

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Allegheny Defense Project, <i>et al.</i> ,)	
Petitioners,)	
)	
v.)	No. 17-1098
)	
Federal Energy Regulatory Commission)	
Respondent.)	

MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Respondent Federal Energy Regulatory Commission (“FERC” or “Commission”) moves to dismiss the petition for review for lack of jurisdiction. The challenged agency order, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (2017) (“Certificate Order”), is not a final order; requests for rehearing of that order – including a request filed by petitioners here – are pending before the Commission. That the Commission does not, at this moment, have a quorum of Commissioners to transact agency business, and issued a “tolling order” announcing that it will act on the pending rehearing requests at a later time, does not alter this Court’s jurisdictional analysis – the petition for review is, by the standards of this Court, “incurably premature.”

In the alternative, should this Court not dismiss the petition, it should hold the petition in abeyance pending completion of agency proceedings.

BACKGROUND

I. Statutory And Regulatory Background

The petitioners, Allegheny Defense Project, *et al.* (collectively “Allegheny”), filed their petition for review pursuant to Natural Gas Act section 19(b), 15 U.S.C. § 717r(b). *See* Petition for Review at 1.

Natural Gas Act section 19(a), 15 U.S.C. § 717r(a) provides, in pertinent part, that: an aggrieved party may file a request for rehearing of a Commission order within 30 days after the Commission issues that order; “[n]o 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;” and “[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied.”

Under Natural Gas Act section 19(b), 15 U.S.C. § 717r(b), “[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States . . . by filing in such court, within sixty days after the order of the Commission upon application for rehearing, a written petition” The statutory prerequisites of a request for rehearing, an order on rehearing, and a petition for review within 60 days of the rehearing order are mandatory; failure to satisfy any of these prerequisite deprives the reviewing court of jurisdiction. *Process Gas*

Consumers Grp. v. FERC, 912 F.2d 511, 514 (D.C. Cir. 1990); *see also Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 336 (D.C. Cir. 2006) (“Statutory jurisdictional requirements, such as the provisions of 15 U.S.C. § 717r, are not mere technicalities that can be brushed aside by a court.”); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (a petition for review filed before the rehearing order issues is “incurably premature” and “must be dismissed”).

II. Factual Background

On February 3, 2017, the Commission issued the challenged order, which conditionally granted Transcontinental Gas Pipe Line Co., LLC’s application, filed under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), for authorization to construct and operate the Atlantic Sunrise pipeline project. Certificate Order, 158 FERC ¶ 61,125 PP 1-2. In accordance with Natural Gas Act section 19, a number of parties to the FERC proceeding, including Allegheny, filed requests for rehearing of the Certificate Order. Some parties, including Allegheny, also moved for a stay of the certificate’s effectiveness.

On March 13, 2017, pursuant to authority delegated by the Commission in 1995,¹ the Secretary of the Commission issued a procedural order tolling the time

¹ *See Delegation of Authority to the Secretary, the Director of the Office of Electric Power Regulation and the General Counsel*, 60 Fed. Reg. 62,326 (Dec. 6. 1995),

for the Commission to issue its order addressing the matters raised in the requests for rehearing of the Certificate Order. *Transcontinental Gas Pipe Line Co., LLC*, Docket No. CP15-138-001 (March 13, 2017) (“Tolling Order”). That order stated:

Rehearings have been timely requested of the Commission order issued on February 3, 2017, in this proceeding. *Transcontinental Gas Pipe Line Company, LLC*, 158 FERC ¶ 61,125 (2017). In the absence of Commission action within 30 days from the date the rehearing requests were filed, the request for rehearing (and any timely requests for rehearing filed subsequently)^[2] would be deemed denied. 18 C.F.R. § 385.713 (2016).

In order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission’s order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order.

Ten days after the Tolling Order issued, without waiting for the Commission to issue the rehearing order addressing the matters raised in Allegheny’s and other parties’ requests for rehearing, Allegheny filed the instant petition seeking review of the Certificate Order.

FERC Stats. & Regs., Reg. Preambles Jan. 1991-June 1996 ¶ 31,030 (1995) (“1995 Delegation Order”) (codified in 18 C.F.R. § 375.302(v)).

² See *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).

ARGUMENT

I. Allegheny's Petition For Review Should Be Dismissed For Lack Of Jurisdiction

A. The Certificate Order Is Not A Final, Reviewable Order

This Court has “long held that [it] ha[s] jurisdiction to review only final orders of the Commission.” *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995) (discussing Natural Gas Act section 19(b)) (citing, *e.g.*, *Pub. Utils. Comm'n of Cal. v. FERC*, 894 F.2d 1372, 1376-77 (D.C. Cir. 1990) (discussing both Natural Gas Act section 19(b) and its parallel provision in Federal Power Act section 313(b), 16 U.S.C. § 825l(b)). Moreover, the “presumption that Congress intends judicial review of administrative action applies . . . *only* to final agency action.” *Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1171 (D.C. Cir. 2016) (internal quotation and citation omitted). “Final agency action is that which ‘mark[s] the consummation of the agency’s decisionmaking process.’” *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (alteration by Court)).

The Certificate Order is not final agency action. Allegheny’s and the other parties’ requests for rehearing, which are pending before the Commission, rendered the Certificate Order non-final. *Clifton Power*, 294 F.3d at 110; *see also Papago Tribal Utility Auth. v. FERC*, 628 F.2d 235, 238-239 & n.11 (D.C. Cir. 1980) (explaining that a party must file for Commission rehearing before it may file a petition for review, and that the order denying the requests for rehearing is

the final, reviewable agency order). Thus, Allegheny's petition for review of the non-final Certificate Order is "incurably premature" and should be dismissed.

Clifton Power, 294 F.3d at 110-11.

B. The Tolling Order Extended The Time For The Commission To Consider The Rehearing Requests

Allegheny's petition asserts that the rehearing "request was denied by operation of law pursuant to 15 U.S.C. § 717r(a) because the Commission did not act on the request within 30 days." Petition for Review at 2; *see also id.* (asserting that "a 'tolling order' does not constitute an 'act' on a request for rehearing under the Natural Gas Act"). Allegheny is mistaken.

Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does state that, "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." This and other Courts have uniformly determined, however, that this does not require the Commission to act on the merits of a rehearing request within 30 days; rather, the Commission appropriately "acts upon the application for rehearing" by providing notice within the 30-day period that it intends to further consider a rehearing request, as it did here. *California Co. v. Federal Power Comm'n*, 411 F.2d 720, 721 (D.C. Cir. 1969) ("the Commission has power to act on applications for rehearing beyond the 30-day period so long as it gives notice of this intent"); *see also Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) ("[t]he statutory

language, . . . although requiring FERC to ‘act’ upon the application for rehearing within thirty days after filing, lest the application is deemed denied, does not state . . . that FERC must ‘act on the merits’ within that time lest the application is deemed denied.”); *Gen. Amer. Oil Co. of Tex. v. Federal Power Comm’n*, 409 F.2d 597, 599 (5th Cir. 1969) (Commission “acted” for purposes of Natural Gas Act section 19 by providing notice that it intends to further consider rehearing requests). These and other relevant court authorities are listed in a recent district court decision, denying interlocutory relief while another pipeline proceeding (PennEast) was underway before the Commission, in *Delaware Riverkeeper Network, et al. v. FERC*, No. 16-cv-416, slip op. at 4 (D.D.C. Mar. 22, 2017), *on appeal*, No. 17-5084 (D.C. Cir. filed Apr. 24, 2017).

As this Court has found in granting Commission motions to dismiss other petitions for review filed upon FERC issuance of tolling orders, “tolling orders do not resolve the rehearing requests but simply extend the time to consider them.” *City of Glendale, Cal. v. FERC*, No. 03-1261, 2004 WL 180270, at *1 (D.C. Cir. Jan. 22, 2004) (citing *Kokajko*, 837 F.2d at 525); *see also Cal. Mun. Utils. Ass’n v. FERC*, No. 01-1156, 2001 WL 936359, at *1 (D.C. Cir. Jul. 31, 2001) (“In light of the agency’s tolling order and subsequent clarification order, it is clear petitioners’ rehearing requests are still under consideration by the Commission. The petitions for review are, therefore, incurably premature.” (internal citation omitted)).

C. The Commission Delegated Authority To The Secretary To Issue Tolling Orders

Allegheny's petition also mistakenly contends that the Tolling Order is invalid because a recent delegation order did not delegate "authority to act on requests for rehearing" to Commission staff. Petition for Review at 2 (quoting *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 P 4 n.10 (2017) ("2017 Delegation Order")).

As already discussed, the Commission's 1995 Delegation Order delegated authority to the Commission Secretary to issue tolling orders. The 2017 Delegation Order, 158 FERC ¶ 61,135 n.5, explicitly states that "[a]ll pre-existing delegations of authority by the Commission to its staff continue to be effective. 18 C.F.R. §§ 375.301-.315 (2016). This includes the authority of the Secretary to toll the time for action on requests for rehearing. 18 C.F.R. §§ 375.302(v) (2016)." *See also* 2017 Delegation Order n.10 ("authority to issue tolling orders already rests with the Secretary").

D. The Secretary's Authority To Issue Tolling Orders Continues When The Commission Lacks A Quorum

Allegheny's petition also asserts that the Secretary did not have authority to issue the Tolling Order because the Commission lacked a quorum when that order issued. Petition for Review at 2. But the absence of a quorum does not justify departure from the normal rule of final agency action. *See Pub. Citizen*, 839 F.3d

at 1171 n.4 (“practical and prudential considerations, however compelling, cannot provide the basis for our jurisdiction absent demonstrated final agency action”). If Allegheny truly believes there are exceptional circumstances justifying extraordinary relief from this Court to preserve future jurisdiction, it can try to justify extraordinary relief under the All Writs Act, 28 U.S.C. § 1651. *But see In re: American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004) (writ of mandamus for agency delay typically justified only when delay measures in years, not months or weeks).³

Moreover, a staff member to whom authority is delegated while an agency has a quorum retains that authority during periods when the agency lacks a quorum. *See UC Health v. NLRB*, 803 F.3d 669, 670, 672, 675-81 (D.C. Cir. 2015) (finding that an agency staff member maintained his previously delegated authority to conduct a union election and certify its results when the agency lacked a quorum); *SSC Mystic Oper. Co., LLC v. NLRB*, 801 F.3d 302, 308-09 (D.C. Cir. 2015) (same); *see also New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 684 n.4

³ Many parties in recent years, seeking interlocutory judicial relief from FERC certificate approvals (of natural gas infrastructure projects), have filed motions for stay or petitions for mandamus, prior to merits briefing on final orders; all have failed. *See Sierra Club, et al. v. FERC*, D.C. Cir. No. 16-1329 (Nov. 17, 2016), and 14 earlier denials in: D.C. Cir. Nos. 16-1081 (2016), 15-1127 (2015), 15-1052 (2015), 12-1481 (2013), 13-1016 (2013), 13-1015 (2013), 12-1390 (2012), 10-1389 (2011), and 10-1407 (2011); 2nd Cir. Nos. 16-345 (2016), 15-926 (2015) and 12-566 (2012); 3rd Cir. No. 15-2940 (2015); and D. Mass. No. 1:15-cv-12352 (2015).

(2010) (that the agency lacked a quorum did “not cast doubt on the prior delegations of authority to [staff]”).

As in *UC Health* and *SSC Mystic*, the Commission had a quorum when it delegated authority to the Secretary to issue tolling orders. Furthermore, as in those cases, the Commission determined that this delegated authority would continue during the period in which the Commission did not have a quorum. *See* 2017 Delegation Order n.5 (determining that the Commission’s 1995 delegation to the Secretary to toll the time for action on requests for rehearing (as well as its other prior delegations) would continue to be effective in the absence of a quorum).⁴

II. Alternatively, The Petition For Review Should Be Held In Abeyance

If the Court determines not to dismiss the petition for review, it should be held in abeyance pending issuance of an order on the pending requests for rehearing. As this Court has noted, it “often . . . issue[s] . . . orders [to hold a

⁴ Petitioners Allegheny Defense Project and Sierra Club also cannot fairly rely upon the lack of a quorum for relief because they signed a March 1, 2017 letter urging Members of Congress to “oppose restoration of a quorum of FERC Commissioners.” *See* Letter at p. 6 of the following link: <http://www.delawariverkeeper.org/sites/default/files/PR%20FERC%20Quorum%20Should%20Be%20Opposed%203.1.17%20w%20attach.pdf>.

petition for review in abeyance] in light of other pending proceedings that may affect the outcome of the case before [it].” *Basardh v. Gates*, 545 F.3d 1068, 1069 (D.C. Cir. 2008)); *see also Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992) (it is “usually preferable to require the parties to wait for appellate review until the [proceeding] is ultimately resolved -- to insist on the standard of one case, one appeal.”).

CONCLUSION

Accordingly, the Commission requests that the Court dismiss Allegheny's petition for review because it seeks review of a non-final Commission order. Alternatively, the Commission requests that the Court hold the petition for review in abeyance pending the issuance of a final order in the underlying FERC proceeding.

Respectfully submitted,

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April 28, 2017

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), and the Court's Administrative Order Regarding Electronic Case Filing, I hereby certify that I have, this 28th day of April 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system.

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