

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

|                                       |   |                        |
|---------------------------------------|---|------------------------|
| The Town of Weymouth, Massachusetts,  | ) |                        |
| Petitioner,                           | ) |                        |
|                                       | ) |                        |
| and                                   | ) |                        |
|                                       | ) |                        |
| Fore River Residents Against the      | ) |                        |
| Compressor Station, <i>et al.</i> ,   | ) |                        |
| Petitioners,                          | ) |                        |
|                                       | ) |                        |
| v.                                    | ) | Nos. 17-1135 & 17-1139 |
|                                       | ) | (consolidated)         |
| Federal Energy Regulatory Commission, | ) |                        |
| Respondent.                           | ) |                        |

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

The July 10, 2017 joint response of the Town of Weymouth, Massachusetts (“Weymouth”) and Fore River Residents Against the Compressor Station, *et al.* (“Coalition) (collectively “Project Opponents”), and the separate response of movant-intervenors Lori and Michael Hayden (“Haydens”), are entirely beside the point. Their arguments concerning quorums and delegations do nothing to blunt the force of two basic considerations:

- Their 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.<sup>1</sup>

Nothing raised in the responses alters the fact that the challenged agency orders are not final orders, and that Project Opponents' petitions for review are "incurably premature." *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002); *see also* Motion at 8-9 (citing cases). Project Opponents are therefore incorrectly "pressing [their] cause[s] concurrently upon both the judicial and the administrative fronts." *Clifton Power*, 294 F.3d at 111; *accord Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938) ("Obviously, the rules requiring exhaustion of the administrative remedy cannot be circumvented by asserting that . . . the mere holding of the prescribed administrative hearing would result in irreparable damage.").

---

<sup>1</sup> Project Opponents' response raises arguments that are substantially similar to those made by petitioners in *Allegheny Defense Project, et al. v. FERC*, No. 17-1098 (D.C. Cir. filed Mar. 23, 2017), in response to a similar motion to dismiss (filed Apr. 28, 2017). *See* Petitioners' Response Opposing Motion to Dismiss, *Allegheny Defense Project, et al. v. FERC*, No. 17-1098 (filed May 8, 2017). Accordingly, this reply is modeled after the Commission's reply in support of its motion to dismiss in that case. *See* Respondent's Reply in Support of Motion to Dismiss, *Allegheny Defense Project, et al. v. FERC*, No. 17-1098 (filed May 15, 2017).

## ARGUMENT

### I. Project Opponents' Arguments Against Dismissal Lack Merit

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

Project Opponents rely on *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), to support their contention that the Secretary's authority to issue tolling orders ceases when the Commission lacks a quorum. Response at 5-6. 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.*

Indeed, contrary to Project Opponents' assertions, Response at 5-8, the Department of Energy Organization Act allows the Commission to delegate functions. *See* 42 U.S.C. § 7171(g) ("The Commission may, by one or more of its members or by such agents as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions[.]"). And it provides that the Commission's rules and delegations continue until changed. *See* 42 U.S.C. § 7171(f) ("Commission is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions. Until changed by the Commission, any procedural and administrative rules applicable to particular functions over which the Commission has jurisdiction shall continue in effect with respect to such particular functions."); *see also Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 n.8 (2017) (citing 42 U.S.C. § 7171(f), 18 C.F.R. §§ 375.301-.315, and a 1993 delegation order).

While Project Opponents are correct that the Commission cannot issue an order on the pending rehearing requests while it lacks a quorum, Response at 10-11, the agency is not at a stand-still: 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>2</sup> Additionally, on

---

<sup>2</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,

May 10, 2017, the President nominated two new members to the Commission,<sup>3</sup> and the Senate Energy and Natural Resources Committee voted on June 6, 2017 to advance those nominees to the Senate floor for confirmation.<sup>4</sup> In light of these developments, and subject to Senate confirmation of those nominees, the Commission will be able to act on the rehearing requests in the “reasonable timeframe” requested by Project Opponents. *See* Response at 11. 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 15 (citing *In re: American Rivers*, 372 F.3d 413, 419 (D.C. Cir. 2004)).

**B. 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, the Project Opponents point

---

Accession No. 20170510-3009 (staff letter to Rover Pipeline, limiting construction activities pipeline may undertake until it complies with specified measures).

<sup>3</sup> *See* <https://www.whitehouse.gov/the-press-office/2017/05/10/nine-nominations-sent-senate-today>.

<sup>4</sup> *See* <https://www.energy.senate.gov/public/index.cfm/2017/6/committee-advances-nominees-for-interior-energy-and-ferc>.

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. Project Opponents' Response at 9. 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 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)).

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)).

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

Project Opponents' response 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. In fact, Project Opponents entirely ignore the numerous cases, from this and other courts, listed in the Commission's motion (at 10-12) that address this issue. But 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 Project Opponents' 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 orders (*Algonquin Gas Transmission, LLC*, Docket No. CP16-9-001 (Mar. 27, 2017); *Algonquin Gas Transmission, LLC*, Docket No. CP16-9-003 (May 8, 2017)) state, the Commission intends to issue a substantive merits

order on all pending requests for rehearing (and stay), by Project Opponents and other parties, of the challenged orders. 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 petitions, the Court should hold the petitions 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 Project Opponents' petitions for review because they seek review of non-final Commission orders. Alternatively, the Commission requests that the Court hold the petitions for review in abeyance pending the issuance of a final order in the underlying FERC proceeding.

Respectfully submitted,

Robert H. Solomon  
Solicitor

/s/ Nicholas M. Gladd  
Nicholas M. Gladd  
Attorney

Federal Energy Regulatory  
Commission  
Washington, DC 20426  
TEL: (202) 502-8836  
FAX: (202) 273-0901  
E-mail: [nicholas.gladd@ferc.gov](mailto:nicholas.gladd@ferc.gov)

July 13, 2017

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Circuit Rule 32(e), I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and Circuit Rule 27(d)(2)(A) because this motion contains 1,886 words.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

*/s/ Nicholas M. Gladd*  
Nicholas M. Gladd  
Attorney

Federal Energy Regulatory  
Commission  
Washington, D.C. 20426  
Tel.: (202) 502-8836  
Fax: (202) 273-0901  
Email: [Nicholas.Gladd@ferc.gov](mailto:Nicholas.Gladd@ferc.gov)

July 13, 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 13th day of July 2017, served the foregoing upon the counsel listed in the Service Preference Report via email through the Court's CM/ECF system, as indicated below:

Andrew Nicholas Beach  
Vinson & Elkins LLP  
2200 Pennsylvania Avenue, NW  
Suite 500W  
Washington, DC 20037-1701

Email

Donna M. Brewer  
Miyares and Harrington LLP  
40 Grove Street  
Suite 190  
Wellesley, MA 02482

Email

Carolyn Elefant  
Law Offices of Carolyn Elefant  
2200 Pennsylvania Avenue, NW  
4th Floor  
Washington, DC 20037

Email

Ivria Fried  
Miyares and Harrington LLP  
40 Grove Street  
Suite 190  
Wellesley, MA 02482

Email

Michael H. Hayden  
Morrison Mahoney LLP  
250 Summer Street  
Boston, MA 02210-0000

Email

Jeremy C. Marwell  
Vinson & Elkins LLP  
2200 Pennsylvania Avenue, NW  
Suite 500W  
Washington, DC 20037-1701

Email

Joseph Raymond Miyares  
Miyares and Harrington LLP  
40 Grove Street  
Suite 190  
Wellesley, MA 02482

Email

Michael B. Wigmore  
Vinson & Elkins LLP  
2200 Pennsylvania Avenue, NW  
Suite 500W  
Washington, DC 20037-1701

Email

Anita Rutkowski Wilson  
Vinson & Elkins LLP  
2200 Pennsylvania Avenue, NW  
Suite 500W  
Washington, DC 20037-1701

Email

*/s/ Nicholas M. Gladd*  
Nicholas M. Gladd  
Attorney

Federal Energy Regulatory  
Commission  
888 First Street, NE  
Washington, D.C. 20426  
Tel.: (202) 502-8836  
Fax: (202) 273-0901  
Email: [nicholas.gladd@ferc.gov](mailto:nicholas.gladd@ferc.gov)