

EN BANC D.C. CIRCUIT OVERTURNS LONG-STANDING FERC PRACTICE OF ISSUING TOLLING ORDERS FOR REHEARING REQUESTS

To Our Clients and Friends:

An en banc decision by D.C. Circuit today likely ends the Federal Energy Regulatory Commission's ("FERC's") practice of issuing tolling orders for the purpose of allowing additional time for consideration. In *Allegheny Defense Project v. FERC*, No. 17-1098 (June 30, 2020), the D.C. Circuit on rehearing en banc found that FERC's routine practice of issuing an order to allow additional time for consideration of a rehearing request is inconsistent with the plain language of the Natural Gas Act ("NGA"). Although this case concerned the hearing provisions of the NGA, this order can be expected to end the practice of rehearing tolling orders under the Federal Power Act ("FPA") as well.

The NGA requires a party aggrieved by a FERC order to first obtain an order on rehearing from FERC before proceeding to judicial review.^[1] The NGA also states that a rehearing request may be deemed denied if FERC does not act upon it within thirty days.^[2] The question in *Allegheny Defense* was whether FERC "granting rehearing" simply to allow additional time for consideration qualified as "acting upon" the rehearing request. The D.C. Circuit concluded it does not. The court found that Congress had identified four actions that FERC may take to "act upon" a rehearing request within the meaning of the statute: (i) grant it, (ii) deny it, (iii) abrogate its order without further hearing, or (iv) modify its order without further hearing.^[3] The court found FERC's tolling orders did not qualify as any of the foregoing. Accordingly, the court concluded that FERC cannot escape the consequence of its inaction by "kicking the can down the road" with a non-substantive tolling order.^[4] The court held that tolling orders would be treated "deemed denials" that allow the aggrieved party to proceed with judicial review.^[5] The court, however, did stop short of requiring that FERC decide all rehearing requests within thirty days, leaving open the possibility that something short of a substantive decision on rehearing may be sufficient.^[6]

RULING'S IMPACT

This decision will have immediate and broad consequences for a range of FERC matters. First, with respect to pipeline construction cases, this decision in combination with FERC's recently issued rule on construction during rehearing will prevent pipeline construction from starting while the rehearing process plays out, but provide additional timing certainty for that process. Indeed, there should now be less uncertainty for both pipelines and landowners in how the rehearing process plays out. Second, this decision will likely change the calculation on pipeline opponents pursuing stays of construction in the court of appeals because judicial review will always be available at the time construction begins. Third, while we expect landowners spurred by plaintiff's lawyers to argue that the D.C. Circuit's decision in

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combination with the new FERC rule should cause certain district courts to hold eminent domain cases in abeyance while the rehearing process plays out, the Court today was very careful to not create new law on this point and the prevailing law remains in place.[7] However, it should be noted that the concurring opinion by Judges Griffith, Katsas, and Rao called out allowing construction and eminent domain suits to go forward despite FERC granting rehearing for further consideration.

Finally, more broadly, going forward this order will place additional demands on FERC and its Staff since the long standing tolling practice is no longer available under the NGA or FPA. Given how often rehearing papers are filed, and the complexity of many rehearing requests, FERC would be more than justified in seeking additional resources to handle what is now a cramped rehearing time frame.

No Pipeline Construction During Rehearing

On June 9, 2020, FERC issued Order No. 871 and will no longer allow pipeline construction to proceed before it decides requests for rehearing on a certificate order.[8] In Order No. 871, FERC announced that it will no longer authorize construction of an approved natural gas project under sections 3 or 7 of NGA, until either FERC acts on the merits of any timely-filed request for rehearing or the time for filing such a request has passed.[9] At the time this decision was announced, that meant construction could be delayed for an indefinite period of time (months or possibly years) while FERC considered timely filed rehearing requests.[10] Now Order No. 871 in combination with the *Allegheny Defense* decision, mean that construction typically should be delayed only during the thirty day period permitted for an aggrieved party to seek rehearing and then the additional thirty days for FERC to act on the request (*i.e.*, a total of sixty days). The court made clear that even after a petition for review is filed with the court, FERC retains concurrent jurisdiction to modify or set aside a challenged order until the administrative record is filed with the court, which typically happens forty days after the petition is served on FERC.[11] Therefore, in certain cases, the time period where construction could not move forward under Order No. 871 could extend an additional hundred days or longer (the up to sixty days for a party to petition for review and the forty days to file the administrative record, which could be extended with leave from the court). This, however, still provides a more definite end point in terms of timing than under FERC's prior tolling practice. Thus, the *Allegheny Defense* decision removes timing uncertainty for both proponents and opponents to new pipeline construction.

Implications for Stays

Prior to the *Allegheny Defense* decision, it was challenging for opponents of gas construction projects to obtain a stay while rehearing was pending because, absent a final order on rehearing, the only readily available forum for such a request was FERC itself.[12] Now that the beginning of construction will coincide with the availability of judicial review, more litigants may pursue stays in the court of appeals. FERC has had a relatively good track record in fending off stays, and it will be interesting to see how the rule change and Opinion today change the frequency and velocity of stay requests.

Pending Tolloed Actions

Although *Allegheny Defense* was an NGA case, the implications of this decision are not limited to the NGA, as FERC routinely uses tolling orders under parallel provisions of the FPA.[13] Indeed, the

Allegheny Defense court noted that matters beyond pipeline cases have “met a similar fate, with open-ended tolling orders leaving applicants awaiting action for a year or more.”^[14] Given that the NGA and the FPA are generally interpreted in parallel, it is likely that the D.C. Circuit would similarly find FERC’s use of tolling orders impermissible under the parallel provisions of the FPA. Accordingly, any request for rehearing under the NGA or FPA that is pending under a tolling order may now be fair game to proceed to the court of appeals for judicial review.

[1] 15 U.S.C. § 717r(a) (“No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.”).

[2] *Id.*

[3] Slip Op at 22 (explaining that FERC is given four options under the statute to “act on” rehearing requests: “the Commission can (i) ‘grant * * * rehearing,’ (ii) ‘deny rehearing,’ (iii) ‘abrogate * * * its order without further hearing,’ or (iv) ‘modify its order without further hearing[.]’”).

[4] *Id.* at 24.

[5] *Id.* at 27.

[6] *Id.* at 29-30 (“[W]e need not decide whether or how Section 717r(a), the ripeness doctrine, or exhaustion principles might apply if the Commission were to grant rehearing for the express purpose of revisiting and substantively reconsidering a prior decision, and needed additional time to allow for supplemental briefing or further hearing processes.”).

[7] *Id.* at 18 n.2 (explaining that FERC adopted Order 871 after oral argument, but that rule does not prevent courts from moving forward with eminent domain proceedings); *id.* at 30 n.4 (noting that the court was not deciding what the implications of a grant of merits rehearing might mean for reliance in eminent domain proceedings); *see also, e.g., Transcon. Gas Pipe Line Co. v. Permanent Easements for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Township, Lancaster County, Pa., Tax Parcel No. 1201606900000*, 2017 WL 3624250, at *3-4 (E.D. Pa. Aug. 23, 2017); *Steckman Ridge GP, LLC v. An Exclusive Nat. Gas Storage Easement Beneath 11.078 Acres*, 2008 WL 4346405 at *4 (W.D. Pa. Sept. 19, 2008).

[8] Limiting Authorizations to Proceed with Construction Activities, Order No. 871, 171 FERC ¶ 61,201 (2020).

[9] *Id.* at P 1.

[10] *Id.* at PP 8-9.

[11] Slip Op. at 30.

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[12] Certain litigants pursued extraordinary relief in the court of appeals as a work-around in this circumstance, but that is not done frequently. *See, e.g.*, Emergency Petition for a Writ of Prohibition, *New York Dept. of Enviro. Conservation v. FERC*, (2nd Cir. filed Nov. 14, 2017) available at <https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15000152>.

[13] *See* Slip Op. at 26-27; 16 U.S.C. § 8251(a) (“Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. . . . Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon.”).

[14] Slip Op. at 26 (citing a challenge under the Federal Power Act where it took FERC twenty two months to act on a rehearing request).



Gibson Dunn’s Energy, Regulation and Litigation lawyers are available to assist in addressing any questions you may have regarding the developments discussed above. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or the authors:

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