



ALGONQUIN GAS TRANSMISSION, LLC

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June 26, 2015

**CERTIFICATE OF CONFERENCE**

In accordance with Local Rule 7(a)(2), I hereby certify that on June 25, 2015, I conferred with counsel for Plaintiff, the Town of Dedham, Massachusetts, and unsuccessfully attempted in good faith to resolve or narrow the issue herein.

/s/ James T. Finnigan  
James T. Finnigan

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the CM/ECF system on June 26, 2015 will be served electronically to the registered participants as identified on CM/ECF.

/s/ James T. Finnigan  
James T. Finnigan



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## INTRODUCTION

The Plaintiff in this case, the Town of Dedham, Massachusetts (“Dedham” or the “Town”), is unhappy that the Federal Energy Regulatory Commission (“FERC”) authorized Algonquin to begin construction of (and eventually operate) a critical natural gas infrastructure project. That project includes a pipeline that will traverse the Town’s boundaries. Evidently impatient or dissatisfied with the Natural Gas Act’s detailed procedures for obtaining judicial review of FERC’s orders—which vest the U.S. Courts of Appeals with “exclusive” jurisdiction over such challenges—Dedham seeks to invoke the jurisdiction of this District Court in a manner unknown in eight decades of Natural Gas Act jurisprudence.

To do so, Dedham departs from on-point guidance from the First Circuit and its sister courts, which hold that subject-matter jurisdiction to review claims associated with FERC certificate orders lies exclusively in the U.S. Courts of Appeals. Those authorities give Dedham clear guidance on where its remedy, if any, lies—i.e., the Court of Appeals. Tellingly, Dedham has not even attempted to obtain relief in that forum.

Dedham invokes this novel jurisdictional theory in seeking a highly unusual form of relief: a judicial “injunction” commanding a federal administrative agency to issue an *administrative* stay of the agency’s own orders. Contrary to basic principles of exhaustion of administrative remedies codified in the Natural Gas Act, however, Dedham seeks such relief from this Court without even having *asked* FERC in the first instance.

The Complaint exhibits a wide range of fatal flaws, including a lack of jurisdiction and failure to allege a valid claim for relief. But because this Court has an obligation to assure itself of jurisdiction in the first instance, it can and should dismiss the Complaint on that basis.

## BACKGROUND

### **I. The Natural Gas Act Creates Exclusive Federal Jurisdiction Over Interstate Natural Gas Pipeline Infrastructure Projects.**

Recognizing that “[f]ederal regulation in matters relating to the transportation [and sale] of natural gas . . . in interstate and foreign commerce [wa]s necessary in the public interest,” Congress enacted the Natural Gas Act (“NGA”) in 1938. 15 U.S.C. § 717(a). The NGA established a comprehensive federal regulatory scheme for the interstate transportation and sale of natural gas. 15 U.S.C. § 717(b); *see also* *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-01 (1988).

Under that scheme, “natural gas companies are subject to the exclusive jurisdiction of [FERC],” *Islander E. Pipeline Co., LLC v. Conn. Dep’t of Env’tl. Prot.*, 482 F.3d 79, 84 (2d Cir. 2006), and may not “construct[]” or “operate” any facilities subject to FERC’s jurisdiction unless they have first received “a certificate of public convenience and necessity issued by [FERC] authorizing such acts or operations.” 15 U.S.C. § 717f(c). The certificate proceeding is the “heart” of the NGA, and requires FERC “to evaluate all factors bearing on the public interest.” *Atlantic Refining Co. v. Public Serv. Comm’n of the State of New York*, 360 U.S. 378, 388, 391 (1959).

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

**II. The Natural Gas Act Creates an Exclusive Pathway for Judicial Review of FERC Actions on Certificate Orders in the U.S. Courts of Appeals.**

The NGA contains a highly reticulated process by which parties aggrieved by FERC action on a certificate may seek judicial review. First, a party “aggrieved by an order issued by [FERC]” must apply to the Commission “for a rehearing . . . after issuance of that order.” 15 U.S.C. § 717r(a). The rehearing request must “set forth specifically the ground or grounds upon which such application is based,” and is a mandatory prerequisite to invoking federal-court jurisdiction. “No proceeding to review any order of [FERC] shall be brought by any person, unless such person shall have made application to [FERC] for a rehearing thereon.” *Id.* A party “aggrieved by an order issued by [FERC] . . . may obtain a review of such order in the *court of appeals of the United States.*” “[U]pon filing of [a] petition [for review] such court *shall have jurisdiction*, which upon the filing of the record with it *shall be exclusive*, to affirm, modify, or set aside such order in whole or in part.” *Id.* § 717r(b) (emphases added). “No objection . . . shall be considered by the court unless such objection shall have been urged before [FERC] in the application for rehearing unless there is reasonable ground for failure to do so.” *Id.*

The Act also provides that district courts have “exclusive jurisdiction” over “all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.” 15 U.S.C. § 717u.

**III. In March 2015, FERC Issued a Certificate Authorizing Algonquin to Construct and Operate the AIM Project.**

Following years of pre-filing and certificate proceedings, the preparation of an exhaustive Environmental Impact Statement, and a lengthy period of public input and comment, on March 3, 2015, FERC issued a Certificate authorizing Algonquin to construct and operate the AIM Project (or “Project”). The Project involves replacing 29.2 miles of existing pipeline,

installing 7.4 miles of new pipeline, upgrading six existing compressor stations, constructing three new metering stations, and modifying numerous existing metering facilities in New York, Connecticut, Rhode Island, and Massachusetts. *See* Dkt. No. 3, Ex. 1. The Project will enable Algonquin to transport up to 342,000 dekatherms of natural gas daily from New Jersey facilities to various delivery points in Connecticut, Rhode Island, and Massachusetts, to meet increased demand and to serve critical need.

As part of the AIM Project, Algonquin will install 4.1 miles of 16-inch diameter pipeline and 0.8 miles of 24-inch diameter pipeline in the Towns of Westwood and Dedham and the West Roxbury section of the City of Boston. Collectively, these segments are colloquially known as the “Lateral” or the “West Roxbury Lateral.”

The Town of Dedham intervened in the FERC proceedings involving the AIM Project, and submitted comments opposing the Project on grounds that it was unnecessary and failed to account for alternate routes to reduce residential impact. *See* Exhibit A, attached hereto. After FERC issued the Certificate—which accounted for these concerns by exhaustively considering (and rejecting as disadvantageous) alternative routes, and requiring Algonquin to take specific measures (consulting with municipalities, providing construction schedules, preparing traffic management plans, and providing police details) to minimize construction “impacts to less than significant levels,” *see* Dkt. No. 3, Ex. 1 at 6-7—the Town filed a request for rehearing on April 2, 2015, raising narrower arguments about the “scope of review of alternatives to the Project,” the resolution and definition of specific mitigation measures, the adequacy of FERC’s review of safety hazards, and whether public convenience was sufficiently shown. *See* Dkt. No. 3, Ex. 3. On May 1, 2015, FERC granted Dedham’s request for a rehearing only “to afford additional time for consideration” and “for the limited purpose of further consideration.” *See* Dkt. No. 3,

Ex. 4. FERC has not yet taken any final action on Dedham’s request for rehearing, or the numerous other rehearing requests filed simultaneously with it.

On June 8, 2015, Algonquin requested a Notice to Proceed from FERC, to allow it to start construction of certain segments of the AIM Project. *See* Dkt. No. 3, Ex. 5. Over the Town’s opposition, *see* Dkt. No. 3, Ex. 6, FERC issued a Partial Notice to Proceed on June 11, 2015, *see* Dkt. No. 3, Ex. 7, prompting Dedham to file this suit. *See* Complaint [Dkt. No. 1]. At no point in these proceedings has the Town sought an administrative stay from FERC.

### ARGUMENT

#### **I. The District Court Lacks Jurisdiction Because the Lawsuit Falls Within the Natural Gas Act’s Statutory Review Provision, which Gives Exclusive Jurisdiction to the Courts of Appeals.**

Under well-settled case law, because the Town’s claims for relief fall within the NGA’s statutory review provision—vesting exclusive jurisdiction to review challenges to FERC certificate orders in the Courts of Appeals—this Court lacks subject-matter jurisdiction and must dismiss the Complaint with prejudice under Federal Rule of Civil Procedure 12(b)(1).

##### A. The Natural Gas Act’s statutory review provision vests exclusive authority to review FERC certificate orders in the U.S. Courts of Appeals.

The NGA’s statutory review provision vests *exclusive* authority to review a FERC certificate order in the U.S. Courts of Appeals. In particular, § 717r prescribes a detailed set of prerequisites before a party may invoke federal-court jurisdiction to challenge FERC’s actions in issuing a certificate order. A party must timely seek rehearing from FERC on any claim of error that it plans to pursue on judicial review. Only after FERC has acted on the rehearing request may that party “obtain a review of such order in the *court of appeals of the United*

*States.*” 15 U.S.C. § 717r(b) (emphases added). Filing a petition for review in a Court of Appeals grants it “jurisdiction,” which upon the filing of the record “shall be exclusive.” *Id.*<sup>1</sup>

Courts have consistently read § 717r to create the exclusive mechanism for judicial review of a broad range of challenges relating to FERC certificate orders, and to establish that district courts lack jurisdiction over such suits. For example, in *American Energy Corp. v. Rockies Express Pipeline LLC*, the Sixth Circuit held that a district court lacked jurisdiction over a coal company’s claims for equitable relief associated with a FERC certificate authorizing construction of a natural gas pipeline. *See* 622 F.3d 602, 605 (2010). As here, the plaintiffs sought to enjoin construction of a natural gas pipeline authorized by FERC, alleging that construction would cause harm to their property that “their FERC appeal [in the D.C. Circuit] . . . can[not] compensate.” *Id.* at 604. The Sixth Circuit made “short work” of the claims for injunctive relief, observing that FERC had addressed “those same claims . . . in its original order granting the certificate” and on rehearing. Under the NGA’s “reticulated” review procedures, appellate courts have “exclusive” jurisdiction to consider those challenges, notwithstanding the plaintiff’s allegation that such review would not fully remedy their alleged harms. *Id.* at 605; *see also id.* (“Exclusive means exclusive[.]”).

*Consolidated Gas Supply Corp. v. FERC* reached the same conclusion as to a district-court lawsuit seeking an injunction against FERC. There, a district court granted injunctive relief, but the Fourth Circuit promptly reversed, adhering to the “uniform construction given the statute” and holding that § 717r(b) “vests *exclusive jurisdiction* to review all decisions of

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<sup>1</sup> That filing the record gives a particular court of appeals exclusive jurisdiction vis-à-vis any other circuits where the suit might have been brought does not open the door to district court jurisdiction. As courts have explained, “[j]udicial review under § 19(b) is exclusive in the courts of appeals *once the FERC certificate issues.*” *Williams Natural Gas Co. v. City of Oklahoma City*, 890 F.2d 255, 262 (10th Cir. 1989) (emphasis added).

[FERC] in the circuit court of appeals.” “[T]here is *no area of review*, whether relating to final or preliminary orders, available in the district court.” 611 F.2d 951, 957 (4th Cir. 1979) (emphasis added); *see also id.* (“the district court was without jurisdiction to interfere with [FERC’s] proceedings through the issuance of an injunction”). The Fourth Circuit rejected the suggestion that “preliminary matters” in ongoing FERC proceedings (i.e., proceedings that had not yet culminated in final agency action) were “by implication within the jurisdiction of the district court.” *Id.* at 958.

So too in *Williams Natural Gas Co. v. City of Oklahoma City*, where the 10th Circuit was “hard pressed to formulate a doctrine with a more expansive scope” than the rule that “[j]udicial review . . . is exclusive in the courts of appeals once the FERC certificate issues.” 890 F.2d 255, 262 (10th Cir. 1989); *see also id.* at 264 (“a collateral challenge to the FERC order [can]not be entertained by the federal district court”); *see also Millennium Pipeline Co. v. Certain Permanent & Temp. Easements*, 777 F. Supp. 2d 475, 481 (W.D.N.Y. 2011) (“[a] district court’s role in proceedings involving FERC certificates is circumscribed by statute”); *Kansas 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”).

B. Where Congress has vested exclusive jurisdiction in the Courts of Appeals, suits seeking to force agency action are also limited to appellate courts.

In a separate line of cases, the First Circuit and other courts nationwide have held that where Congress has vested exclusive jurisdiction in the Courts of Appeals to review *final* agency action, lawsuits seeking equitable relief (e.g., a judicial order *forcing* agency action) may only be brought in the Courts of Appeals—typically by an original proceeding seeking a

writ of mandamus. In *Sea Air Shuttle Corp. v. United States*, the First Circuit explained that, where Congress has made the U.S. Courts of Appeals the exclusive forum for review of agency action, a party seeking to challenge agency *inaction* must seek a writ of mandamus from the appellate court. See 112 F.3d 532, 535, 538 (1st Cir. 1997) (citing *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) (“*TRAC*”)); accord *In re Sierra Club, Inc.*, No. 12-1860, 2013 WL 1955877, at \*1 (1st Cir. May 8, 2013).<sup>2</sup>

As *Sea Air Shuttle* explained, “[i]t is well established that the exclusive jurisdiction given to the courts of appeals to review [agency] actions also extends to lawsuits alleging [agency] delay in issuing final orders.” *Sea Air Shuttle*, 112 F.3d at 535. The absence of a private right of action under a particular statutory scheme, the court further explained—as here—confirms a “congressional intent to limit review of [an agency’s] handling of complaints to the scheme set out in [the statute]” involving review by the Court of Appeals. *Id.* at 536.

This line of cases draws on the D.C. Circuit’s seminal *TRAC* decision, which held that “[b]ecause the statutory obligation of a Court of Appeals to review on the merits may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction.” 750 F.2d at 76. The D.C. Circuit explained, however, that such review is exclusive: “[b]y lodging review of agency action in the Court of Appeals, Congress manifested an intent that the appellate court exercise sole jurisdiction over the class of claims covered by the statutory grant of review power. It would be anomalous to hold that this grant of authority only strips the District Court of general federal

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<sup>2</sup> See also *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 187 (2d Cir. 2001) (statutes that “vest judicial review of administrative orders exclusively in the courts of appeals also preclude district courts from hearing claims that are ‘inescapably intertwined’ with review of such orders”).

question jurisdiction . . . when the Circuit Court has present jurisdiction under a special review statute, but not when the Circuit Court has immediate jurisdiction under the All Writs Act in aid of its future statutory review power.” 750 F.2d at 77.

- C. The Natural Gas Act’s exclusive-review provision, combined with the settled law that action-forcing suits belong in the Courts of Appeals, establish that this Court lacks jurisdiction to hear this case.

These two lines of authority establish that this Court lacks jurisdiction, because Dedham’s Complaint raises concerns that fall squarely within the scope of FERC’s certificate-order proceedings, and because Dedham seeks a form of equitable relief closely analogous to action-forcing lawsuits that Congress has channeled to the Courts of Appeals.

1. To begin with, as in past cases finding jurisdiction exclusive in the Courts of Appeals, “[a]t the heart of” Dedham’s claim for “equitable relief . . . lies the belief that FERC did not adequately consider the safety risks . . . that [the Town believes it] would face from the pipeline” and other alleged harms from construction and operation. *American Energy*, 622 F.3d at 605; *see also* Complaint ¶¶ 16, 26, 31. Dedham raised some of its current claims in the FERC certificate-order proceedings, FERC addressed them in the Certificate Order, and Dedham has reprised some of those claims in its pending request for rehearing.

Whether or not those claims are well-founded (and here, they plainly are not), they are “not for [this Court] to resolve.” *American Energy*, 622 F.3d at 605. “It is precisely this exclusive jurisdiction [for challenging a FERC certificate to build an interstate pipeline] that [the Town] wish[es] to sidestep” by bringing this lawsuit in district court. *Id.* Because “FERC . . . evaluated those same claims and same types of claims in its original order granting the certificate” and “again in reviewing [the Town’s] rehearing petition,” judicial review can only be obtained in the Court of Appeals—just as in numerous prior cases. *Id.*; *see supra* § I.A.

That Dedham’s lawsuit constitutes an “impermissible collateral attack[.]” on the FERC certificate, *Williams Natural Gas*, 890 F.2d at 261 (quoting *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 334-36 (1958)), is confirmed by examining what the Town would need to show to obtain its desired injunction. To issue an order compelling FERC to stay construction of the Project pending the Town’s petition for review, this Court would need to find, in addition to irreparable harm and other factors, that Dedham had shown a sufficient likelihood of success on the merits of the claims it plans to raise in a future appeal. *E.g.*, *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Nken v. Holder*, 556 U.S. 418, 434 (2009). Those claims assert various errors in FERC’s issuance of the Certificate Order, such as failure to consider alternate routes and failure to address transient harms due to construction. But those are the very same issues for which Congress vested exclusive jurisdiction in the Courts of Appeals, rendering the current lawsuit inextricably intertwined with the merits of the Town’s claims. *See also Tennessee Gas Pipeline Co. v. Mass. Bay Transp. Auth.*, 2 F. Supp. 2d 106, 109 (D. Mass. 1998) (this Court lacks “authority” to consider “a collateral attack on the validity of the [FERC] Certificate [Order]”).

Indeed, district courts have dismissed equitable claims for lack of jurisdiction even where a plaintiff’s ability to obtain review under § 717r was seriously uncertain, unlike here. *The Steamboaters v. FERC*, 572 F. Supp. 329 (D. Or. 1983), dismissed a claim seeking to enjoin construction of a hydropower project authorized by FERC. FERC had revoked the plaintiff’s intervenor status in administrative proceedings, thus depriving it of the ability to seek

review under the Federal Power Act’s parallel judicial review provision, 16 U.S.C. § 825l.<sup>3</sup> The district court pointedly noted that “the core of this case” was “a NEPA claim” challenging FERC’s project approval, and that FERC and the Court of Appeals were both “entirely able” to grant a stay if warranted. Even the possibility that the challengers would “fall[] through the cracks of the statutory review procedures does not mean that the district court gets to hear the case.” *Id.* at 329-30. The font of district court jurisdiction was, in the court’s view, “narrow and tiny.” *Id.* at 330-31. Dedham does not allege any similar disqualification from seeking review under 15 U.S.C. § 717r, and thus the *Steamboaters* rationale applies *a fortiori*.

2. Moreover, the relief Dedham seeks from this Court—an equitable order compelling FERC to take a particular administrative action (here, to stay construction) while the Commission considers requests for rehearing—falls comfortably within the rationale and result of cases holding that any remedy in action-forcing suits comes from the Court of Appeals. Just as in *Sea Air Shuttle* and *TRAC*, Congress vested exclusive review of final FERC action in the Courts of Appeals. (Indeed, Dedham appears to concede as much, acknowledging that its underlying NEPA claims will be adjudicated in the Court of Appeals following FERC’s decision on rehearing. *See* Complaint ¶¶ 8-10.) Both cases addressed whether a plaintiff could interfere with an agency’s unfinished decision-making process via a district court lawsuit, and force the agency to take a particular action. Dedham asks this Court to do the same thing (i.e., direct FERC to issue a stay), purportedly in furtherance of invoking the statutory review mechanism. Just as in *Sea Air Shuttle* and *TRAC*, a Court of Appeals would have jurisdiction

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<sup>3</sup> Because “the provisions for judicial review are the same under both [16 U.S.C. § 825l] and [15 U.S.C. § 717r],” courts interpret them in parallel. *Alabama Mun. Distribs. Grp. v. FERC*, 300 F.3d 877, 878 n.1 (D.C. Cir. 2002).

under the All Writs Act to provide Dedham relief, in the highly unlikely event that agency delay was so extraordinary as to interfere with the appellate court's exercise of its jurisdiction.

Dedham evidently filed this lawsuit in a misguided attempt to sidestep binding First Circuit precedent confirming that the Town's exclusive remedy lies with the Court of Appeals. In *Kokajko v. FERC*, the First Circuit dismissed a petition for review as premature where FERC had not yet acted on rehearing petitions, but confirmed that the challenger could invoke the court's jurisdiction under the All Writs Act, through a petition for a writ of mandamus. Although the appellate court had *jurisdiction* to consider such relief, the court concluded that the plaintiff—who alleged *five years of delay by FERC*—had not yet shown entitlement to an extraordinary writ. *See* 837 F.2d 524 (1st Cir. 1988). Even five years of delay, the First Circuit observed, was only “approaching the threshold of unreasonableness.” *Id.* at 525. Dedham filed its rehearing petition on April 2, 2015, not even *three months* ago.

D. This lawsuit is incurably premature.

This Court lacks jurisdiction over Dedham's lawsuit for a second, independent reason: the NGA authorizes judicial review of claims associated with a FERC certificate order only after FERC has acted on a timely request for rehearing. Under the plain language of § 717r, any party “aggrieved by an order issued by the Commission in [a] proceeding [under the NGA]” may obtain review only “after the order of the Commission upon the application for rehearing.” 15 U.S.C. § 717r(b). A challenge to a FERC “order filed while an administrative request for reconsideration of the same order remains pending is incurably premature.” *City of Glendale, Cal. v. FERC*, No. 03-1261, 2004 WL 180270, at \*1 (D.C. Cir. Jan. 22, 2004) (citing *Clifton Power v. FERC*, 294 F.3d 108, 112 (D.C. Cir. 2002)).

*Kokajko v. FERC* illustrates the point. There, as here, FERC issued a tolling order on a request for rehearing. While that request remained pending, the party petitioned for review, arguing that “FERC failed to timely decide [his] request for rehearing” or, alternatively, that the tolling order, “coupled with the length of time that the underlying matter has been pending before FERC, constitutes a denial of due process.” 837 F.2d at 524-25. The First Circuit held that “because FERC has not yet issued a ruling on the merits of the petition, this court is without jurisdiction.” *Id.* at 525; *accord Consolidated Gas Supply Corp.*, 611 F.2d at 958 (“[N]o court, having the power of review of the actions of an administrative agency, should exercise that power to review mere preliminary or procedural orders or orders which do not finally determine [some substantive] rights of the parties.”); *Gen. Am. Oil Co. of Tex. v. Fed. Power Comm’n*, 409 F.2d 597, 599 (5th Cir. 1969).

This rule applies with equal force to Dedham’s lawsuit. The NGA contains no explicit “district court” exceptions to its mandatory and “exclusive” timeline for seeking judicial review of FERC actions. 15 U.S.C. § 717r(b). It would render ineffective both the statutory text and the uniform judicial treatment of the NGA’s appellate review provisions as “exclusive,” if a party could sidestep those timeframes by filing in district court, instead of the Court of Appeals.

E. Neither 15 U.S.C. § 717u nor the Declaratory Judgment Act supports jurisdiction.

1. *Section 717u does not allow an end-run around the Act’s exclusive appellate review procedures.*

In an attempt to avoid this clear precedent and § 717r’s explicit language, Dedham invokes 15 U.S.C. § 717u, which creates district court jurisdiction over “violations of this chapter” or “suits in equity and actions at law” to “enforce any liability or duty created by, or to enjoin any violation of, this chapter or any rule, regulation, or order thereunder.” *See also*

*Columbia Gas Transmission, LLC v. Singh*, 707 F.3d 583, 591 (6th Cir. 2013) (“Section 717u provides for federal jurisdiction, but it does not create an action.” (citing *Pan Am. Petroleum Corp. v. Superior Ct. of Del. for New Castle Cnty.*, 366 U.S. 656, 662-64 (1961))).

Dedham has cited no case, and Algonquin is aware of none, reading § 717u to allow an end-run around § 717r’s exclusive appellate procedures for raising claims related to FERC certificate orders in the manner suggested here. To the contrary, § 717u has consistently been understood to allow a narrow class of challenges that do not assert error in FERC’s issuance of a certificate order.

For example, the court in *Panhandle E. Pipe Line Co. v. Utilicorp United Inc.*, exercised jurisdiction to enforce a FERC order authorizing a pipeline company to collect money from a local distribution company that had been improperly collected. 928 F. Supp. 466 (D. Del. 1996). FERC’s order had “created a *liability* [within the meaning of § 717u] on the part of [the local distribution company] to repay the money .... As a result ... under 15 U.S.C. § 717u, this Court has jurisdiction.” *Id.* at 473; *see also, e.g., Columbia Gas Transmission Corp. v. Burke*, 768 F. Supp. 1167, 1170 (N.D.W.Va. 1990) (action to enforce easement necessary to construct and maintain FERC-approved pipeline, and to prevent landowner from interfering with that right).

Conversely, courts have rejected attempts to expand § 717u in a way that would infringe on § 717r’s exclusive appellate review provisions. *E.g., Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co.*, 486 F.2d 315, 318 (8th Cir. 1973) (no district court jurisdiction to determine “reasonableness of the rates for natural gas”); *U.S. Commodity Futures Trading Comm’n v. Amaranth Advisors, LLC*, 523 F. Supp. 2d 328, 338 (S.D.N.Y. 2007) (assertion that FERC is “improperly exercising jurisdiction” over the defendant in an administrative enforcement proceeding “is for a court of appeals to address,” not the district court under

§ 717u). Algonquin is not aware of any case allowing a party to invoke § 717u to elude § 717r's exclusive judicial review mechanism in the way Dedham suggests here.

Furthermore, Dedham has not made any plausible allegation that a relevant "duty" exists under the Natural Gas Act, or that FERC violated such a duty. *See infra* § II.

2. *The Declaratory Judgment Act cannot establish jurisdiction.*

The Complaint cites the Declaratory Judgment Act, 28 U.S.C. § 2201(a). *See* Complaint ¶ 4. But that statute does not independently confer jurisdiction on federal courts. "[T]he operation of the Declaratory Judgment Act is procedural only. Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *accord Tyler v. Michaels Stores, Inc.*, 840 F. Supp. 2d 438, 452 (D. Mass. 2012) (citing cases). Dismissal of the underlying claims also requires dismissal of the claim for declaratory relief. As a result, the Declaratory Judgment Act does not create jurisdiction in this Court where Congress, through the Natural Gas Act, vested exclusive jurisdiction in the Courts of Appeals.

F. To the extent Dedham seeks injunctive relief based on claims it failed to raise on rehearing before FERC, these claims are barred from judicial review.

To the extent that Dedham seeks an injunction to protect its ability to appeal claims that it failed to raise before FERC on rehearing, these claims are categorically removed from federal-court jurisdiction. Under 15 U.S.C. § 717r(b), "[n]o objection to the order of [FERC] shall be considered by the court unless such objection shall have been urged before [FERC] in the application for rehearing unless there is reasonable ground for failure so to do." Though Dedham's Complaint (and subsequent motion and memorandum for a preliminary injunction)

make vague reference to potential substantive arguments, the issues on which Dedham sought rehearing were narrower, more discrete, and different.

Dedham's Complaint raises vague concerns about "public health and welfare" pertaining to the construction and operation of the pipeline. *E.g.*, Complaint ¶ 26. Dedham's Memorandum in support of a preliminary injunction states that FERC inadequately considered (1) "alternate routes" bypassing the town; (2) mitigation of certain temporary construction-related impacts on "traffic, noise and operation of local businesses"; and (3) adequate "safety measures." *See* Memo. [Dkt. No. 3 at 8].

However framed, these claims differ appreciably from those Dedham raised in its request for rehearing before FERC. There, Dedham sought rehearing on: (1) whether FERC failed to comply with the National Environmental Policy Act's requirements as to the appropriate scope of review of alternatives to the Project; (2) whether the Certificate failed to resolve and define the mitigation measures to be undertaken by Algonquin; (3) whether FERC's review of potential safety hazards from the completed pipeline is inadequate; and (4) whether FERC erroneously held that Algonquin met its burden to show that public convenience and necessity require the AIM Project. Dkt. No. 3, Ex. 3 at 4.

Any grounds for injunctive relief that Dedham failed to urge with specificity before FERC are outside this Court's jurisdiction, under 15 U.S.C. § 717r(b).

## II. Dedham’s Complaint Fails to State a Valid Claim for Relief.

The Complaint seeks one form of relief—an injunction ordering FERC to grant a stay of construction pending FERC’s action on the rehearing requests.<sup>4</sup> But the legal predicate for such relief—i.e., a private right of action under the NGA to enforce an alleged duty to provide “meaningful judicial review,” *see* Complaint ¶ 32—has *never* been recognized by *any* court. Therefore, the Town has failed to state a valid claim for relief. *See* Fed. R. Civ. P. 12(b)(6).

### A. Count II of the Complaint does not state any claim for relief.

Count II of the Complaint simply seeks injunctive relief. But an injunction is a *remedy*, not a cause of action. *See Wentworth Precious Metals, LLC v. City of Everett*, No. 11-cv-10909, 2013 WL 441094, at \*15 (D. Mass. Feb. 4, 2013) (“[a]n injunction is a remedy not a claim”); *Payton v. Wells Fargo Bank, N.A.*, No. 12-cv-11540, 2013 WL 782601, at \*6 (D. Mass. Feb. 28, 2013) (same). Count II must be dismissed, because Dedham improperly pleaded it as a freestanding claim for relief.

### B. Dedham’s failure to exhaust administrative remedies also warrants dismissal.

The Complaint fails to state a valid claim because Dedham did not exhaust its administrative remedies. Dedham has *never* asked FERC for an administrative stay of construction—the very relief the Town now seeks in this Court. Courts have repeatedly held, consistent with the NGA’s express prohibition on judicial review of claims not presented in a rehearing petition, that before “review[ing] the NGA claim . . . [the challenger] must have properly exhausted its administrative remedies.” *S. Union Gathering Co. v. FERC*, 687 F.2d 87, 90 (5th Cir. 1982); *see generally McKart v. United States*, 395 U.S. 185, 193 (1969) (“The

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<sup>4</sup> The Complaint also refers to a declaratory judgment, but the declaratory relief sought appears to be coextensive with Dedham’s request for an injunction. *See* Compl. p. 1 (“a declaration that the right . . . to judicial review . . . obligates FERC to exercise its authority to order a stay”).

doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law” and “provides that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.” (internal quotation marks omitted); *cf. also* Fed. R. App. P. 18(a) (“A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order”).

C. The Natural Gas Act does not create a private right of action to enforce an alleged duty to provide meaningful judicial review.

Count I of the Complaint alleges that the NGA creates a private right of action in district court, for an alleged violation of a duty to provide meaningful judicial review. But *Dedham* cites no provision of the NGA imposing such a duty on FERC. Nor does *Dedham* cite any case—and *Algonquin* is aware of none—recognizing a private right of action to bring a lawsuit in district court to enforce such a duty, or holding that FERC’s use of tolling orders denies a party the opportunity for meaningful judicial review.

To the contrary, courts have squarely upheld FERC’s use of tolling orders without any suggestion that they deny a party a meaningful opportunity for judicial review. *E.g.*, *Kokajko v. FERC*, 837 F.2d 524, 524 (1st Cir. 1988); *California Co. v. Federal Power Comm’n*, 411 F.2d 720 (D.C. Cir. 1969); *General Am. Oil Co.*, 409 F.2d 597. To the extent any such concern existed, the proper remedy would be an All Writs Act suit seeking a writ of mandamus from the Court of Appeals—which has authority to issue a writ “necessary or appropriate in aid of [its] jurisdiction[.]” under the NGA. 28 U.S.C. § 1651(a).<sup>5</sup>

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<sup>5</sup> Of course, the standard for such relief is very high. Recently, the Second Circuit summarily denied mandamus where the petitioner sought to force FERC to act on a rehearing request or deem the request denied. *See Order, In re Stop the Pipeline*, No. 15-926 (2d Cir. Apr. 21, 2015) (attached hereto as Exhibit B).

Contrary to Dedham's suggestion, *see* Complaint ¶ 27, FERC's issuance of a tolling order does not indicate its claims are viable. As FERC explained, the Tolling Order was only issued to "afford additional time for consideration of the matters raised" and "for the limited purpose of further consideration." May 1, 2005 Order [Dkt. No. 3, Ex. 4]. FERC routinely issues tolling orders for this purpose, and frequently denies rehearing after issuing such orders. The First Circuit and other Circuits have understood tolling orders in precisely this way. *E.g.*, *Kokajko*, 837 F.2d at 524 ("It is clear that the . . . order granting rehearing for purpose of further consideration was issued so as to give FERC more time to consider the merits of the petition for rehearing and to avoid a denial of the petition by silence."); *Valero Interstate Transmission Co. v. FERC*, 903 F.2d 364, 369 (5th Cir. 1990) ("FERC's tolling order . . . made clear that FERC had not yet made a final decision in the proceeding.").

D. Even assuming FERC has a duty to ensure meaningful judicial review, Dedham has not pleaded a valid claim for relief.

Even if this Court concludes that the NGA imposes a duty on FERC to ensure meaningful judicial review, Dedham's Complaint must still be dismissed, because it fails to allege a plausible violation of that duty. To begin with, as discussed above, Dedham has never even *asked* FERC for a stay of the relevant orders. As a result, Dedham cannot prove that a judicial injunction is necessary to protect the appellate review process, or to avoid causing it irreparable harm.

Even if the pipeline is fully constructed and in operation by the time FERC denies rehearing (as Dedham fears may occur, albeit without any non-speculative basis to believe that

will be the case<sup>6</sup>), the Town cannot show that an injunction is necessary to avoid the harms it alleged. The First Circuit has ample ability to craft meaningful relief, including by (a) issuing a writ of mandamus prior to FERC acting on the requests for rehearing, if Dedham can meet the stringent requirements for that extraordinary relief; (b) issuing a stay pending disposition of a timely petition for judicial review, filed after FERC acts on the rehearing requests; or (c) ultimately remanding for FERC to modify the conditions of the certificate order, if the court agrees with Dedham's claims on the merits. With respect to mandamus, the D.C. Circuit has pointedly explained that "[w]here statutory review is available in the Court of Appeals it will rarely be inadequate." *TRAC*, 750 F.2d at 78. And even putting aside mandamus, judicial review of FERC certificate orders routinely proceeds in this manner, with pipeline projects having begun construction or even operation before appellate review is complete. Indeed, Congress evidently intended the scheme to function in precisely this fashion: the NGA explicitly states that a rehearing petition does not automatically stay FERC's action. *See* 15 U.S.C. § 717r(c). Algonquin is aware of *no case* ever suggesting that this statutory review procedure is inadequate to protect a right of appellate review. This Court should not be the first.

### CONCLUSION

For the foregoing reasons, this Court should grant this Motion and dismiss the Complaint with prejudice.

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<sup>6</sup> The pipeline's projected in-service date is November 2016. *See* Certificate Application, attached hereto as Exhibit C.

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June 26, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the CM/ECF system on June 26, 2015 will be served electronically to the registered participants as identified on CM/ECF.

/s/ James T. Finnigan  
James T. Finnigan