

**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.	)	

**REPLY IN SUPPORT OF MOTION TO DISMISS  
FOR LACK OF JURISDICTION**

The May 8, 2017 response of Allegheny Defense Project, *et al.* (collectively “Allegheny”), while lengthy, is entirely beside the point. Allegheny’s arguments concerning quorums and delegations do nothing to blunt the force of two basic considerations:

- Its request for rehearing (and motion for stay) – as well as other parties’ requests for rehearing (and motions for stay) – are pending before the Commission; and
- The Commission **will** act on those rehearings and motions in a timely manner.

The Commission will address all rehearing and stay requests, will respond to all arguments, will complete the record, and will offer the Court, at the conclusion of the administrative proceeding, all its findings and conclusions for judicial review,

just as the Natural Gas Act contemplates. There is no reason to short circuit the statutory process now.

Nothing raised in the response alters the fact that the challenged agency order, *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125 (2017) (“Certificate Order”), is not a final order, and that Allegheny’s petition for review is “incurably premature.” *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002); *see also* Motion at 5-6 (citing cases). “There is good reason to prohibit any litigant from pressing its cause concurrently upon both the judicial and the administrative fronts: a favorable decision from the agency might yet obviate the need for review by the court,” or the agency might act to alter the issues ultimately presented for review, “mak[ing] the case moot and [the court’s] efforts supererogatory.” 294 F.3d at 111-12.

## **ARGUMENT**

### **I. Allegheny’s Arguments Against Dismissal Lack Merit**

#### **A. *Laurel Baye* Is Inapposite Here**

Allegheny relies on *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), to support its contention that the Secretary’s authority to issue tolling orders ceases when the Commission lacks a quorum. Response at 4-10. As this Court has explained, however, “*Laurel Baye* considered only whether plenary, final authority delegated to panels of the Board’s own

members could survive when the Board had no quorum . . . .” *UC Health v. NLRB*, 803 F.3d 669, 678 (D.C. Cir. 2015). *Laurel Baye* does not govern the different situation in *UC Health* and here – whether nonfinal authority already delegated to agency staff continues when the agency loses its quorum. *Id.*; *see also id.* at 676-80 (further discussing and distinguishing *Laurel Baye*).

Likewise, in discussing *Laurel Baye*, the Supreme Court stated: “Nor does failure to meet a quorum requirement necessarily establish that an entity’s power is suspended so that it can be exercised by no delegee.” *New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 684 n.4 (2010). While an agency “may not, of course, take any action absent sufficient membership to muster a quorum,” that “does not cast doubt on the prior delegations of authority to [staff].” *Id.*

#### **B. There Is No Due Process Concern Here**

There also is no merit to Allegheny’s claim that it “lack[s] any opportunity for [its] challenges to the Certificate Order to be heard ‘at a meaningful time and in a meaningful manner.’” Response at 12 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

As explained in the Commission’s motion, 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), and this Court has jurisdiction to review only final

Commission orders, *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995). Allegheny’s and the other parties’ requests for rehearing, which are pending before and will be addressed by the Commission, rendered the Certificate Order non-final. *See Clifton Power*, 294 F.3d at 110. Allegheny’s irreparable injury claims do not change these fundamental finality principles. *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”); *see also Clifton Power*, 294 F.3d at 112 (rejecting argument that “the requirement of finality is merely a prudential consideration, with which we may dispense, rather than a jurisdictional prerequisite”).

Moreover, while Allegheny is correct that the Commission cannot issue an order on the pending rehearing requests while it lacks a quorum, Response at 12, the agency is not, as Allegheny fears, “paralyzed”: the Commission does not need to have a quorum for its staff to commence analyzing the rehearing (and stay) issues and working on a draft order for issuance once a quorum is restored.<sup>1</sup>

Additionally, on May 10, 2017, the President nominated two new members to the

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<sup>1</sup> Commission staff also continues to perform other normal regulatory activities, including monitoring licensed projects and taking necessary action to enforce its license orders. *See, e.g.*, May 10, 2017 Letter Order in Docket No. CP15-93, Accession No. 20170510-3009 (staff letter to Rover Pipeline, limiting construction activities pipeline may undertake until it complies with specified measures).

Commission,<sup>2</sup> an important step towards restoring a quorum. In light of this development, and subject to Senate confirmation of those nominees, the Commission will be able to act on the rehearing requests in “the foreseeable future.” *See* Response at 12. As the Commission’s motion pointed out, whether agency delay is undue, meriting extraordinary action by a court in support of future jurisdiction, outside the normal processes contemplated by the Natural Gas Act, is measured in years, not weeks or months. *See* Motion at 9 (citing *In re: American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004)).

**C. The Plain Language Of The Regulation Delegated Authority To Issue The Tolling Order**

The regulation at issue here, 18 C.F.R. § 375.302(v), provides that “[t]he Commission authorizes the Secretary, or the Secretary’s designee to: Toll the time for action on requests for rehearing.” While this regulation contains no language limiting the rehearing requests the Secretary may toll, Allegheny points to language in the preamble of the 1995 rulemaking promulgating that regulation to argue that the Secretary cannot toll the time for action on rehearing requests that are combined with a stay request. Response at 14-16. But, “[t]he preamble to a rule is not more binding than a preamble to a statute.” *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002). Thus, the “language in the preamble of a

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<sup>2</sup> *See* <https://www.whitehouse.gov/the-press-office/2017/05/10/nine-nominations-sent-senate-today>.

regulation is not controlling over the language of the regulation itself.” *Entergy Servs., Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) (quoting *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)); *see also Nat’l Wildlife Fed’n v. EPA*, 286 F.3d at 570 (“Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.”). As Allegheny recognizes, “[c]ourts must give effect to the plain language of an agency regulation . . . .” Response at 20.

Consistent with the plain language of the regulation, the Secretary has been tolling the time to act on rehearing requests, whether combined with stay requests or not, since shortly after 18 C.F.R. § 375.302(v) was promulgated. *See, e.g.*, FERC Docket No. CP98-280 Accession Nos. 19981207-0192 (Dec. 3, 1998 Request for Rehearing and Stay) and 19981210-0098 (Secretary’s Dec. 9, 1998 order tolling rehearing request); FERC Docket No. P-4718 Accession Nos. 20021023-5027 (Oct. 23, 2002 Request for Rehearing and Stay) and 20021125-3011 (Secretary’s Nov. 25, 2002 order tolling rehearing request); FERC Docket No. ER09-1682 Accession Nos. 20091125-5125 (Nov. 25, 2009 Request for Rehearing and Stay) and 20091224-3007 (Secretary’s Dec. 24, 2009 order tolling rehearing request); *Nat’l Fuel Gas Supply Corp.*, 138 FERC ¶ 61,048 (2012) (order in FERC Docket No. CP11-128 noting that an order (Accession No. 20111219-

3027, issued by the Secretary) in that proceeding had tolled a rehearing request that was combined with a request for a stay (Accession No. 20111118-5034)).

**D. A Tolling Order Satisfies The Requirement To Act On A Rehearing Request Within 30 Days**

Allegheny's response (at 19-22) does not dispute that this and other courts have uniformly determined that Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does not require the Commission to act on the merits of a rehearing request within 30 days. Instead, Allegheny asserts merely that "this Court's decisions . . . were wrongly decided" and are not binding on the Court. Response at 21-22. In fact, however, the Court is, "of course, bound to follow circuit precedent absent contrary authority from an en banc court or the Supreme Court." *Nat'l Inst. Of Military Justice v. U.S. Dep't of Defense*, 512 F.3d 677, 682 (D.C. Cir. 2008) (quoting *U.S. v. Carson*, 455 F.3d 336, 384 n.43 (D.C. Cir. 2006)).

**II. If Not Dismissed, The Petition For Review Should Be Held In Abeyance**

Even if the claims in Allegheny's response were correct, the Court still should not direct the Commission to file the certified index to record and proceed to briefing at this time.

As the Tolling Order (*Transcontinental Gas Pipe Line Co., LLC*, Docket No. CP15-138-001 (March 13, 2017)) states, the Commission intends to issue a substantive merits order on all pending requests for rehearing (and stay), by Allegheny and other parties, of the Certificate Order. Until the certified index to

record is filed with the Court, the Commission retains jurisdiction to “modify or set aside, in whole or in part,” any prior order – even after it has issued (or has been deemed to have issued) a rehearing order. Natural Gas Act section 19(a), 15 U.S.C. § 717r(a); *see also Clifton Power*, 294 F.3d at 111 (same, construing identical provision in Federal Power Act section 313(a), 16 U.S.C. § 825l(a)). As noted in the Commission’s motion, this Court has found that 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.” *Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992). Accordingly, this Court “often . . . issue[s] . . . orders [to hold a 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).

Here, the Commission commits to act in a timely manner on the pending rehearing and stay requests in this proceeding once it regains a quorum. Thus, if the Court determines not to dismiss the petition, the Court should hold the petition in abeyance and allow for periodic reassessment through status reports, with motions to govern once the Commission acts with finality.

## CONCLUSION

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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May 15, 2017

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P 32(g)(1), I certify that this Reply complies with type-volume limitations because it contains 1,882 words and was prepared in Times New Roman 14-point font using Microsoft Word 2010.

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May 15, 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 15th day of May 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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