8/21/17

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Laura D. Urban, et al.	)	**Case No. 5:17-cv-01005**
	)	
Plaintiffs,	)	**Judge John R. Adams**
	)	
v.	)	
	)	
Federal Energy Regulatory Commission	)	
	)	
	)	**Plaintiffs' Objection to Magistrate Judge**
Defendant.	)	**Burke's Report and Recommendation**

Now come the Plaintiffs, by and through Counsel, and hereby Object to the Report and Recommendation issued by Magistrate Judge Burke. For the reasons that follow, this Court should decline to follow the recommendation and overrule it.

A. Procedural Background

Plaintiffs have moved for a preliminary injunction ("Motion") against defendants Nexus Gas Transmission, LLC ("Nexus") and the Federal Energy Regulatory Commission and certain individual commissioners ("Federal Defendants"). Response and Reply briefs were filed. This matter was referred to Magistrate Judge Burke to issue a report and recommendation on the Motion, who has issued a report and recommendation.

While the Motion was pending, Defendants each filed Motions to Dismiss this case. Response and Reply briefs were filed. Motions to Dismiss were not referred to Magistrate Judge

Burke and remains pending. On August 7, 2017 Magistrate Judge Burke issued a Report and Recommendation which recommended that this Court deny Plaintiff's Motion.

B. Errors in Magistrate Judge Burke's Recommendation

Plaintiffs are not going to repeat their arguments respecting the jurisdiction of this Court over this case in this Objection. The Court has these briefs and Plaintiffs feel it would be redundant to repeat the same arguments, unless directly relevant to a point of claimed error in the Recommendation.

As set forth below, the Recommendation relies upon cases which are unsupportive of its conclusion and glosses over cases which suggest a different outcome is warranted. As such the Recommendation does not address several core contentions of Plaintiffs. When these issues are considered, it is clear that Plaintiffs Motion should be granted and the Recommendation overruled.

1. The Issuance of a Certificate will not deprive this Court of Jurisdiction

Initially it should be noted that the statement on page two of the Recommendation that "There appears to be no dispute between the parties that, if and when FERC issues a Certificate . . . no district court would have jurisdiction" is incorrect. The Recommendation notes that Plaintiffs were concerned that the issuance of a Certificate would moot their motion. It is true that the issuance of a Certificate would moot Plaintiffs' motion for injunctive relief since that motion seeks to enjoin the issuance of a Certificate. However, Plaintiffs do not believe, and have never conceded, that this Court would lose jurisdiction due to events occurring subsequent to the filing of this action. See *Smith v. Campbell*, 450 F.2d 829, 832 (1971)(citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938))(" It is generally accepted that in civil cases, jurisdiction is measured at the time the action is filed, and subsequent

events cannot divest the court of that jurisdiction."). Having properly acquired jurisdiction over this matter, this Court will retain jurisdiction even if a Certificate is issued.

2. There is a Clear Violation of the NGA

Defendants and Magistrate Judge Burke focus almost exclusively on the jurisdictional issue. However, it must not be overlooked by the Court that if jurisdiction is found, Plaintiffs are entitled to an injunction.

Pipelines which export natural gas must seek approval under Section 3 of the NGA. This section does not permit an applicant to utilize eminent domain. Of the currently subscribed capacity of the pipeline, over eighty percent is destined for the Dawn Hub in Canada. Nexus does not dispute this fact. Rather it attempts to argue that the NGT Project does not directly cross borders; that it simply links to another pipeline which in turn transports the natural gas to Canada, despite the fact that its Application sought improvements and modifications to the Vector system, which crosses national boundaries. Plaintiffs have previously demonstrated that this argument is illogical, absurd, and lacking in support from any legal authority. The Project's primary purpose has always been about transporting natural gas to the Dawn Hub in Canada, owned by an affiliate of Nexus. Only recently, has Nexus asserted that it is not an export pipeline despite inclusion of Vector Pipeline LP in its application.[1] If jurisdiction exists, Plaintiffs will prevail.

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[1] See submission by Nexus on FERC docket CP-16-22-000 dated August 17, 2017 at page 4: "The fact that some of that gas may ultimately be transported to markets in Canada does not make NEXUS an export facility subject to Section 3 of the NGA; indeed, the Project does not include any border crossing facilities." It is clear from previously submitted materials and existing regulations that Nexus is required to comply with Section 3 in addition to Section 7. "FERC regulations governing authorization of facilities to construct, operate, or modify natural gas import/export facilities are set forth at 18 C.F.R. Part 153. Applications for Presidential Permits are subject to these regulatory requirements. 18 C.F.R. § 153.5 articulates "who should apply" for such FERC authorizations. The regulation provides that any person proposing to site,

3. Cases Relied upon in the Recommendation do not Support the Conclusion that Section 717r Vests Exclusive Jurisdiction in the Court of Appeals and the conclusion that similar Exclusive Jurisdiction does not exist in the District Court for NGA violations.

Magistrate Judge Burke relies on several decisions involving cases where a certificate has already been issued. See *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 337 (1958); *Consol. Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 611 F.2d 951 (4th Cir. 1979). As discussed in the briefing on the Motion, cases which deal with post certificate litigation do not address the issues in this case. Section 717r grants exclusive jurisdiction to review Orders of FERC such as certificates. No order has been issued in this case and it does not matter that one may be issued subsequently. The die has been cast-- the Complaint was filed prior to the issuance of the certificate.

The difference is material. In this case, the entire FERC process is premised upon a falsehood. Nexus is an export pipeline, not an interstate pipeline-- eminent domain may not be utilized on export pipelines. By proceeding under the incorrect section of the NGA, the issuance of the Certificate itself will cause significant irreparable harm to Plaintiffs. The

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construct, or operate natural gas import or export facilities **or to "amend an existing Commission authorization, including the modification of existing authorized facilities," must apply for a permit**." (emphasis added) Page 4, 7-5700, www.crs.gov, R43261, October 29, 2013. The FEIS encompasses several pipelines and modifications thereto: NEXUS Gas Transmission, LLC, Texas Eastern Transmission, LP, DTE Gas Company, Vector Pipeline L.P., Docket Nos. CP16-22-000, CP16-23-000, CP16-24-000, CP16-102-000. Vector Pipeline L.P. is a joint venture between Calgary-based Enbridge Inc. (NYSE/TSX: ENB), with a 60 percent interest, and Detroit-based DTE Energy Company (NYSE: DTE), with a 40 percent interest. "With the potential of Marcellus / Utica gas entering the Vector system in Michigan via proposed third party pipelines (Nexus), we envision transporting large quantities of gas in both directions to supply Chicago, Dawn and all markets en route. By expanding (to a 42" pipe) and re-purposing the Vector system to flow bi-directionally, our customers will be able to acquire the lowest priced gas from multiple Chicago sources, or from the prolific Marcellus / Utica region or from Michigan / Ontario storage." www.vector-pipeline.com Oct. 6, 2014.

Recommendation denies Plaintiffs any meaningful way to remedy this harm but essentially recommends that Plaintiffs seek a stay before FERC (See footnote 10, page 9 of Recommendation.). Section 717r will require Plaintiffs to request a rehearing, wait until FERC's tolling order runs, and then file an appeal. By that time, their property will have been long ago subject to eminent domain and the pipeline will be operational. Defendants assert this is speculation, but it is not and they know that. Decades of standard practice by FERC demonstrate that nearly every motion for rehearing of a certificate is tolled allowing the Applicant to complete the project[2]. Fortunately, Congress enacted a statute specifically designed to remedy this type of harm and abuse by FERC. Section 717u grants a District Court "**exclusive jurisdiction**" to "enjoin any violation" of the NGA. For all the discussion of the "exclusivity" of 717r's appeal procedure, which was not applicable at the time of filing the Complaint, the exclusive independent nature of 717u jurisdiction has been ignored and overlooked in the Recommendation. The Court cannot ignore an applicable statute passed by Congress on a specific topic which is the subject of this case. Section 717u must be given meaning. *In re Arnett*, 731 F.2d 358, 361 (6th Cir. 1984) ("[C]onstruction of one part or provision of a statute which renders another part redundant or superfluous should be rejected; all parts of a statute should, if possible, be given effect.")

The *Dedham* decision, relied upon heavily by Defendants and Magistrate Burke, does not resolve this issue and clearly was a post-certificate attempt to collaterally attack the certificate in the *Dedham* case. Not only are the facts and procedural makeup of the two cases distinguishable, the decision has no precedential value to a district court in Ohio in a different appellate circuit.

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[2] See Exhibit 1 attached to Motion for Preliminary Injunction, page 3.

The Recommendation acknowledges that pre-certificate cases present different legal issues and therefore refers to an unpublished decision: *Lovelace v. U.S.*, No 15-cv-30131-MAP (D. Mass Feb. 18 2016). *Lovelace* dealt with a Fifth Amendment challenge to FERC proceedings prior to the issuance of a certificate. This decision contains sparse discussion of this issue and primarily relies upon another unpublished decision: *Town of Dedham v. Federal Energy Regulatory Commission*, No. 15-12352-GAO, 2015 WL 4274884, *1 (D. Mass. July 15, 2015).

First, although it may be appropriate for the District Court in Massachusetts to rely upon a prior, unpublished decision issued by that Court, such opinion has no binding effect, and little to no persuasive effect upon the decision of this Court.

Second, the issues in *Lovelace* are too dissimilar to the issues in this case for that decision to provide any guidance in resolving Plaintiffs' Motion. In *Lovelace*, the challenge was constitutional.[3] Unlike the Motion which rests upon violations of the NGA itself, and the rules and regulation thereunder, *Lovelace* was based upon the United States Constitution. Section 717u gives this Court exclusive jurisdiction over violations of the NGA itself, and the rules and regulations promulgated thereunder. Thus, the reasoning in *Lovelace* is simply inapplicable to the Motion and provides no guidance.

Finally, the case relied upon in *Lovelace*, the *Town of Dedham* decision, is a post-certificate case. As set forth above and in the briefing on the Motion, post-certificate decisions are simply not relevant to whether a Court has jurisdiction under Section 717u of the NGA. The

[3] Plaintiffs do not concede that Lovelace correctly decided that it had no jurisdiction to hear the Constitutional challenges. Rather, the issues in Lovelace, to the extent they are discernable from the brief decision, are separate and distinct from those raised in the Motion. This distinction is directly material to Plaintiffs' jurisdictional arguments.

Magistrate's Recommendation is devoid of any reasoning or analysis addressing the "exclusive jurisdiction" of this Court to issue an injunction under Section 717u, but for reliance on the *Dedham* decision. The Magistrate attempts to equate this case with *Dedham*, but *Dedham* was filed after the Certificate had been issued. The Plaintiff was seeking to enjoin the Certificate in *Dedham* from proceeding to construction. In this case, Plaintiffs attempt to enjoin Nexus from proceeding under the inappropriate section of the NGA and FERC's "Final Environmental Impact Statement" which clearly violates the NGA, its regulations and other federal laws. Due to the use of the improper NGA provision, the issuance of the Certificate will cause Plaintiffs immediate and irreparable harm. Upon issuance of the Certificate under Section 7 rather than 3, Nexus will initiate eminent domain, quick take under F.R.C.P. Rule 65, and construction on existing easements and under quick take. Thus, the procedure for appeal of a FERC order will not provide Plaintiffs a meaningful remedy capable of addressing the wrong. The train will have left the station. Section 717u does provide such a remedy to enjoin violations of the NGA before the harm occurs and is irreparable.

The Magistrate has adopted the unfounded conclusion of *Dedham*, which is not binding authority, that Section 717u is merely an "enforcement provision, not an open-ended grant of jurisdiction to the district courts." Both 717r and 717u provide exclusive jurisdiction.[4] There is no indication in the NGA or its legislative history that 717u was limited only to enforcing orders of FERC. The statute is expressly clear that this district court has jurisdiction "to enjoin any violation of, this chapter or any rule, regulation or order thereunder. . .". "This chapter" can only

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[4]"We have two sections conferring jurisdiction upon the Federal court, included in the Act. The one, just referred to, gives certain jurisdiction to the District Court. It is general and quite inclusive . . . . The scope of the exclusive jurisdiction of the Circuit Court of Appeals is specific and covers appeals, which includes rate cases." Nat. Gas Pipeline Co. of Am. v. Fed. Power Comm'n, 128 F.2d 481, 486- 87 (7th Cir. 1942)

refer to all sections of the NGA including Section 3 and 7 and the federal laws and regulations cited by Plaintiffs pertaining to export of natural gas. The statute by its express language is broader than mere enforcement actions of FERC rulings or orders, but rather the statute provides a means to enjoin FERC from ultra-virus acts, omissions, and violations of law, which was intended to limit FERC's authority. Magistrate Burke's view is one of unlimited governmental power and that Congress did not intend any checks and balances on FERC prior to issuance of certificates and orders. There is no language in the statute supporting this limited view of the law—in fact, the NGA expressly provides for a check on FERC's power in 717u. Court decisions cannot rewrite the NGA or imply an intent not apparent from the statute itself.

4. The Final EIS Constitutes Final Agency Action

In determining that the Final EIS issued in this case did not constitute final agency action, the Recommendation rejects the clear holdings of *Sw. Williamson Cty. Cmty. Ass'n, Inc. v. Slater*, 173 F.3d 1033, 1036 (6th Cir. 1999) and *Sierra Club v. Slater*, 120 F.3d 623, 628 (6th Cir. 1997). The Recommendation reads those cases quite narrowly and, as a result, recommends a result that is at odds with the central ruling in both cases: a final EIS is final agency action and can be challenged under the APA in district court under the abuse of discretion standard.

The Recommendation finds that the Final EIS in this case is not final agency action because it "is only a recommendation of FERC's staff" not the FERC itself.[5] The Recommendation further states "Clearly staff who prepared the FEIS are not themselves the decisionmakers." Id. at 13. This line of reasoning eviscerates the rule set forth in *Williamson* and *Slater*. The majority, if not all, Environmental Impact Statements, whether labelled as final or not, are prepared by agency staff. It is highly doubtful that heads of any federal agencies have

[5] Recommendation at p. 12.

the requisite knowledge to formulate an EIS, which is a highly technical document and must follow NEPA. To dismiss as non-final every final EIS prepared by agency staff would render *Williamson* and *Slater* meaningless. Moreover, it is inconsequential that FERC could refuse to adopt the FEIS or modify it subsequently; should that occur, some of Plaintiffs' claims may be rendered moot. The agency action occurs upon the issuance of the FEIS and the APA allows review of the FEIS by the district court, under abuse of discretion. Clearly, if the FEIS does not comply with NEPA or the NGA, it should be subject to review by this Court before it reaches the Commission rather than be subject to rubber stamp approval.

Williamson and *Slater* articulates this clear rule in the Sixth Circuit: a Final EIS is final agency action and may be appealed under the APA. The Sixth Circuit spelled this out even more clearly in *Sw. Williamson Cty. Cmty. Ass'n, Inc. v. Slater*, 243 F.3d 270 (6th Cir. 2001) where the court heard an appeal on a residual issue not decided in the first *Williamson* case.

> NEPA, which is "our basic national charter for protection of the environment," 40 C.F.R. § 1500.1(a), requires all federal agencies to prepare an environmental impact statement or "EIS" for "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(C). The responsible federal, or in some circumstances state, agency may first choose to prepare an environmental assessment or "EA," a preliminary document which "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9. After considering the EA, the agency may then decide to issue either a finding of no significant impact ("FONSI") or a more detailed EIS. **Issuance of either document constitutes "final agency action" for purposes of NEPA actions brought pursuant to the Administrative Procedure Act and triggers the relevant statute of limitations, see 5 U.S.C. § 704, on any claims arising from the agency action. (emphasis added)**

Sw. Williamson Cty. Cmty. Ass'n, Inc. v. Slater, 243 F.3d 270 at fn. 3(6th Cir. 2001). The Sixth Circuit has articulated this rule in three opinions. It is clear and straight-forward- issuance of a final EIS is final agency action. Not once does the Sixth Circuit qualify this rule based upon the

particular staff member who authored the document. Plaintiffs' causes of action are ripe and may be heard by this Court.

The Magistrate Recommendation suggests to the Court that Supreme Court's dicta in *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) should be instructional. The Magistrate correctly quotes "the core question is whether the agency has completed its decision making process, and whether the result of that process will directly affect the parties" from the *Franklin* decision, adopted by the Sixth Circuit. However, the Court in *Franklin* held that:

> "At issue in this case is whether the "final" action that appellees have challenged is that of an "agency" such that the federal courts may exercise their powers of review under the APA. We hold that the final action complained of is that of the President, and the President is not an agency within the meaning of the Act. Accordingly, there is no final agency action that may be reviewed under the APA standards." *Id.*

The Magistrate suggests that FERC staff are not decision makers, but this statement belies an understanding of the FERC process. FERC staff have already rejected various aspects of the Nexus Project and imposed many reroutes and other orders on the parties. It has already acted as a decision maker. The FEIS adopted these reroutes removing many property owners from the controversial Nexus route but rejected other reroutes, central to the dispute in this case. The Plaintiffs cannot meaningfully litigate the issues of the FEIS, after the certificate is issued and FERC's issuance of a tolling order upon motion for rehearing, because of the imposition of eminent domain under Section 7. It is critical that course corrections to the FEIS be made before the Certificate is issued.

5. The Recommendations reliance on Dedham is misplaced

The Recommendation disregards Section 717u's grant of "exclusive jurisdiction" to this Court based upon an unpublished decision issued by the District Court in Massachusetts-- *Town of Dedham v. Federal Energy Regulatory Commission*, No. 15-12352-GAO, 2015 WL 4274884,

*1 (D. Mass. July 15, 2015). As discussed above, the *Dedham* decision is inapplicable since it deals with a post-certificate case. In fact, the *Dedham* case was filed seeking an injunction while a request for rehearing under Section 717r was still pending.

The *Dedham* court, in declining jurisdiction stated "§ 717u is simply an enforcement provision, not an open-ended grant of jurisdiction to the district courts." To support this proposition *Dedham* cites *Tenn. Gas Pipeline Co. v. Massachusetts Bay Transp. Auth.*, 2 F.Supp.2d 106, 109–10 (D.Mass.1998). *Tenn. Gas Pipeline Co.* did not even involve section 717u. Rather it was a dispute over an eminent domain proceeding brought pursuant to 717h. In the context of eminent domain proceedings, the *Tennessee Gas Pipeline Co.* court stated that "This Court's role is one of mere enforcement." *Id.* at 110. Furthermore, the *Dedham* court's statement that 717u is simply an enforcement provision is dicta without reasoning and ignores the express language of the statute. No legislative history supports that 717u cannot be used to enjoin FERC from violating the law and limited only to enforcement of FERC orders. On its face, this aspect of the Recommendation is deficient.

Unlike the broad treatment of the *Dedham* ruling, the Recommendation takes a narrow reading of *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1564 (2016) in determining that it does not apply to this case. While it is true that the *Manning* case dealt with whether a state or federal court had jurisdiction over the claims asserted, the United States Supreme Court spoke regarding the scope of jurisdiction in an analogous statute to 717u. As set forth in Plaintiffs' Response to Nexus' Motion to Dismiss, the Supreme Court determined that the scope of jurisdiction is broad: "arising under" in Section 78aa held the same meaning as "arising under" as used in 28 U.S.C. § 1331. Although the precise issue is not identical to this case, this is a United States Supreme Court decision. It would appear that if a decision is to be

read broadly or inclusively, it should be a Supreme Court decision, not an unpublished decision from the Massachusetts district court severely lacking supportive reasoning.

The Recommendation's reliance on *Dedham* underscores the importance of this Court's decision and guidance in this matter and rejection of the Recommendation. There is decisional law from this Circuit directly addressing the issues and the posture under which Plaintiffs bring this case and support the use of injunctive relief to overturn the FEIS and enjoin the issuance of the Certificate. There are serious violations of the NGA and NEPA at issue in this case as fully outlined in the Complaint. Plaintiffs' respectfully request that this Court give these issues the treatment they deserve and not simply castaway the plaintiffs to the mercy of FERC.

C. Federal Subject Matter jurisdiction exists under the Leedom exception.

Magistrate Burke admits that "[t]he Leedom exception is narrow, and is invoked only exceptional circumstances." Page 16 of Recommendation. Magistrate Burke points out that it "must be shown that the action of the agency was a patent violation of its authority or that there has been a manifest infringement of substantial rights irremediable by the statutorily prescribed method of review." Magistrate Burke suggests that FERC is "the guardian of the public interest" and the Commission has wide discretion. Magistrate Burke then concludes that she "is not persuaded that there has been a 'readily observable usurpation of power not granted to [FERC] by Congress." Magistrate Burke does not examine the enabling statute of FERC to determine how responsibility for safety considerations, which includes recognition of local and state government land use and zoning plans, protected by Supreme Court decision, can be simply ignored. Her conclusions are unsupported and contrary to the record in this case.

Moreover, ignoring that Nexus is an export pipeline, not seriously in dispute, subject to Section 3 of the NGA and multiple export regulations cannot justify a lack of "observable

usurpation of power." Clearly, FERC has crossed the demarcation of objective agency decision making of authority granted to it by Congress. Its acts and omissions that are alleged in the Complaint are not credibly disputed in the record. FERC cannot ignore federal laws intended to restrain its authority without usurping it. Judicial determination and Constitutional separation of powers provided by the Constitution must limit an agencies power or no such force exists. Just because certain federal laws are inconvenient or hinder or delay the resolution of an Application, FERC cannot simply ignore federal law.

Only the judiciary can determine the limits of FERC's authority. Failure to follow federal laws which define and limit FERC's authority gives rise to usurpation of power. The Complaint has alleged sufficient un-refuted facts, such as the Memorandum Agreement delegating all safety issues to another federal agency specifically prohibited from siting pipelines. FERC's recommendation in the FEIS to allow a foreign company to build an export pipeline for purely private use and be granted eminent domain powers can serve no better example of usurpation of power. While officials serving and benefiting under this system, may attempt to minimize the impacts to the "public interest," undoubtedly, property owners who seek protection from FERC's abuses do not describe the Commission as the "guardian" of anything but the interests of the industry, financing and being served by FERC. The "public interest" is served by protecting the Constitution, the federal laws, and the rights of property owners living within the United States and not a foreign country. If FERC can ignore any federal law or rule it chooses, undoubtedly the principals set forth in Constitution have no meaning and no usurpation of power could ever be found.

D. Conclusion

For the foregoing reasons, the Recommendation's conclusion that this Court does not have jurisdiction to hear this case and, therefore, Plaintiffs' are unlikely to succeed on the merits in this action is erroneous. As such, this Court should reject the Magistrate's Recommendation, overrule it, and grant Plaintiffs' Motion for Preliminary Injunction.

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CERTIFICATE OF SERVICE

I, David Mucklow, hereby certify that a true copy of the foregoing document was filed with the Clerk of Courts using the ECF system, which will send notification of such filing to all attorneys of record on this 21st day of August, 2017.

/s/ David A. Mucklow
DAVID A. MUCKLOW (#0072875)