IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cletus Woodrow and Beverly Ann Bohon, *et al.*,	)	
Plaintiffs	)	
v.	)	Case No. 1:20-cv-00006-JEB
Federal Energy Regulatory Commission, *et al.*,	)	Hon. Judge James Boasberg
Defendants	)	

MOTION OF DEFENDANT FEDERAL ENERGY REGULATORY COMMISSION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION

Defendants Federal Energy Regulatory Commission and Chairman Neil Chatterjee, in his official capacity, respectfully move this Court to dismiss the Complaint in the above-captioned proceeding under Rule 12(b)(1) of the Federal Rules of Civil Procedure. A Memorandum in Support and a proposed order are attached.

Respectfully submitted,

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

/s/ Scott Ray Ediger
Scott Ray Ediger
Susanna Y. Chu
Attorneys

Federal Energy Regulatory Commission
Washington, DC 20426
Tel.: (202) 502-8509
Fax: (202) 273-0901
scott.ediger@ferc.gov

March 9, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cletus Woodrow and Beverly Ann Bohon, *et al.*,	)	
Plaintiffs	)	
v.	)	Case No. 1:20-cv-00006-JEB
Federal Energy Regulatory Commission, *et al.*,	)	Hon. Judge James Boasberg
Defendants	)	

MEMORANDUM IN SUPPORT OF DEFENDANT
FEDERAL ENERGY REGULATORY COMMISSION'S
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Respectfully submitted,

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

/s/ Scott Ray Ediger
Scott Ray Ediger
Susanna Y. Chu
Attorneys

Federal Energy Regulatory Commission
Washington, DC 20426
Tel.: (202) 502-8509
Fax: (202) 273-0901
scott.ediger@ferc.gov

March 9, 2020

Table of Contents

INTRODUCTION 1

BACKGROUND 2

I. Statutory and Regulatory Background.....2

II. Procedural Background.....4

A. FERC Proceeding and D.C. Circuit Appeal..... 4

B. Fourth Circuit Dismissal of Constitutional Challenge to Mountain Valley Pipeline for Lack of Jurisdiction..... 7

ARGUMENT.....9

I. This Court must dismiss the complaint for lack of subject matter jurisdiction because the Natural Gas Act divests district courts of jurisdiction to "affirm, modify, or set aside" FERC pipeline certificate orders.....9

II. The Supreme Court's *Thunder Basin* framework confirms the conclusion that the Natural Gas Act bars the exercise of district court jurisdiction over Plaintiffs' claims. 12

A. Congress intended initial review of Natural Gas Act challenges to occur at FERC followed by judicial review in the U.S. Courts of Appeals. 13

B. The claims in this case are of the type Congress intended to be reviewed within the Natural Gas Act review structure..... 15

1. Precluding district court subject matter jurisdiction would not foreclose all meaningful review because the Natural Gas Act allows for review in the appellate courts..... 15

2. The Plaintiffs' claims are not wholly collateral to the Natural Gas Act's review provisions..... 17

3. The Plaintiffs' claims are subject to threshold questions that are well within FERC's area of expertise. 19

CONCLUSION.....19

Table of Authorities

Court Cases

**Adorers of the Blood of Christ v. FERC*,
897 F.3d 187 (3d Cir. 2018)..... 9, 12, 13, 16

Am. Energy Corp. v. Rockies Express Pipeline LLC,
622 F.3d 602 (6th Cir. 2010) 11, 13, 14

**Appalachian Voices v. FERC*, No. 17-1271,
2019 WL 847199 (D.C. Cir. Feb. 19, 2019) 1, 7, 10, 16

Bennett v. U.S. Sec. & Exch. Comm'n,
844 F.3d 174 (4th Cir. 2016) 8, 13

**Berkley v. Mountain Valley Pipeline, LLC*,
896 F.3d 624 (4th Cir. 2018) 8, 12, 17, 19

**Berkley, et al. v. Mountain Valley Pipeline, LLC, et al*., No. 17-357,
2017 WL 6327829 (W.D. Va. Dec. 11, 2017)..... 1, 7, 8, 9

**Bold All. v. FERC*, No. 17-1822,
2018 WL 4681004 (D.D.C. Sept. 28, 2018) 1, 3, 4, 9, 10, 11, 15

City of Bos. Delegation v. FERC,
897 F.3d 241 (D.C. Cir. 2018)..... 3

City of Rochester v. Bond,
603 F.2d 927 (D.C. Cir. 1979)..... 12, 15

City of Tacoma v. Taxpayers of Tacoma,
357 U.S. 320 (1958)..... 11, 13, 14

City of Tacoma, Washington v. Nat'l Marine Fisheries Serv.,
383 F. Supp. 2d 89 (D.D.C. 2005)..... 11

Constitution Pipeline Co., LLC v. A Permanent Easement, No. 14-2119,
2015 WL 1638428 (N.D.N.Y. Feb. 21, 2015) 14

Delaware Riverkeeper Network v. FERC,
895 F.3d 102 (D.C. Cir. 2018)..... 17, 18

**Elgin v. Department of Treasury*,
567 U.S. 1 (2012)..... 12, 13, 15, 17, 19

Free Enter. Fund v. Public Co. Accounting Oversight Bd.,
561 U.S. 477 (2010) 12, 13, 15, 17

GAF Corp. v. United States,
818 F.2d 901 (D.C. Cir. 1987) 10

Guardian Pipeline v. 529.42 Acres of Land,
210 F. Supp. 2d 971 (N.D. Ill. 2002) 14

Jarkesy v. SEC,
803 F.3d 9 (D.C. Cir. 2015) 11

Media Access Project v. FCC,
883 F.2d 1063 (D.C. Cir. 1989) 12

Millennium Pipeline Co., L.L.C. v. Seggos,
860 F.3d 696 (D.C. Cir. 2017) 3

Minisink Residents for Envtl. Pres. & Safety v. FERC,
762 F.3d 97 (D.C. Cir. 2014) 3

Miriyeva v. U.S. Citizenship & Immigration Servs., No. 19-3351,
2019 WL 7037540 (D.D.C. Dec. 21, 2019) 13

Myersville Citizens for a Rural Cmty., Inc. v. FERC,
783 F.3d 1301 (D.C. Cir. 2015) 3

N.J. Conservation Foundation v. FERC,
353 F. Supp. 3d 289 (D.N.J. 2018) 9, 18

Nat'l Ass'n of Home Builders v. EPA,
786 F.3d 34 (D.C. Cir. 2015) 10

Scahill v. D.C.,
909 F.3d 1177 (D.C. Cir. 2018) 10

Thatcher v. Tennessee Gas Transmission Co.,
180 F.2d 644 (5th Cir. 1950) 7

**Thunder Basin Coal Co. v. Reich*,
510 U.S. 200 (1994) 12, 13, 15, 19

Town of Dedham v. FERC, No. 15-12352,
2015 WL 4274884 (D. Mass. July 15, 2015) 9, 11

Urban v. FERC, No. 17-1005,
2017 WL 6461823 (N.D. Ohio Dec. 19, 2017) 9

Williams Nat. Gas Co. v. City of Okla. City,
890 F.2d 255 (10th Cir. 1989) 11, 13, 14, 15

Yamaha Corp. of Am. v. United States,
961 F.2d 245 (D.C. Cir. 1992) 10

Administrative Cases

Mountain Valley Pipeline, LLC, Order Issuing Certificates and Granting Abandonment Authority,
161 FERC ¶ 61,043 (2017) (Certificate Order) 1, 4, 5, 6, 16, 18

Mountain Valley Pipeline, LLC, Order on Rehearing,
163 FERC ¶ 61,197 (2018) (Rehearing Order) 1, 6, 7

PennEast Pipeline Co.,
170 FERC 61,064 (2020) 19

Statutes

Natural Gas Act

15 U.S.C. § 717f 1, 4

15 U.S.C. § 717f(c) 3, 4

15 U.S.C. § 717f(h) 6, 7

15 U.S.C. § 717f(h) 14

15 U.S.C. § 717r 1, 4, 8, 9, 11, 13, 18

15 U.S.C. § 717r(a) 4

15 U.S.C. § 717r(b) 2, 4

Department of Energy Organization Act

42 U.S.C. § 7171(a)-(b) 2

42 U.S.C. § 7171(b)(1) 2

42 U.S.C. § 7171(e) 2, 3

Regulations

18 C.F.R. § 157.6(d) 3

18 C.F.R. § 375.101(e) 3

18 C.F.R. § 380.10 5

18 C.F.R. § 385.214 5

INTRODUCTION

The complaint filed by Plaintiffs Cletus Woodrow and Beverly Ann Bohon and other landowners (collectively, Plaintiffs) collaterally attacks a ruling issued last year by the U.S. Court of Appeals for the D.C. Circuit, *Appalachian Voices, et al. v. FERC*, No. 17-1271, 2019 WL 847199 (D.C. Cir. Feb. 19, 2019). *Appalachian Voices* upheld certificate orders issued by Defendant Federal Energy Regulatory Commission (FERC or Commission) under section 7 of the Natural Gas Act, 15 U.S.C. § 717f, conditionally authorizing construction of an interstate natural gas pipeline by Defendant Mountain Valley Pipeline, LLC in West Virginia and Virginia. *See Mountain Valley Pipeline, LLC*, Order Issuing Certificates and Granting Abandonment Authority, 161 FERC ¶ 61,043 (2017) (Certificate Order); Order on Rehearing, 163 FERC ¶ 61,197 (2018) (Rehearing Order).

This Court lacks subject matter jurisdiction over Plaintiffs' belated complaint. *See, e.g.*, *Bold All. v. FERC*, No. 17-1822, 2018 WL 4681004, at *1 (D.D.C. Sept. 28, 2018) (Leon, J.) (dismissing similar challenge), *on appeal*, D.C. Cir. No. 18-5322 (in abeyance); *Berkley, et al. v. Mountain Valley Pipeline, LLC, et al*., No. 17-357, 2017 WL 6327829, at *2 (W.D. Va. Dec. 11, 2017) (dismissing similar challenge), *aff'd* 896 F.2d 624 (4th Cir. 2018), *cert. denied* 139 S. Ct. 941 (2019). The Natural Gas Act's exclusive review provision, 15 U.S.C. § 717r—and a uniform line of cases interpreting that provision—dictate that any claim challenging the constitutionality of the statutory scheme under which the Mountain Valley Pipeline was authorized, like any other claim, must have been initially raised to the Commission in the pipeline certification proceeding and subsequently to the U.S. Court of Appeals on review of the FERC certificate orders. Under this exclusive statutory scheme of administrative-followed-by-appellate review, district courts are divested of jurisdiction to "affirm, modify or set aside" a

FERC certificate order. 15 U.S.C. § 717r(b). This is especially true where the appeals court has already exercised its exclusive jurisdiction to affirm the FERC certificate orders at issue, as the D.C. Circuit did in February 2019.

In *Appalachian Voices*, the D.C. Circuit upheld Commission orders authorizing the Mountain Valley Pipeline against numerous challenges, including constitutional eminent domain challenges—such as the ones here—brought by other landowners. Although they had notice and opportunity to do so, Plaintiffs here did not intervene as parties in the Commission proceeding or in the D.C. Circuit proceeding. Had they availed themselves of the Natural Gas Act's review process—as other landowners did—their claims would have been addressed (first) by the agency and (on review) by the D.C. Circuit. Having filed their claims in the wrong court (district court, rather than the appeals court after the conclusion of the FERC proceeding) at the wrong time (over a year after the D.C. Circuit reviewed and upheld the FERC certificate orders), Plaintiffs' complaint must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

BACKGROUND

I. Statutory and Regulatory Background

FERC is an independent regulatory commission consisting of up to five members appointed by the President, with the advice and consent of the U.S. Senate. *See* Department of Energy Organization Act, 42 U.S.C. § 7171(a)-(b) (establishing the Commission and transferring authority to it). Commissioners serve for up to five-year terms, and no more than three may be members of the same political party. *Id*. § 7171(b)(1). Each member of the Commission, including the Chairman, has one vote, and actions of the Commission are determined by majority vote. *Id*. § 7171(e). Pursuant to statute, "a quorum for the transaction of business shall consist

of at least three members present." *Id.* § 7171(e); *accord* 18 C.F.R. § 375.101(e) (defining quorum as "at least three members present").

Under various statutes, the Commission regulates the interstate transmission and wholesale sale of electricity and natural gas, and licenses the construction and operation of hydropower projects and natural gas pipelines and infrastructure. As relevant here, the Natural Gas Act confers on the Commission "'exclusive jurisdiction' over [interstate] transportation and sale [of natural gas], as well as over the rates and facilities of natural gas companies engaged in transportation and sale." *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.3d 1301, 1315 (D.C. Cir. 2015) (citing cases); *see also Millennium Pipeline Co., L.L.C. v. Seggos*, 860 F.3d 696, 698 (D.C. Cir. 2017) ("For any company desiring to construct a natural gas pipeline, all roads lead to FERC. . . . No company or person may construct a natural gas pipeline without first obtaining 'a certificate of public convenience and necessity' from the agency.") (citing 15 U.S.C. § 717f(c)); *Bold All.*, 2018 WL 4681004, at *1 (same).

FERC regulations "set[] out an extensive application process for all [natural gas pipeline] certificates." *Bold All.*, 2018 WL 4681004, at *2 (citing regulations). Applicants submit "technical, economic, and environmental information concerning the project." *Id.* Any interested member of the public may intervene. *Id.* In particular, landowners in the path of the proposed pipeline receive notice regarding the FERC proceeding and are informed of the procedures for participating in the process. *See* 18 C.F.R. § 157.6(d).

At the conclusion of the administrative process, the Commission may issue an order approving a pipeline certificate application "if the public benefits from the project outweigh any adverse effects." *Bold All.*, 2018 WL 4681004, at *2. *See City of Bos. Delegation v. FERC*, 897 F.3d 241, 246 (D.C. Cir. 2018); *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d

97, 101-02 (D.C. Cir. 2014). "Aggrieved" parties—i.e., "parties disappointed with the outcome of the certificate proceeding"—may avail themselves of the Natural Gas Act's procedures for seeking review of the Commission's determination. *Id*. (citing 15 U.S.C. § 717r). "This process is open . . . to interested parties that have intervened in the FERC proceeding." *Id*.

The Natural Gas Act, 15 U.S.C. § 717r, "provides the sole avenue of review for parties aggrieved by FERC orders." *Bold All.*, 2018 WL 4681004, at *4. "An aggrieved party begins by seeking rehearing from the Commission, and 'set[ting] forth specifically the ground or grounds upon which such application is based.'" *Id*. (quoting 15 U.S.C. § 717r(a)). If the Commission denies rehearing, the party may obtain judicial review of the Commission's rehearing order "'in the court of appeals of the United States for any circuit' where the natural-gas company is located or the D.C. Circuit by 'filing . . . a written petition.'" *Id*. (quoting 15 U.S.C. § 717r(b)). Upon the filing of such a petition in the court of appeals, that court has "exclusive" jurisdiction to "affirm, modify, or set aside such order in whole or in part." *Id*. (quoting 15 U.S.C. § 717r(b)). The court of appeals may not consider any "objection to the order of the Commission … unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so." 15 U.S.C. § 717r(b).

II. Procedural Background

A. FERC Proceeding and D.C. Circuit Appeal

In October 2015, Mountain Valley applied to FERC for a certificate under the Natural Gas Act, 15 U.S.C. § 717f(c), authorizing the construction and operation of its proposed Mountain Valley Project in West Virginia and Virginia. *See* Certificate Order, 161 FERC

¶ 61,043. Mountain Valley's application initiated administrative proceedings at FERC governed by the Natural Gas Act, 15 U.S.C. § 717f.

As part of the proceedings, Commission staff issued a Notice of Intent to Prepare an Environmental Impact Statement. 80 Fed. Reg. 23,535 (2015); *see* Certificate Order P (Paragraph) 122. The notice was published in the Federal Register and mailed to 2,846 interested parties, including: federal, state, and local government representatives and agencies; elected officials; regional environmental groups and nongovernmental organizations; Indian Tribes and Native Americans; affected property owners; other interested entities; and local libraries and newspapers. Certificate Order P 122.

Commission staff issued a draft Environmental Impact Statement on September 16, 2016. *See* FERC Docket Nos. CP16-10 and CP16-13 (FERC Accession No. 20160916-3014).[1] Notice of the draft was sent to over three thousand individuals, including the landowner Plaintiffs here. *See* Final Environmental Impact Statement at 1-30, Appendix A (FERC Accession No. 20170623-4000). Notice of the draft environmental impact study informed landowners of their right to intervene as parties in the FERC proceedings. *See* 18 C.F.R. § 380.10, 385.214.

Landowners Plaintiffs were aware of the FERC proceeding and provided comments, but did not intervene,[2] although numerous other parties, including other affected landowners, intervened. *See* Certificate Order, Appendix A (timely intervenors), Appendix B (untimely

[1] Filings in FERC proceedings are available on FERC's website: https://www.ferc.gov/docs-filing/elibrary.asp.

[2] Following issuance of the draft environmental impact statement, Cletus Bohon and Wendell Flora commented at public hearings in November 2016. *See* FERC Accession No. 20161103-4005 (transcript). Wendell Flora and Mary Flora also filed written comments in December 2016. *See* FERC Accession Nos. 20161220-0067 (Wendell Flora), 20161220-0068 (Wendell Flora), and 20161229-0052 (Mary Flora). Cletus Bohon filed additional comments after issuance of the final environmental impact statement in August 2017. *See* FERC Accession No. 20170811-0011.

intervenors). The Commission received extensive public comments regarding the proposed project. *Id*. PP 123 (pre-filing public scoping meeting and pre-filing comments), 127 (public comment sessions and written comments). Among other things, various parties expressed concerns relating to eminent domain and land use; property values; environmental justice; and cultural, air, and water resources.

Upon review of the extensive public comments and the final Environmental Impact Statement prepared by the Commission's Office of Energy Projects, the Commission issued a certificate of "public convenience and necessity" on October 13, 2017, authorizing Mountain Valley to construct and operate the proposed project, subject to compliance with numerous environmental and operational conditions. Certificate Order PP 307-308 and ordering paragraphs.

Multiple parties, including affected landowners (but not Plaintiffs), requested rehearing of the Certificate Order. *See* FERC Docket Nos. CP16-10 and CP16-13. On June 15, 2018, the Commission issued an order addressing the requests for rehearing. Rehearing Order, 163 FERC ¶ 61,197.

In addition to numerous other issues, the Rehearing Order addressed challenges to the eminent domain provision of the Natural Gas Act, 15 U.S.C. § 717f(h). *Id*. PP 63-72. In particular, the Commission addressed arguments that (1) "Congress improperly delegated eminent domain authority to certificate holders;" and (2) "the Commission improperly granted Mountain Valley Pipeline eminent domain authority before determining whether the pipeline can provide just compensation to landowners." *Id*. P 73. The Commission explained that, once the Commission determines that "proposed pipeline facilities are in the public convenience and necessity," the Natural Gas Act, 15 U.S.C. § 717f(h), authorizes the natural gas company "to

acquire the necessary land or property to construct the approved facilities by the exercise of the right of eminent domain if it cannot acquire the easement by an agreement with the landowner." *Id*. P 73.

Further, as the Commission explained, "[i]t is beyond dispute that the federal government has the constitutional power to acquire property by [the] exercise of eminent domain." *Id*. P 75. "The federal government can also delegate the power to exercise eminent domain to a private party, such as the recipient of [a Natural Gas Act] section 7 certificate, when needed to fulfill the certificate." *Id*. (citing *Thatcher v. Tennessee Gas Transmission Co.,* 180 F.2d 644 (5th Cir. 1950) ("There is no novelty in the proposition that Congress . . . may delegate the power of eminent domain to a corporation, which though a private one, is yet, because of the nature and utility of the business functions it discharges, a public utility, and consequently subject to regulation by the Sovereign.")).

Multiple parties timely filed multiple petitions for review of the FERC orders in the U.S. Court of Appeals for the D.C. Circuit. *See Appalachian Voices*, 2019 WL 847199. On review, the D.C. Circuit upheld the Commission's approach on all issues presented. Of particular relevance, the appeals court rejected petitioners' constitutional challenges concerning the exercise of eminent domain in connection with the Mountain Valley Pipeline project. *Id*. at *1-2.

B. Fourth Circuit Dismissal of Constitutional Challenge to Mountain Valley Pipeline for Lack of Jurisdiction

Separately, a group of landowners in the path of the Mountain Valley Pipeline filed a complaint in the U.S. District Court for the Western District of Virginia, challenging the constitutionality of the Natural Gas Act's eminent domain provision, 15 U.S.C. § 717f(h), as an overly broad delegation of authority by Congress to FERC, and as an unconstitutional "sub-

delegation" by FERC to Mountain Valley Pipeline. *See Berkley*, 2017 WL 6327829, at *2 (describing claims).

The district court did not reach the merits of any of these issues. Instead, the court found that it lacked subject matter jurisdiction because Congress precluded district court jurisdiction in 15 U.S.C. § 717r "by creating a statutory scheme of administrative adjudication and delayed judicial review in a particular court." *Id.* at *5 (quoting *Bennett v. U.S. Sec. & Exch. Comm'n*, 844 F.3d 174, 178 (4th Cir. 2016) (internal quotations removed)). The court concluded that the claims before it, "including [the] constitutional challenges, are subject to the [Natural Gas Act's] exclusivity provision." *Id.* at *8.

The *Berkley* parties appealed to the Fourth Circuit. *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 629 (4th Cir. 2018). The Fourth Circuit agreed that the district court lacked subject matter jurisdiction because "Congress intended to divest district courts of jurisdiction to hear the claims pursued by [the plaintiffs] and instead intended those claims to be brought under the statutory review scheme established by the Natural Gas Act." *Id.* at 633.

The *Berkley* parties then petitioned the Supreme Court for a writ of *certiorari*, seeking review on "key constitutional issues," including "[t]he federal non-delegation doctrine, prohibiting Congress from delegating away its legislative power, particularly to a private entity such as [Mountain Valley Pipeline]." *See* Petition for Writ of Certiorari, *Berkley v. FERC*, No. 18-561, 2018 WL 5786109, at *2-3. The Supreme Court denied certiorari. *Berkley v. FERC*, 139 S. Ct. 941 (Jan. 22, 2019).

ARGUMENT

I. This Court must dismiss the complaint for lack of subject matter jurisdiction because the Natural Gas Act divests district courts of jurisdiction to "affirm, modify, or set aside" FERC pipeline certificate orders.

The complaint before the Court is the latest in a series of district court cases brought by landowners and communities challenging the Commission's certification of natural gas pipelines. All of these cases have been dismissed because the Natural Gas Act's exclusive appellate review provision, 15 U.S.C. § 717r, forecloses challenges to FERC certificate orders in district court—including constitutional challenges. *See, e.g.*, *Berkley*, 2017 WL 6327829, at *5-8 (dismissing constitutional challenge to Natural Gas Act's eminent domain provision in connection with FERC's authorization of Mountain Valley Pipeline), *aff'd*, 896 F.3d 624 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 941 (2019); *Adorers of the Blood of Christ v. FERC*, 283 F. Supp. 3d 342, 345 (E.D. Pa. 2017) (dismissing claims brought under the Religious Freedom Restoration Act challenging FERC's authorization of natural gas pipeline), *aff'd*, 897 F.3d 187 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1169 (2019); *Bold All.*, 2018 WL 4681004, at *1, 4 (dismissing "a bevy of constitutional and statutory claims," including eminent domain claims, concerning FERC's certification of the Mountain Valley Pipeline and Atlantic Coast Pipeline); *N.J. Conservation Foundation v. FERC*, 353 F. Supp. 3d 289, 295-300 (D.N.J. 2018) (dismissing constitutional eminent domain challenge to FERC's certification of natural gas pipeline); *Urban v. FERC*, No. 17-1005, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017) (dismissing complaint challenging FERC's authorization of natural gas pipeline); *Town of Dedham v. FERC*, No. 15-12352, 2015 WL 4274884, at *1-2 (D. Mass. July 15, 2015) (dismissing complaint and denying motion for preliminary injunction for stay of pipeline construction while FERC considered town's request for rehearing of certificate order).

Dismissal is especially warranted here. Among other things, Plaintiffs request a declaration that "any delegation of eminent domain power . . . to any and all private actors, including [Mountain Valley Pipeline], is facially unconstitutional." Complaint at 14. This relief would effectively overturn the D.C. Circuit's ruling in *Appalachian Voices,* which upheld (in all respects) the FERC certificate orders authorizing the Mountain Valley Pipeline. Indeed, *Appalachian Voices* considered, and rejected, eminent domain challenges brought by other landowners who followed the exclusive review procedures set forth in the Natural Gas Act. *See Appalachian Voices*, 2019 WL 847199, at *1-2.

Moreover, Plaintiffs' claims are substantially similar to those raised in *Bold Alliance,* 2018 WL 4681004, and dismissed for lack of subject matter jurisdiction. In particular, Plaintiffs Wendell and Mary Flora were also plaintiffs in *Bold Alliance*, where they sought a "declaratory judgment that [Mountain Valley Pipeline's] exercise of eminent domain violates constitutional separation-of-powers principles, including the private nondelegation doctrine." Complaint at P 86, *Bold All*., 2018 WL 468104. In light of the D.C. Circuit's resolution of issues relating to eminent domain in *Appalachian Voices,* and Judge Leon's dismissal of substantially similar claims in *Bold Alliance,* 2018 WL 4681004, there is no basis for hearing Plaintiffs' belated, duplicative complaint at this juncture. *See Scahill v. D.C.*, 909 F.3d 1177, 1181 (D.C. Cir. 2018) ("Issue preclusion occurs when (1) the same issue was 'contested by the parties and submitted for judicial determination in [a] prior case,' (2) the issue was 'actually and necessarily determined by a court of competent jurisdiction in that prior case,' and (3) preclusion does not result in 'basic unfairness to the party bound by the first determination.'") (quoting *Yamaha Corp. of Am. v. United States,* 961 F.2d 245, 254 (D.C. Cir. 1992)); *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015) ("Issue preclusion applies to threshold jurisdictional

issues like standing as well as issues going to a case's merits."); *GAF Corp. v. United States*, 818 F.2d 901, 912 (D.C. Cir. 1987) ("The judgment ordering dismissal, will, however, have preclusive effect as to matters actually adjudicated; it will, for example, preclude relitigation of the precise issue of jurisdiction that led to the initial dismissal.").

As the court explained in *Bold Alliance*, "Congress could hardly have been more clear" that the courts of appeals have "exclusive" jurisdiction to hear claims challenging FERC certificate orders. *Bold All.*, 2018 WL 4681004, at *4. And "[t]hat is true for 'all issues inhering in the controversy.'" *Id*. (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958)); *see also Town of Dedham*, 2015 WL 4274884, at *1 ("It is well-settled that § 717r's exclusivity provision forecloses judicial review of a FERC certificate in district court.") (citing *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 [§ 717r(b)] is exclusive in the courts of appeals once the FERC certificate issues.")).

"Federal courts are courts of limited jurisdiction, possessing only those powers specifically granted to them by either the U.S. Constitution or Congress." *City of Tacoma, Washington v. Nat'l Marine Fisheries Serv.*, 383 F. Supp. 2d 89, 91 (D.D.C. 2005). Because Congress provided the Plaintiffs an opportunity to advance their constitutional claims in an Article III court (15 U.S.C. § 717r), this Court's general jurisdiction under 28 U.S.C. § 1331 must yield to the more specific provisions of the Natural Gas Act. *See Bold All.*, 2018 WL 4681004, at *4 ("When Congress provides for exclusive review in a court of appeals, that

specific grant of jurisdiction displaces the general federal question statute, 28 U.S.C. § 1331."); *City of Tacoma*, 383 F. Supp. 2d at 92 ("It is well-established that when two jurisdictional statutes provide different avenues for judicial review, courts apply the more specific legislation."); *see also Jarkesy v. SEC*, 803 F.3d 9, 15 (D.C. Cir. 2015) ("If a special statutory review scheme exists, . . . 'it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies.'" (quoting *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979)); *Media Access Project v. FCC*, 883 F.2d 1063, 1067 (D.C. Cir. 1989) ("The courts uniformly hold that statutory review in the agency's specially designated forum prevails over general federal question jurisdiction in the district courts.").

II. The Supreme Court's *Thunder Basin* framework confirms the conclusion that the Natural Gas Act bars the exercise of district court jurisdiction over Plaintiffs' claims.

As the Third and Fourth Circuits have recently held, the framework announced by the Supreme Court in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), confirms that constitutional claims inhering in FERC pipeline certificate orders—such as the ones at issue here—must be channeled through the Natural Gas Act's exclusive agency-followed-by-appellate-review process. *See Adorers of the Blood of Christ*, 897 F.3d at 195-97; *Berkley*, 896 F.3d at 629-33.

"Over the past thirty years, the Supreme Court has issued a trio of cases addressing when Congress intends to divest district courts of jurisdiction over claims that should instead proceed exclusively through administrative review regimes." *Berkley*, 896 F.3d at 629 (discussing *Thunder Basin*; *Elgin v. Department of Treasury*, 567 U.S. 1 (2012); and *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010)). District courts must first determine

whether Congress's intent to "allocate[] initial review to an administrative body" is "'fairly discernible in the statutory scheme.'" *Thunder Basin*, 510 U.S. at 207 (citations and footnote omitted). Second, district courts must determine, using a three-factor test, whether the claims "are of the type Congress intended to be reviewed within this statutory structure." *Id*. at 212. *See Elgin*, 567 U.S. at 9-22; *Free Enter. Fund*, 561 U.S. at 489-91; *see also Bennett*, 844 F.3d at 178-81 (4th Cir. 2016) (synthesizing *Thunder Basin*, *Free Enterprise*, and *Elgin*); *see also Miriyeva v. U.S. Citizenship & Immigration Servs.*, No. 19-3351, 2019 WL 7037540, at *7 (D.D.C. Dec. 21, 2019) (finding special statutory review scheme for naturalization applications (8 U.S.C. § 1421) precluded district court subject matter jurisdiction for separate Administrative Procedure Act and constitutional claims), *appeal docketed*, No. 20-5032 (D.C. Cir. 2020).

As discussed below, each step of the *Thunder Basin* analysis confirms that dismissal is required here.

A. Congress intended initial review of Natural Gas Act challenges to occur at FERC followed by judicial review in the U.S. Courts of Appeals.

Congressional intent to allocate initial review to FERC is demonstrated in the Natural Gas Act, which prescribes specific rules for seeking judicial review of a FERC certificate order. *See Williams Nat. Gas Co.*, 890 F.2d at 262 (citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-40 (1958)) (observing that Congress may prescribe the procedures and conditions for judicial review of administrative orders—including by limiting which courts may consider those challenges). Specifically, a party aggrieved by the Certificate Order 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 circuit court of appeals." *Id*. § 717r(b) (providing for judicial review in the D.C. Circuit or in the circuit where the natural gas company

is located or has its principal place of business). The court of appeals then "has 'exclusive' jurisdiction 'to affirm, modify, or set aside such order in whole or in part.'" *Am. Energy*, 622 F.3d at 605 (quoting 15 U.S.C. § 717r(b)). *See Adorers of the Blood of Christ*, 897 F.3d at 194-97 (concluding that the district court lacked jurisdiction to hear the plaintiffs' claim that the siting of a pipeline violated the Religious Freedom Restoration Act of 1993).

As the Tenth Circuit has stated, "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*, 890 F.2d at 262. *Accord Am. Energy*, 622 F.3d at 605 ("exclusive means exclusive"); *Constitution Pipeline Co., LLC v. A Permanent Easement*, No. 14-2119, 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."); *see also City of Tacoma*, 357 U.S. at 335-36 (holding that with respect to the similar, FERC-administered Federal Power Act, Congress "prescribed [that] the complete and exclusive mode for judicial review of the Commission's orders" lies with the courts of appeals).

With respect to FERC pipeline certificate proceedings, the only jurisdiction provided to district courts under the Natural Gas Act relates to eminent domain proceedings in connection with a valid, FERC-issued certificate. *See* 15 U.S.C. § 717f(h) (providing that holder of a FERC certificate that is unable to reach agreement with affected landowners regarding compensation for the necessary right-of-way may initiate an eminent domain proceeding in "the district court of the United States for the district in which such property may be located"). However, the "eminent domain authority granted the district courts under [section 717f(h)] does not provide challengers with an additional forum to attack the substance and validity of a FERC order." *Williams*, 890 F.2d at 264 ("The district court's function under the statute is not appellate but,

rather, to provide for enforcement."). *Accord Guardian Pipeline v. 529.42 Acres of Land*, 210 F. Supp. 2d 971, 974 (N.D. Ill. 2002) ("The jurisdiction of this court is limited to evaluating the scope of the FERC [c]ertificate and ordering condemnation as authorized by that certificate. . . . This court's role is mere enforcement." (citations omitted)).

B. The claims in this case are of the type Congress intended to be reviewed within the Natural Gas Act review structure.

With regard to whether the Plaintiffs' constitutional claims "are of the type Congress intended to be reviewed" (*Thunder Basin*, 510 U.S. at 212) exclusively by a court of appeals, the Supreme Court has identified three factors relevant to that inquiry: whether "a finding of preclusion could foreclose all meaningful judicial review," whether the claims are "wholly collateral to a statute's review provisions," and whether the claims are "outside the agency's expertise." *Elgin*, 567 U.S. at 15 (quoting *Free Enter. Fund*, 561 U.S. at 489; and *Thunder Basin*, 510 U.S. at 212-13).

1. Precluding district court subject matter jurisdiction would not foreclose all meaningful review because the Natural Gas Act allows for review in the appellate courts.

Plaintiffs had the opportunity to intervene in the Commission's proceedings reviewing the Mountain Valley Project. Moreover, given that the D.C. Circuit issued its *Appalachian Voices* decision, on review of the Commission's Mountain Valley certificate orders in February 2019, the Plaintiffs could have received meaningful review and a court ruling on their claims well before they filed their complaint in this case. *See Bold All.*, 2018 WL 4681004, at *4 ("As our Circuit Court put it, '[t]he policy behind having a special review procedure in the first place . . . disfavors bifurcating jurisdiction over various substantive grounds between district court and the court of appeals" because of "[t]he likelihood of duplication and inconsistency.'") (quoting *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979); *see also Williams*, 890 F.2d

at 262-63 (holding that judicial review over "all issues inhering in the controversy" before FERC is confined to the court of appeals because "coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts").

The U.S. Courts of Appeals are well-equipped to resolve constitutional claims when reviewing FERC orders. *See, e.g.*, *Appalachian Voices*, 2019 WL 847199; *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000) (rejecting constitutional eminent-domain argument on review of final FERC orders issuing certificate for pipeline construction). These cases illustrate the procedure that parties with constitutional concerns regarding pending applications must follow in order to obtain agency and judicial review. Specifically, parties must present their concerns to the Commission during the administrative proceeding—and request rehearing if aggrieved by agency action—before petitioning the appropriate court of appeals for review. Here, although the FERC proceeding regarding the Mountain Valley Project certificate application was open to all interested parties,[3] the Plaintiffs failed to intervene in the FERC proceeding. *See Adorers of the Blood of Christ*, 897 F.3d at 195 ("By failing to avail themselves of the protections [under the Natural Gas Act's procedural regime], the Adorers have foreclosed judicial review of their substantive [Religious Freedom Restoration Act] claims.").

[3] Any interested individual or entity may intervene and participate as a party in a FERC certificate proceeding. *See* 18 C.F.R. § 385.214. In this case, numerous parties intervened and filed comments regarding the Mountain Valley Project application, and the Commission addressed those comments in the Certificate Order. *See* Certificate Order PP 29-310; *see also supra* p. 5 n.2 (Plaintiffs submitted comments to FERC but never intervened as parties eligible to participate in agency rehearing or judicial review).

2. The Plaintiffs' claims are not wholly collateral to the Natural Gas Act's review provisions.

The claims in this case are not "wholly collateral to" the Natural Gas Act's statutory review scheme. Although the Plaintiffs' frame their challenge as a request for a "declaratory judgment in their favor against the Defendants declaring that Congress's overly broad delegation of legislative powers to FERC was and is facially unconstitutional," their complaint seeks a ruling that "all such certificates," including the Mountain Valley certificate that affects them, are "void ab initio." Complaint at 14-15. Thus, the Plaintiffs' constitutional claims here are "the means by which they seek to vacate the granting of the [c]ertificate to" Mountain Valley; "[t]herefore, their claims are not wholly collateral to the Natural Gas Act's statutory review scheme." *Berkley*, 896 F.3d at 632.

Elgin strongly supports this analysis. There, as here, the constitutional claims were "the vehicle" by which complainants sought "to reverse" an agency action. *Elgin*, 567 U.S. at 22. By contrast, in *Free Enterprise Fund*, the Supreme Court allowed a constitutional challenge to proceed in federal district court because the challengers had no other meaningful mechanism to obtain review. 561 U.S. at 490-91. The challengers objected to the structure of the Public Company Accounting Oversight Board (Board), but the statutory-review scheme provided "only for judicial review of [Securities and Exchange] Commission action," not all actions of the Board. *Id*. at 490. Moreover, the challengers did not object to any reviewable Board rule or standard, so they could have obtained review only by subjecting themselves to a sanction—a step the Court concluded they were not required to take. *Id*. By contrast, the Natural Gas Act provides for review of FERC orders, including the very orders Plaintiffs belatedly seek to block—FERC's approval of Mountain Valley's certificate application.

Plaintiffs misread the cases they cite, *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102 (D.C. Cir. 2018), and *NO Gas Pipeline v. FERC*, 756 F.3d 764 (D.C. Cir. 2014), in support of jurisdiction. *See* Complaint at 4. Rather than demonstrating jurisdiction here, *NO Gas Pipeline* and *Delaware Riverkeeper* merely illustrate one category of claims that are collateral to the Natural Gas Act's statutory review scheme.

NO Gas Pipeline and *Delaware Riverkeeper* found district court jurisdiction appropriate where parties alleged that the funding mechanism of the Omnibus Budget Reconciliation Act of 1986 (Budget Act) creates structural bias by incentivizing the FERC to approve applications in order to secure additional funding. *See Delaware Riverkeeper*, 895 F.3d at 107 (upholding district court's dismissal of claims against FERC under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, but explaining that district court had jurisdiction to review claim that "target[ed] the Budget Act's funding mechanism rather than any individual decision to award a certificate"); *NO Gas Pipeline*, 756 F.3d at 768-69 (holding that the bias claim "does not come within the jurisdictional grounds of [the Natural Gas Act]" because it really is a "statutory quarrel . . . against the Budget Act and the financial structure that it creates").

Here, Plaintiffs' challenge centers on the Natural Gas Act, not some other law. Consistent with the uniform set of cases interpreting the scope of the judicial review provisions of that Act, 15 U.S.C. § 717r, Plaintiffs' claims are barred. *See, e.g., N.J. Conservation Foundation*, 353 F. Supp. 3d at 300 ("Indeed, constitutional challenges to FERC's actions, or the NGA itself for that matter, have all been found to be subject to the jurisdictional provision of the NGA.").

3. The Plaintiffs' claims are subject to threshold questions that are well within FERC's area of expertise.

The Commission can bring its expertise to bear on the claims advanced by the Plaintiffs. To be sure, FERC is not an Article III court and lacks the power to declare a provision of the Natural Gas Act unconstitutional. *See* Certificate Order P 63 ("Notwithstanding the fact that we addressed a takings argument raised in Transco and here, such a question is beyond our jurisdiction: only the courts can determine whether Congress' action in passing section [717f(h)] of the [Natural Gas Act] conflicts with the Constitution."). *See also PennEast Pipeline Co.*, Order on Petition for Declaratory Order, 170 FERC ¶ 61,064, at PP 55-56 (2020) (declining to reach constitutional questions surrounding delegation of eminent domain to condemn state land but discussing implications). But as the Fourth Circuit has observed, agencies can nevertheless "apply [their] expertise to threshold questions that may accompany a constitutional claim against a federal statute, even when the agency disclaimed authority to resolve those constitutional claims." *Berkley*, 896 F.3d at 633 (quotations and citations omitted). For example, FERC could have found that Mountain Valley Pipeline did not meet the standards for a Natural Gas Act section 7 certificate, "thereby disposing of the case before reaching the constitutional question." *Id.*; *see also Elgin*, 567 U.S. at 22-23 ("Of particular relevance here, preliminary questions unique to the employment context may obviate the need to address the constitutional challenge."); *Thunder Basin*, 510 U.S. at 214-15 (similar).

CONCLUSION

The Plaintiffs should not be permitted to circumvent the Natural Gas Act's exclusive statutory review provisions (15 U.S.C. § 717r(a)-(b)), requiring identification of all issues first to the Commission and then, on review of the Commission's certificate orders, to the court of

appeals. Accordingly, this case—filed in the wrong court at the wrong time—should be dismissed for lack of jurisdiction.

Respectfully submitted,

James P. Danly
General Counsel

Robert H. Solomon
Solicitor

/s/ Scott Ray Ediger
Scott Ray Ediger
Susanna Y. Chu
Attorneys

Federal Energy Regulatory Commission
Washington, DC 20426
Tel.: (202) 502-8509
Fax: (202) 273-0901
scott.ediger@ferc.gov

March 9, 2020

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cletus Woodrow and Beverly Ann Bohon, *et al.*,	)	
Plaintiffs	)	
v.	)	Case No. 1:20-cv-00006-JEB
Federal Energy Regulatory Commission, *et al.*,	)	
Defendants	)	

[PROPOSED] ORDER

Upon consideration of Federal Defendants' motion to Motion to Dismiss for Lack of Subject Matter Jurisdiction, it is hereby ORDERED that the motion is GRANTED. Plaintiffs' Complaint is hereby DISMISSED with prejudice.

_____
Hon. James E. Boasberg

Counsel:

Mia Yugo
GENTRY LOCKE
P.O. Box 40013
Roanoke, VA 24011
540-983-9444
Email: yugo@gentrylocke.com

Thomas J. Bondurant , Jr.
GENTRY LOCKE
10 Franklin Road, SE
Suite 900
Roanoke, VA 24011
540-983-9389

John R. Thomas , Jr.
HAFEMANN MAGEE & THOMAS, LLC
11 Franklin Road
Suite 200
Roanoke, VA 24011

Counsel for Plaintiffs

Brian Dennis O'Neill
VAN NESS FELDMAN LLP
1050 Thomas Jefferson Street, NW
Suite 700
Washington, DC 20007
202-298-1983
Fax: 202-338-2361
Email: bdo@vnf.com

Wade W. Massie
PENN, STUART & ESKRIDGE
P.O. Box 2288
Abingdon, VA 24212
(276) 623-4409
Fax: (276) 628-5621
Email: wmassie@pennstuart.com

Counsel for Defendants Mountain Valley Pipeline, LLC

Scott Ediger
Susanna Y. Chu
FEDERAL ENERGY REGULATORY COMMISSION
888 First Street, NE
Washington, DC 20426
202-502-8509
Email: scott.ediger@ferc.gov

Counsel for Defendants Federal Energy Regulatory Commission and Chairman Neil Chatterjee, in his official capacity

CERTIFICATE OF SERVICE

I hereby certify that, on March 9, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Scott Ray Ediger
Scott Ray Ediger
Attorney

Federal Energy Regulatory Commission
Washington, DC 20426
Tel: (202) 502-8509
Fax: (202) 273-0901
scott.ediger@ferc.gov

March 9, 2020