P 1 (Mar. 3, 2015) ("Certificate Order"), *reh'g pending*. In granting the certificate, and subject to conditions, the Commission found that the project's benefits outweighed any adverse effects. *Id.* P 19.

The pipeline would provide 342,000 dekatherms of natural gas per day from existing recipient points in New York to city-gate delivery points in Connecticut, Rhode Island, and Massachusetts. *Id.* PP 1, 19. The Commission found that the additional gas supplies are necessary to accommodate increased demand in the New England region – evidenced by the fact that eight local distribution companies and two municipal utilities had already contracted to use 100% of the available transportation service. *Id.* P 20. And the Commission determined that the pipeline would meet the needs of residential and commercial customers. *Id.* P 24.

After finding a need for the project, the Commission weighed potential adverse consequences. To do so, the Commission considered a record containing over 1,500 documents and prepared a 400-page Environmental Impact Statement – in consultation with the U.S. Environmental Protection Agency, the U.S. Army Corps of Engineers, and the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration. *Id.* P 53. Before issuing the Statement, the Commission considered comments from over 150 people who spoke at public meetings, and reviewed over 800 letters and comments. *Id.* PP 52, 54.

The final Statement addressed, among other issues, geology, soils, water resources,

wetlands, vegetation, wildlife and fisheries, air quality, and the impact upon residents, traffic, and property values. *Id.* P 58. The Commission found that the project would have some adverse environmental impacts. *Id*. But those impacts would be reduced to less-than-significant levels with the Commission-imposed mitigation measures, including requiring the following:

- Building 93 percent of the proposed pipeline utilizing existing right-of-ways and streets or public property, minimizing the need for easements on private properties and reducing the adverse impact on landowners. *Id.* PP 21, 97;

- Using a horizontal directional drill method to cross waterbodies to avoid or adequately minimize impacts on surface water resources. *Id.* P 67;

- Implementing measures to minimize the impacts on residences, such as installing safety fences and attempting to preserve mature trees and vegetation; *Id.* P 80;

- Developing traffic plans addressing parking and considerations for pedestrians, bicycles, and construction workers, *Id.* PP 92-93, as well as providing regularly updated construction schedules to all affected municipalities, *Id.* P 93; and

- Complying with mitigation measures to ensure the project does not have a significant impact on air quality; *Id.* P 100.

Of importance here, the Commission imposed conditions to reduce the impact upon Dedham. The Commission found that the intersection of High Street, East Street, and Harris Streets in Dedham could experience adverse traffic impacts from construction. *Id.* P 94. To reduce those impacts, the Commission required Algonquin to construct at night, and to obtain road-crossing permits from Dedham before undertaking in-street construction. *Id.* PP 93, 95.

In light of these conditions, the Commission determined that the project was safe and reliable. The majority of the project replaces existing, aged pipeline. *Id.* P 105. The Commission found that proposed alternative routes do not constitute viable options – nor would energy conservation and renewable energy sources serve as practical alternatives. *Id.* P 25. Accordingly, the benefits of additional, needed natural gas service to the Northeast outweigh any environmental harm – once appropriate mitigation measures are applied.

Eight parties filed requests for rehearing by April 2, 2015.[1] And although Dedham made no such request, multiple other parties requested that the Commission administratively stay its order. *Id.* On May 1, 2015, the Commission issued an order granting rehearing for the limited purpose of further consideration so that timely-filed rehearing requests would not be deemed denied by operation of law. *See* Order Granting Rehearing for Further Consideration (May 1, 2015) (Pl. Ex. D).

On June 8, Algonquin requested authorization to proceed with construction of certain segments of the West Roxbury Lateral Pipeline. Algonquin Request for Auth. to Commence Construction (Pl. Ex. E). On June 11, the Commission granted Algonquin partial approval to proceed with the "Massachusetts Facilities and Archaeological Data Recovery." (Pl. Ex. G). On June 17, 2015, Dedham filed this complaint and motion seeking an injunction commanding the Commission to stay this construction. *Id*.

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 Viqueria v. First Bank*, 140 F.3d 12, 16 (1st Cir. 1998). A court may look beyond the pleadings to determine jurisdiction. *See White v. C.I.R.*, 899 F. Supp. 767, 771 (D. Mass. 1995).

The United States has sovereign immunity unless it consents to be sued – 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

[1] See Docket for FERC CP14-96-000, available at *http://elibrary.ferc.gov*.

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. Because the Natural Gas Act provides the courts of appeals with exclusive jurisdiction over any objection to a Commission natural gas pipeline certificate order, Dedham's complaint must be dismissed.

I. DEDHAM'S COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

A. The District Court Lacks Jurisdiction to Consider Dedham's Complaint

The Natural Gas Act, 15 U.S.C. § 717 *et seq.*, governs the process for siting and constructing natural gas pipelines. The Act is a comprehensive federal scheme for the interstate transportation and sale of natural gas. 15 U.S.C. § 717(b); *see Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-301 (1988). Under the Act, an entity proposing to construct a pipeline must obtain a certificate of public convenience and necessity from the Commission. *Id.* § 717f(c). The Commission can issue a certificate only if it finds that the proposed facilities "is or will be required by the present of future public convenience and necessity." *Id*. § 717f(e).

1. *The Natural Gas Act Vests Exclusive Jurisdiction in the Courts of Appeals*

Once the Commission acts upon a pipeline certificate request, the Natural Gas Act prescribes a specific method for agency rehearing and judicial review. *See Williams Natural Gas Co. v. City of Okla. City*, 890 F.2d 255, 262 (10th Cir. 1989) (citing *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. *See* 15 U.S.C. § 717r(a). If the Commission denies 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 court of appeals." *Id.* § 717r(b). The court of appeals then "has 'exclusive' jurisdiction 'to affirm, modify, or set aside such order in whole or in part.'" *American Energy Corp v. Rockies Exp. Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010) (quoting § 717r(b)).

"Exclusive jurisdiction" has been universally interpreted as "plainly stat[ing]" that judicial review is limited to the "the courts of appeals once the FERC certificate issues." *Williams*, 890 F.2d at 261. *Accord Am. Energy Corp.*, 622 F.3d at 605 (6th Cir. 2010) ("exclusive means exclusive"); *Const. Pipeline Co. v. A Perm. Easement*, 2015 WL 1638428, at *1 (N.D.N.Y. Feb. 21, 2015) ("Once a FERC certificate is issued, judicial review of the FERC certificate itself is only available in the circuit court."). As a court in this District observed, under the Natural Gas Act's "statutory framework, there is no appeal of a FERC decision save to the appropriate Court of Appeals." *Tenn. Gas Pipeline Co. v. Mass. Bay Transp.*, 2 F. Supp. 2d 106, 110 (D. Mass. 1998) ("*Mass. Bay*") (citing 15 U.S.C. § 717r(b)). *See also City of Tacoma*, 357 U.S. at 335-336 (In considering the substantively identical Federal Power Act, the Supreme Court held that Congress "prescribed [that] the complete and exclusive mode for judicial review of the Commission's orders" lies with the U.S. Courts of Appeals).

The Natural Gas Act's exclusive jurisdiction provision does not apply only when a party challenges a Commission's final decision on the merits. Judicial review is so limited for "any decision" by the Commission. *Consolidated Gas Supply Corp. v. FERC*, 611 F.2d 951, 957 (4th Cir. 2010). This includes claims for injunctive relief and attempts to force agency action. *See id.* (finding no review for "final or preliminary orders, available in the district court"); *Am. Energy Corp.*, 622 F.3d at 605 (making "short work" in rejecting a claim brought in district court for injunctive relief). *See also Sea Air Shuttle Corp. v. U.S.*, 112 F.3d 532, 535 (1st Cir. 1997) ("It is well established that the exclusive jurisdiction given to the courts of appeals . . . also extends to

lawsuits" alleging agency delay in issuing final orders.).

In *Consolidated Gas*, the Fourth Circuit vacated a district court order granting a preliminary injunction against a Commission preliminary show cause order. 611 F.2d at 958. The Fourth Circuit held that the "uniform construction" of the Natural Gas Act's exclusive jurisdiction provision left "no area of review" available to object to Commission actions in district court, including for "preliminary or procedural orders." *Id.* at 957-958. As the Tenth Circuit held, "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 certificate issues." *Williams Nat. Gas. Co.*, 890 F.2d at 262.

2. *The District Court Lacks Jurisdiction to Consider Any Objections to a Commission Order – Including a Stay Request*

Consequently, district courts lack jurisdiction to amend or qualify Commission orders. *See Mass. Bay*, 2 F. Supp. 2d at 110. *Accord Kan. Pipeline Co v. A 200 Foot by 250 Foot Piece of Land*, 210 F. Supp. 2d 1253, 1256 (D. Kan. 2002) ("The district court lacks jurisdiction to review the validity and/or conditions of a FERC certificate."). A district court may not consider any collateral attack on a Commission certificate. *See Williams*, 890 F.2d at 262; *Guardian Pipeline v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 974 (N.D. Ill. 2002); *Mass. Bay*, 2 F. Supp. 2d at 110. The only jurisdiction provided to district courts under the Natural Gas Act is to enforce condemnation proceedings in accord with a facially valid certificate. *See Guardian Pipeline*, 210 F. Supp. 2d at 974; *Mass. Bay*, 2 F. Supp. 2d at 110 ("This Court's role is one of mere enforcement."). Otherwise, a district court "has simply no power to impose conditions concerning safety or the potential for interference with others' property rights on a pipeline company's exercise of the authority granted it by FERC." *Mass. Bay*, 2 F. Supp. 2d at 110.

This lack of jurisdiction extends to an inability to stay Commission orders. "The NGA

itself directs that an order by FERC not be stayed unless either FERC itself – in the context of a rehearing – or the reviewing Court of Appeals specifically orders a stay." *Id.* at 109 (citing 15 U.S.C. § 717r(c)) (holding that FERC orders remain effective during review proceedings and cannot be stayed by district courts).

It also precludes a district court from considering any cause of action that is so intertwined with a Commission order that it would necessarily require the district court to address that order. In *Steamboaters v. FERC*, a plaintiff sought to enjoin the construction of a hydroelectric dam under the substantively identical Federal Power Act 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"). Likewise, in *Pub. Util. Dist. No. 1 of Snohomish Cnty. v. FERC*, 270 F. Supp. 2d 1, 5 (D.D.C. 2003), the District Court for the District of Columbia 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 order in contravention of the exclusive jurisdiction vested in the courts of appeals. *Accord Ind. & Mich. Elec. Co. v. FPC*, 224 F. Supp. 166 (N.D. Ind. 1963)

(holding that the remedy was not to seek a writ of mandamus in district court, but to seek such relief in the courts of appeals).

So Dedham's claim for a stay of construction because the Commission purportedly failed to consider "safety risks" is "not [a matter] for [this Court] to resolve." *Am. Energy*, 622 F.3d at 605. Like in *Steamboaters*, considering Dedham's motion would necessarily involve reviewing the Commission's consideration of the harms alleged by Dedham, which only the courts of appeals have jurisdiction to do. As the court in *104 Acres* instructed, "rather than seeking relief from this Court, [the aggrieved party's] only remedy is to ask for a stay from the Commission or from the Court of Appeals." *See 104 Acres*, 749 F. Supp. at 431.

3. *Section 717u Does Not Provide an Independent Grant of Jurisdiction*

In response, Dedham seemingly alleges that 15 U.S.C. § 717u provides this Court jurisdiction. Section 717u provides federal jurisdiction – to the same extent provided by 28 U.S.C. § 1331's general grant of federal question jurisdiction – to a party to enforce a defendant's obligations under the Natural Gas Act. *See Columbia Gas Trans. v. Singh*, 707 F.3d 583, 591 (6th Cir. 2013) (citing *Pan American Petroleum Corp. v. Superior Ct. of Delaware for New Castle Cnty.*, 366 U.S. 656, 662-664 (1961)); *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold*, 524 F.3d 1090, 1100 (9th Cir. 2008).

But this section has never been interpreted to provide a district court authority to address the validity of a Commission order. It does not create an independent cause of action. *Columbia Gas*, 707 F.3d at 591. *See also id.* at 593 ("A party must still assert either a federal cause of action or state-law claim with a substantial federal interest"). And section 717u's general language cannot provide Dedham a method to avoid section 717r's specific language vesting exclusive jurisdiction in the court of appeals to consider challenges to the Commission's pipeline

certificate orders. *See Nat'l Gas Pipeline Co v. FPC*, 128 F.2d 481, 487 (7th Cir. 1942) (the specific provision providing for direct review to the court of appeals trumps 717u's general language). *See also Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) (when two jurisdictional statutes provide for different judicial review, courts must apply the more specific legislation).

B. Dedham's Complaint Must Be Dismissed for Lack of Finality

Not only does the Court lack jurisdiction to hear Dedham's claim; Dedham's claim is also premature. As noted, under 15 U.S.C. § 717r(a) of the Natural Gas Act, "unless the Commission acts upon the application for rehearing within 30 days after it is filed, such application" is deemed denied, permitting a party to seek judicial review. In order for an agency's inaction to qualify as a "failure to act," the agency must fail to take a "discrete" action that it is legally required to take. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004); *see also* 5 U.S.C. § 702 (Administrative Procedure Act).

The First Circuit and at least two other circuit courts have rejected the contention that "act" means that the Commission must act on the merits, within 30 days of receiving a request for rehearing. "The statutory language [of an identical provision of the related Federal Power Act] . . . although requiring FERC to 'act' within thirty days after filing . . . does not state, as the petitioner would have it, that FERC must 'act on the merits.'" *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988); *see Cal. Co. v. Fed. Power Comm'n*, 411 F.2d 720, 722 (D.C. Cir. 1969) (holding that 15 U.S.C. § 717r(a) only requires the Commission to act upon the petition – not to act on the merits); *General American Oil Co. of Texas v. Fed. Power Comm'n*, 409 F.2d 597, 599 (5th Cir. 1969) (same). Those courts instead held that Commission tolling orders constitute a valid 'act' that satisfies FERC's statutory responsibilities. *See Kokajko*, 837 F.2d at 524 ("at

least two circuits, in reviewing [the Natural Gas Act] have ruled that 'tolling orders . . . are valid'") (citing *Cal. Co.*, 411 F.2d 720; *Gen. Am.*, 409 F.2d 597).

In fact, courts have long accepted the Commission's time-honored practice of using tolling orders to afford the agency the time it needs to issue rehearing orders ruling on the merits of the issues presented. *See Cal. Co.*, 411 F.2d at 721-22 (holding that the Commission's use of a tolling order is a "long standing" and "time honored interpretation" by the agency and that the Commission "has the power to act on applications for rehearing beyond the 30-day period so long as it gives notice of [its] intent [through a tolling order]"). Because tolling orders constitute a valid act, courts have held that attempts to seek review after a tolling order – but prior to an agency decision on the merits – are premature. *See Cal. Mun. Utilities Ass'n v. FERC*, 2001 WL 936359, at *1 (D.C. Cir. Jul. 31, 2001) ("In light of the agency's tolling order . . . it is clear petitioners' rehearing requests are still under consideration by the Commission" so the petitions for review were "incurably premature.") (citations omitted); *Kokajko*, 837 F.2d at 525 (because FERC issued a valid tolling order, the "petition for review filed prior to a decision on the merits of the application for rehearing" was premature).

Dedham seemingly contends that a stay is nonetheless warranted under the D.C. Circuit's multi-factor test from *Telecommc'ns Research & Action Ctr. v. FCC* ("*TRAC*"), 750 F.2d 70, 79 (D.C. Cir. 1984), which addressed how an appellate, not district, court should determine when the extraordinary remedy of mandamus is warranted for agency delay that infringes upon judicial review. *See* Pl. Mot. for PI at 9 (citing cases applying *TRAC* factors). Putting aside that Dedham brings this argument in the wrong forum, the central question in evaluating a claim of unreasonable delay is "whether the agency's delay is so egregious as to warrant mandamus." *In re Core Commc'ns*, 531 F.3d 849, 855 (D.C. Cir. 2008). Courts measure such unreasonable

delay in ***years*** – not months. *See In re Cal. Power Ex.*, 245 F.3d at 1125 ("[t]he cases in which courts have afforded relief have involved delays of years, not months"); *Town of Wellesley v. FERC*, 829 F.2d 275, 277 (1st Cir. 1987) ("The cases in which courts have afforded relief have involved delays of years."); *see also Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341, 359 (D.C. Cir. 1987) ("[T]his court has stated generally that a reasonable time for an agency decision could encompass months, occasionally a year or two, but not several years or a decade."). In *Kokajko*, the First Circuit found that even an allegation of a five-year delay by the Commission was insufficient to entitle petitioner to a writ of mandamus ordering agency action. *See* 837 F.2d at 525 (finding the delay was only "approaching the threshold of unreasonableness.").

The Plaintiff falls well short of this exacting standard. Dedham's request for rehearing has been pending for ***less than three months***. *See In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015) (denying a petition for mandamus to force the Commission to act on a rehearing petition that was pending for four months). Dedham does not cite a case – nor does one exist – where a delay by the Commission of three months was found to constitute unreasonable delay. The D.C. Circuit and Second Circuit have repeatedly declined to grant stays and other forms of emergency relief in other recent natural gas infrastructure cases, some with much greater project impacts (and alleged harm) than here – including three such denials since March 2015:

- *EarthReports, Inc. v. FERC*, No. 15-1127 (D.C. Cir. June 12, 2015) (denying motion to stay construction of liquefied natural gas export facilities and clearing of acreage for construction staging);

- *In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015) (denying a petition for mandamus to force the Commission to act on a pending rehearing petition regarding the issuance of a certificate for a 124-mile long pipeline to provide additional supplies of natural gas to New England);

- *Del. Riverkeeper Network v. FERC*, No. 15-1052 (D.C. Cir. Mar. 19, 2015) (denying a motion for stay to halt the clearing of 140 acres of forest adjacent to streams and wetlands for pipeline construction);

- *Minisink Residents for Envt'l Pres. and Safety v. FERC*, No. 12-1481 (D.C. Cir. Mar. 5, 2013) (denying motion for stay to halt operation of natural gas compressor station where stated harm was the perceived safety threat to nearby residents);

- *Del. Riverkeeper Network v. FERC*, No. 13-1015 (D.C. Cir. Feb. 6, 2013) (denying a stay concerning tree clearing and the construction of a 40-mile pipeline);

- *In re Minisink Residents for Envt'l Pres. and Safety*, No. 12-1390 (D.C. Cir. Oct. 11, 2012) (denying stay of construction of natural gas compressor close to homes);

- *Coal. for Resp. Growth & Res. Conservation v. FERC*, No. 12-566 (2d Cir. Feb. 28, 2012) (denying stay concerning clearing of 200,000 mature trees for a 39-mile greenfield natural gas pipeline); and

- *Summit Lake Paiute Indian Tribe and Defenders of Wildlife v. FERC*, Nos. 10-1389 & 10-1407 (D.C. Cir. Jan. 28, 2011 & Feb. 22, 2011) (rejecting motions to stay construction of a 40-mile segment of a 675-mile pipeline that crosses a habitat for two sensitive species and land with special significance to Native Americans).

Dedham's vague assertion that its request is different because the threat is to health and welfare – rather than mere economic harm – is not unique. *See In re Minisink*, D.C. Cir. No. 12-1390 (denying a stay request where the alleged harm was a perceived safety threat). Dedham's alleged "imminent" harms from construction consist of "disrupting traffic, creating noise, and affecting business operations" – *i.e.*, primarily economic concerns. *See* Pl. Ex. C at 1. The only alleged safety risk is "in the event of an accident or explosion." *Id.* at 1-2. But, as Dedham concedes, that alleged risk would arise only after the project's completion, *id,* and, therefore, is too remote to warrant an immediate stay. This is particularly true, as the Commission – the entity entrusted with assessing a project's public convenience and necessity and balancing the developmental and non-developmental concerns involved in that assessment – will address any alleged safety and other concerns raised on rehearing in its pending rehearing order. *See Mass. Bay*, 2 F. Supp. 2d at 110 (The district court is "'without authority to question the necessity . . . of the project. That decision is solely within the realm of the FERC.'") (quoting *Rivers Elec. Co.*

v. 4.6 Acres, 731 F. Supp. 83, 87 (N.D.N.Y. 1990)); *see also Guardian Pipeline*, 210 F. Supp. 2d at 974 ("The FERC Certificate is the conclusive answer" to most of the objections and "FERC has determined the public convenience and necessity.").

So – as provided by the Natural Gas Act – Dedham has the full opportunity for its position to be considered by the Commission on rehearing. If Dedham is aggrieved following issuance of a final FERC order, it will have the opportunity for its challenge to be considered by a court of appeals. Circuit courts have repeatedly considered (or are considering) merit challenges to FERC orders authorizing gas infrastructure projects, including the following:

- *Sierra Club, et al. v. FERC*, Nos. 14-1249, 14-1275, 15-1127, 15-1133 (D.C. Cir. filed Nov. 17, 2014 and later) (petitions for review concerning FERC approval of liquefied natural gas export terminals and related facilities) (briefing ongoing);

- *Gunpowder Riverkeeper v. FERC*, No. 14-1062 (D.C. Cir. filed April 18, 2014) (challenge to a Commission order authorizing the construction of 21 miles of pipeline in Baltimore and Harford Counties, MD) (awaiting decision);

- *Myersville Citizens for a Rural Comm., Inc., et al. v. FERC*, 783 F.3d 1301 (D.C. Cir. 2015) (denying challenge to an order granting certificate to construct and operate new natural gas facilities in Myersville, MD);

- *Minisink Residents for Environmental Preservation and Safety, et al. v. FERC*, 762 F.3d 97 (D.C. Cir. 2014) (denying petition challenging certificate authorizing Millennium Pipeline to construct and operate a compressor station and related facilities in Minisink);

- *No Gas Pipeline, et al. v. FERC*, 756 F.3d 764 (D.C. Cir. 2014) (denying challenges to a certificate approving the construction of a natural gas pipeline connecting New Jersey and New York to deliver gas supplies to lower Manhattan);

- *Delaware Riverkeeper Network, et al. v. FERC*, 753 F.3d 1304 (D.C. Cir. 2014) (remanded to the Commission to consider the cumulative impacts of a certificate authorizing the upgrade of an existing pipeline with 40 miles of pipeline looping); and

- *Coal. for Resp. Growth v. FERC*, 485 Fed. Appx. 472 (2d Cir. 2012) (denying petition challenging certificate order authorizing the construction of a 39-mile pipeline).

Many of those matters involved ongoing construction while the cases were pending. *See, e.g.*, *Gunpowder Riverkeeper*, D.C. Cir. No. 14-1062 (tree clearing ongoing during judicial

review). What Dedham may not do is an end-run to seek action in the district court when this Court lacks jurisdiction and the Commission's action is not yet final. Dedham's complaint should be dismissed.

II. DEDHAM'S PRELIMINARY INJUNCTION MUST BE DENIED

Given that this Court lacks subject matter jurisdiction, it cannot entertain Dedham's request for a preliminary injunction. *See Snohomish*, 270 F. Supp. 2d at 5 (denying a preliminary injunction request against the Commission because "this Court concludes that it is without jurisdictional authority to afford the plaintiff the remedy it is principally seeking . . . .").

Even if this Court had jurisdiction, Dedham cannot meet its burden to obtain a preliminary injunction. A plaintiff must demonstrate that: (1) it has a substantial likelihood of success on the merits; (2) it would suffer an irreparable injury were an injunction not granted; (3) an injunction would not substantially injure other interested parties; and (4) the grant of an injunction would further the public interest. *See McGuire v. Reilly*, 260 F.3d 36, 42 (1st Cir. 2001).

A. Dedham Is Not Likely to Succeed on the Merits Because the Commission Reasonably Determined the Pipeline is in the Public Interest

As noted, the Commission, using its expertise and consistent with its responsibilities under the Natural Gas Act and the National Environmental Policy Act, conducted a public interest balance. *See* Order P 19. The Commission determined that the need for, and benefits from, the proposed pipeline – namely the delivery of needed natural gas to residential and commercial end-users in the New England area – outweighed potential adverse impacts. *Id.* The Commission made this determination only after considering all views, preparing a 400-page Environmental Impact Statement, and imposing numerous conditions upon construction – including conditions designed to reduce the impacts upon Dedham. *See id.* PP 93-95. In

weighing appropriate considerations, and striking a balance that mitigates harmful effects, the Commission has carried out its statutory responsibility to promote the public interest.

Dedham has raised its objections to the Commission's decision in both its motion and its request for rehearing. (Pl. Ex. C). The Commission will address those concerns in its pending order on rehearing.

B. Dedham Cannot Meet its Burden to Prove it Will Suffer Irreparable Harm if its Request for a Stay is Not Granted

A plaintiff must show "more than a 'tenuous or overly speculative forecast of anticipated harm.'" *Hearst Stations Inc. v. Aereo, Inc.*, 977 F. Supp. 2d 32, 40 (D. Mass. 2013) (quoting *Ross–Simons of Warwick v. Baccarat, Inc.,* 102 F.3d 12, 19 (1st Cir. 1996)). *See also Charlesbank Equity Fund II v. Blinds To Go, Inc.*, 370 F.3d 151, 162 (1st Cir. 2004) (An applicant for a stay cannot rely upon unsupported assertions or conjecture to meet this stringent standard). And this standard is heightened further when a plaintiff seeks a preliminary injunction prior to exhausting its administrative remedies. *See Bailey v. Delta Air Lines, Inc.*, 722 F.2d 942, 944 (1st Cir. 1983) (requiring a plaintiff to show an "irreparable injury sufficient in kind and degree to justify the disruption of the prescribed administrative process").

Here Dedham alleges that a finished pipeline poses a safety risk in the event of an accident. Pl. Ex. C. at 2.[2] But the Commission considered this argument and determined that, based on available data, natural gas pipelines remain a safe, reliable means of energy

[2] *United States v. D'Annolfo*, 474 F. Supp. 220, 222 (D. Mass. 1979), does not support Dedham's claim that it need not prove an irreparable injury. *D'Annolfo* stands for the proposition that when the federal government "'acts to enforce a statute or make effective a declared policy of Congress, the standard of public interest and not the requirements of private litigation measures the propriety and need for injunctive relief.'" *Id.* (quoting *United States v. Shafer*, 132 F. Supp. 659 (D. Md. 1955)). Here it is FERC – not the Plaintiff – that is entrusted with administering the Natural Gas Act. *See D'Annolfo*, 474 F. Supp. at 223 (granting preliminary injunction to the Army Corps of Engineers); *Shafer*, 132 F. Supp. at 670 (granting preliminary injunction to the Department of Agriculture).

transportation. *See* Order P 105. Likewise, Dedham's claim that construction will affect traffic and create noise not only ignores the mitigation conditions ordered by the Commission, *see id.* PP 82 (noise management), 92-96 (traffic mitigation), 97 (lack of impact upon private property), but amounts to the type of generalized harms that are insufficient to support a preliminary injunction motion. *See Fund for Animals v. Frizzell*, 530 F.2d 982, 987 (D.C. Cir. 1975) (non-specific claims of "the destruction and loss of wildlife" constitute an insufficient injury). This is especially true here where Dedham failed to seek a stay from the Commission.

Moreover, even if the Court were to determine that Dedham showed it would suffer an irreparable injury, such a finding must be balanced against other factors. *See Nken v. Holder*, 556 U.S. 418, 427 (2009) (a stay "is not a matter of right, even if irreparable injury might otherwise result"). Here, the Commission – in conjunction with other federal agencies – conducted an extensive environmental analysis. Any injury remaining after mitigation efforts is outweighed by the public benefits of enhanced natural gas transportation options that would be reduced, if not eliminated altogether as project economics change, by a stay. *See* Order PP 25-26.

Dedham is incorrect in claiming that meaningful judicial review is foreclosed absent a stay. *See* Pl. Mot. for PI at 6-9. As noted, circuit courts have allowed construction to proceed while rehearing is pending. *See EarthReports, Inc.*, No. 15-1127 (finding petitioners failed to satisfy "the stringent standards for a stay" to stop in-progress construction); *Del. Riverkeeper Network*, No. 15-1052 (denying stay to prevent tree felling while request for rehearing was pending); *Coal. for Resp. Growth*, No. 12-566 (same). Algonquin only has partial authorization for construction. It is not yet authorized to complete construction or begin utilizing the pipeline.

C. A Stay Would Injure Other Parties And Is Not in the Public Interest

Nor do the last two factors of the preliminary injunction test support Dedham's motion. The public interest is a "crucial" factor in "litigation involving the administration of regulatory statutes designed to promote the public interest." *Va. Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Because FERC is the "presumptive[] guardian of the public interest," its views "indicate[] the direction of the public interest" for purposes of deciding a request for stay pending appeal. *N. Atl. Westbound Freight Ass'n v. Fed. Mar. Comm'n*, 397 F.2d 683, 685 (D.C. Cir. 1968). It is the Commission – not courts – that determine the public convenience and necessity of a certificate. *See Mass. Bay*, 2 F. Supp. 2d at 110.

Here, in issuing the certificate of public convenience and necessity, the Commission found a strong showing of need for the project. *See* Certificate Order P 26. As noted, the pipeline will provide substantial benefits to gas producers, local distributors and residential and commercial end-users by providing additional capacity to meet high-demand in the Northeast markets – evidenced by the fact that distributors have already contracted to use the pipeline's full capacity. *See id.* PP 23-24. A stay would likely prevent the on-time completion of the project. *See 3883 Connecticut LLC v. District of Columbia*, 336 F.3d 1068, 1074 (D.C. Cir. 2003) ("the permit holder has a substantial interest in the continued effect of the permit and in proceeding with a project without delay").

A stay would also potentially jeopardize the Commission's administration of ongoing proceedings in this matter. It is not just Dedham's rehearing request that the Commission must consider. The Commission must address eight competing rehearing claims regarding a nearly billion-dollar interstate pipeline project. *See Cal. Co.*, 411 F.2d at 721 (noting that the complex nature of the Commission's mission in "giving careful and mature consideration to the multiple,

and often clashing arguments set out in applications for rehearing in complex cases supports the use of tolling orders such as this one").

Dedham's extraordinary motion would effectively require the Commission to break out the issues raised by Dedham and address the rehearing requests piecemeal. Or the Commission would have to expedite its consideration of all eight rehearing requests – to the detriment of careful consideration of the competing claims – as Algonquin's request for a pipeline certificate is just one of numerous complex matters the Commission is currently considering, potentially jeopardizing "agency activities of a higher or competing priority." *TRAC*, 750 F.2d at 80.

CONCLUSION

For the reasons stated, this Court should dismiss the Plaintiff's petition for lack of subject matter jurisdiction and/or deny Plaintiff's motion for a preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) 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: July 8, 2015

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