

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

Appalachian Voices, <i>et al.</i> ,	)	
Petitioners,	)	
	)	
v.	)	No. 18-1114
	)	
Federal Energy Regulatory Commission	)	
Respondent.	)	

**MOTION TO DISMISS PETITION FOR REVIEW  
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 in this case for lack of jurisdiction. The challenged agency order, *Atlantic Coast Pipeline, LLC*, 161 FERC ¶ 61,042 (2017) (“Certificate Order”), is not a final order. Requests for rehearing of that order – including requests filed by the petitioners here – are pending before the Commission. Thus, the joint petition for review is, under this Court’s standards, premature.

In the alternative, if the Court does not dismiss the petition, it should hold it in abeyance pending completion of the agency proceedings. Counsel has informed Petitioners and Intervenor of this motion. Petitioners oppose this motion; Intervenor consents.

## BACKGROUND

### I. Statutory And Regulatory Background

The petitioners, Appalachian Voices, *et al.* (collectively, “Appalachian Voices”), filed their joint petition for review pursuant to Natural Gas Act section 19(b), 15 U.S.C. § 717r(b). *See* Joint Petition for Review at 3.

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. *See Halifax Cty.,*

*Va. v. Lever*, 718 F.2d 649, 652 (4th Cir. 1983) (“proper remedy” if dissatisfied with a FERC order is to “petition for a rehearing by the Commission as provided for and mandated by the [Federal Power] Act”); *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (judicial interpretations of the Federal Power Act and Natural Gas Act, both administered by the Commission, may be followed interchangeably); *see generally N.C. Utils. Comm’n v. FERC*, 741 F.3d 439, 448 (4th Cir. 2014) (the requirement that a party must first seek agency rehearing is “based on the time-honored doctrine of exhaustion of administrative remedies”) (internal quotations omitted); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (a petition for review filed before the FERC rehearing order issues is “incurably premature” and “must be dismissed”).

## **II. Factual Background**

On October 13, 2017, the Commission issued the challenged order, which conditionally granted Atlantic Coast Pipeline 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 Coast Pipeline Project. Certificate Order, 161 FERC ¶ 61,042 PP 1-4. In accordance with Natural Gas Act section 19, a number of parties to the FERC proceeding, including Appalachian Voices, filed requests for rehearing of the Certificate Order. *See, e.g., Atlantic Coast Pipeline, LLC, Request for Rehearing of Appalachian Voices, et al.*, Docket No. CP15-554 (filed Nov. 13,

2017).<sup>1</sup> Some parties, including Appalachian Voices, also requested that the Commission stay the Certificate Order's effectiveness. *See, e.g., id.*

On December 11, 2017, FERC's Secretary, pursuant to 18 C.F.R. § 375.302(v), issued a procedural order, tolling the time for the Commission to issue its order addressing the matters raised in the requests for rehearing of the Certificate Order. *Atlantic Coast Pipeline, LLC*, Docket No. CP15-554 (Dec. 11, 2017) ("Tolling Order"). That order stated:

Rehearings have been timely requested of the Commission order issued on October 13, 2017, in this proceeding. [Certificate Order], 161 FERC ¶ 61,042 (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) would be deemed denied. 18 C.F.R. § 385.713 (2017). [Internal footnote omitted].

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. As provided in 18 C.F.R. § 385.713(d), no answers to the rehearing requests will be entertained.

On January 29, 2018, Appalachian Voices filed a joint petition seeking judicial review of the Certificate Order, without waiting for the Commission to issue the promised rehearing order addressing the matters raised in their and other parties' requests for rehearing.

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<sup>1</sup> Available at <https://elibrary.ferc.gov>.

## ARGUMENT

### I. The Joint 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 “no ‘objection to the order of the Commission shall be considered by the court’ unless such objection” was first raised to the Commission in an application for rehearing and addressed in a rehearing order. *Consol. Gas Supply Corp. v. FERC*, 611 F.2d 951, 959 (4th Cir. 1979) (quoting 15 U.S.C. § 717r(b)). A party cannot “willfully fail to exhaust [its] administrative remedies and then . . . resort to court without having given the agency an opportunity to determine the questions raised” on rehearing. *Consol. Gas*, 611 F.2d at 959 (quoting *Fed. Power Comm’n v. Colo. Interstate Gas Co.*, 348 U.S. 492, 500 (1955)). This Court interprets this requirement “strictly” based “on the ‘time-honored doctrine of exhaustion of administrative remedies.’” *N.C. Util. Comm’n*, 741 F.3d at 448 (quoting *Consol. Gas*, 611 F.2d at 959, and *Colo. Interstate Gas Co.*, 348 U.S. at 500).

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) (quoting *Bowen v. Mich. Acad. Of Family Physicians*, 476 U.S. 667, 670 (1986)). Final agency action is that which “mark[s] the consummation of the agency’s decisionmaking process.” *Bennett v.*

*Spear*, 520 U.S. 154, 177-78 (1997); *see also Aquaenergy Systems, Inc. v. FERC*, 857 F.2d 227, 230 (4th Cir. 1988) (“We will not consider a contention not presented to, or considered by,” the Commission.).

The Certificate Order here is not final agency action. The rehearing requests by Appalachian Voices and other parties, which are pending before the Commission, rendered the Certificate Order non-final. *See Consol. Gas*, 611 F.2d at 959 (refusing to review FERC orders where the party failed to preserve its arguments in an application for rehearing); *accord Clifton Power*, 294 F.3d at 110. This Court has explained that there is good reason for the Natural Gas Act’s rehearing requirement – it “allow[s] FERC the opportunity to correct its own errors, if any, prior to court intervention.” *N.C. Util. Comm’n*, 741 F.3d at 448 (citing *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773-74 (D.C. Cir. 1985)); *see also Clifton Power*, 294 F.3d at 112-13 (a favorable decision from FERC on rehearing “might yet obviate the need for review by the court,” or the agency rehearing might alter the issues ultimately presented for review, “mak[ing] the case moot and [the court’s] efforts supererogatory.”).

So, as this Court has held, if a party is dissatisfied with the Commission’s decision, its proper remedy is to “petition for a rehearing by the Commission as provided and mandated in the Act.” *Halifax Cty.*, 718 F.2d at 652 (applying the “plain meaning” of the substantively-identical Federal Power Act judicial review

provision); *see also Ark. La. Gas.*, 453 U.S. at 577 n.7. Only then, if Appalachian Voices is dissatisfied with the agency’s decision on rehearing, can it seek “review [of] a decision of the Commission” in the appropriate court of appeals. *Halifax Cty.*, 718 F.2d at 652.

The joint petition for review of the non-final Certificate Order is therefore “premature” and should be dismissed. *Consol. Gas*, 611 F.2d at 960; *see also Clifton Power*, 294 F.3d at 112-13 (petitions for judicial review before FERC acts on rehearing are “incurably premature”).

**B. The Tolling Order Constituted An “Act” On The Rehearing Requests Under Natural Gas Act Section 19(a)**

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.” Yet Courts have uniformly determined 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. *See Cal. Co. v. Fed. 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) (“The

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. Fed. 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).<sup>2</sup>

Such “FERC tolling orders have been repeatedly upheld against challenges.” *Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Nat. Gas Pipeline*, No. 17-00492, 2018 WL 648376, at \*7 (W.D. Va. Jan. 31, 2018) (collecting cases); *see Kokajko*, 837 F.2d at 525 (holding that FERC’s use of a tolling order did not constitute a due process violation); *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).

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<sup>2</sup> 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. *Del. Riverkeeper Network, et al. v. FERC*, 243 F. Supp. 3d 141, 145-46 (D.D.C. 2017), *on appeal*, No. 17-5084 (D.C. Cir. filed Apr. 24, 2017).

As the D.C. Circuit found in granting Commission motions to dismiss other petitions for review filed upon 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 Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993) (“we hold that section 717r(a) denies us jurisdiction to review matters . . . raised in rehearing petitions before FERC until FERC denies the petition or until FERC rules on the merits of a granted petition for rehearing”); *see also Valero Interstate Transmission Co. v. FERC*, 903 F.2d 364, 369 (5th Cir. 1990) (“We agree with FERC that by issuing the April 6 order keeping open consideration of Transco’s March 7, 1988 petition for rehearing, FERC indicated that it was considering action regarding the proceeding, and therefore the February 5 order did not become final so as to cause expiration of the time for filing for judicial review.”).

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

If the Court determines not to dismiss the joint petition for review, it should be held in abeyance until the promised order on the pending requests for rehearing issues. As this Court has noted, a court may hold a matter in abeyance in light of other pending proceedings that may affect the outcome of the case before it. *See United States v. Boyd*, 537 Fed. Appx. 234, 237 (4th Cir. 2013); *accord 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 Petitioners’ joint petition for review because they seek 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 rehearing order in the underlying FERC proceeding.

Respectfully submitted,

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February 16, 2018

**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 16th day of February 2018, 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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