

**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.)	

**REPLY OF RESPONDENT FEDERAL ENERGY
COMMISSION IN SUPPORT OF MOTION TO DISMISS
PETITION FOR LACK OF JURISDICTION**

Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) submits this reply in support of its Motion to Dismiss the petition for review in this case.

Petitioners’ response to the Commission’s Motion is entirely beside the point—their arguments do nothing to blunt the force of two fundamental facts:

- Their requests for rehearing, and those of other parties, are pending before the Commission; and
- The Commission **will** act on those rehearings in a timely manner.

The Commission will address all rehearing requests, will respond to all arguments, will complete the record, and will offer the Court, at the conclusion of the administrative proceeding, all of its findings and conclusions for judicial review, just as the Natural Gas Act contemplates. There is no reason to shortcut the statutory process in this case.

I. The Certificate Order Will Not Be Final And Reviewable Until The Commission Issues Its Rehearing Order

As this Court has long 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., Va. v. Lever*, 718 F.2d 649, 652 (4th Cir. 1983) (applying the "plain meaning" of the substantively-identical Federal Power Act judicial review provision). "The self-evident purpose of this requirement is to allow FERC the opportunity to correct its own errors, if any, prior to court intervention." *N.C. Utils. Comm'n v. FERC*, 741 F.3d 439, 448 (4th Cir. 2014) (citing *ASARCO, Inc. v. FERC*, 777 F.2d 764, 773–74 (D.C. Cir. 1985)). As the Commission demonstrated in its Motion (at 3-7), that procedure has not yet resulted in a final, appealable order.

Petitioners contend that requests for rehearing of the Certificate Order were denied by operation of law because, purportedly: a tolling order does not constitute an "act" on a request for rehearing under Natural Gas Act section 19(a), 15 U.S.C. § 717r(a); Natural Gas Act section 19(a) does not permit the Commission to delegate its authority to toll the time to act on rehearing requests; and FERC's Secretary does not have delegated authority to act on requests for rehearing that are paired with motions for stay. Resp. at 4-20. Petitioners are mistaken on all points.

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

Petitioners do not dispute that the D.C., First, and Fifth Circuits — all the courts that have ruled on the question, over almost half a century — have uniformly determined that the Commission has the statutory authority to extend its consideration of rehearing on the merits beyond 30 days with a tolling order, under both the Natural Gas Act and the Federal Power Act. *See* Mot. at 7-9 (citing cases); *see also Mountain Valley Pipeline, LLC v. Easements to Construct, Operate, and Maintain a Natural Gas Pipeline Over Tracts of Land in Giles County, et al.*, No. 7:17-CV-00492, 2018 WL 648376, at *7 (W.D. Va. Jan. 31, 2018) (rejecting argument that tolling orders deny due process, and noting cases where “FERC tolling orders have been repeatedly upheld against challenges”).

Instead, Petitioners boldly claim that all of those cases were “wrongly decided,” Resp. at 9, based on their view that section 19(a) solely governs the scope of the Court’s jurisdiction, a matter for the Court to consider *de novo*. Resp. at 7-11. Elsewhere, however, Petitioners reveal that, of course, what they seek is a ruling that “FERC cannot indefinitely extend its ‘further consideration’ of whether to grant rehearing.” Resp. at 7. That question necessarily turns on the scope of the Commission’s statutory authority to “act” on requests for rehearing. Accordingly, the statutory analysis followed by the D.C. Circuit, the First Circuit, and the Fifth Circuit is not only unsurprising, but fully consistent with Supreme Court precedent.

See City of Arlington, Tex. v. FCC, 569 U.S. 290, 296 (2013) (holding that the two-step framework of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), applies to questions concerning “the scope of the agency’s statutory authority (that is, its jurisdiction)”).

Moreover, Petitioners’ reliance here on section 706 of the Administrative Procedure Act, 5 U.S.C. § 706(1), which allows courts to “compel agency action unlawfully withheld,” is misplaced. Resp. at 6. To the extent Petitioners believe the Commission has failed to timely act on the pending requests for rehearing, they may seek mandamus in the appropriate court. Indeed, Petitioners have filed in this Court for mandamus—seeking a stay of the Certificate Order in the event that the Court grants the Commission’s Motion to Dismiss—but have disclaimed any request to compel agency action. *See* Petition for a Writ Staying the FERC Order at 2, No. 18-1271 (4th Cir. filed Mar. 8, 2018); *see also 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).

Petitioners aver that the Commission need not act on the “merits” of a rehearing request, so long as it grants or denies the request. Resp. at 6. But Petitioners make no effort to square such summary action with the requirements of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A); *see FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016) (citing *Motor Vehicle Mfrs. Ass’n of*

United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)); *see also FPC v. Metro. Edison Co.*, 304 U.S. 375, 384 (1938) (holding that judicial review is limited to “orders of a definitive character dealing with the *merits* of a proceeding before the Commission”) (emphasis added).

B. The Commission Appropriately Delegates Authority To The Secretary To Issue Tolling Orders

The Commission’s regulations authorize it to delegate responsibility for issuing tolling orders to the Commission’s Secretary. 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.” This regulation does not contain any language limiting the rehearing requests the Secretary may toll.

Petitioners point to the preamble of the 1995 rulemaking promulgating that regulation¹ to argue that the Commission’s Secretary cannot toll the time for action on rehearing requests that are combined with a stay request. Resp. at 14-21. 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 “first task is to determine whether the regulation itself is unambiguous; if so, its plain language

¹ *Delegation of Auth. to the Sec’y, the Dir. of the Office of Elec. Power Regulation and the Gen. Counsel*, 60 Fed. Reg. 62,326 (Dec. 6. 1995), FERC Stats. & Regs., Reg. Preambles Jan. 1991-June 1996 ¶ 31,030 (1995).

controls.” *Dickenson-Russell Coal Co. v. Sec’y of Labor*, 747 F.3d 251, 257 (4th Cir. 2014) (internal quotation omitted); *see also Entergy Servs., Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) (holding that “language in the preamble of a regulation is not controlling over the language of the regulation itself”).

Consistent with the plain language of the regulation, FERC’s 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)). This course of conduct “indicate[s] a time honored interpretation of the section

involved, worthy of judicial deference.” *California Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969).

C. The Commission Can Delegate Its Tolling Authority To Its Secretary

The Commission, as a federal agency, is presumed to have authority to delegate its functions to subordinates. *See U.S. Telecom Ass’n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.”); *see also Ethicon Endo-Surgery, Inc. v. Covidien L.P.*, 812 F.3d 1023, 1031 (Fed. Cir. 2016) (explaining that an agency’s “implicit power to delegate to subordinates” was firmly entrenched in *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 122 (1947)). “The general principle is so well accepted that the Supreme Court has called it ‘unexceptional.’” *Ethicon*, 812 F.3d at 1032 (quoting *U.S. v. Giordano*, 416 U.S. 505, 514 (1974)).

Furthermore, the Supreme Court has determined that Congress’ grant of broad rulemaking power to an agency may itself be sufficient to show that the agency has authority to delegate. *Fleming*, 331 U.S. at 121. In *Fleming*, the Supreme Court found that a provision stating “[t]he Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in

order to carry out the purposes and provisions of this Act,” showed the agency there had authority to delegate its functions. *See Fleming*, 331 U.S. at 121.

The statute establishing the Commission, the 1977 Department of Energy Organization Act, 42 U.S.C. § 7171, contains a similar provision: “The Commission is authorized to establish such procedural and administrative rules as are necessary to the exercise of its functions.” 42 U.S.C. § 7171(f). Moreover, Natural Gas Act section 16, 15 U.S.C. § 717o, provides that: “The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.”

Thus, as a federal agency, the Commission is not only inherently presumed to have authority to delegate the issuance of tolling orders to its Secretary, but the pertinent statutory provisions granting the Commission broad rulemaking authority confirm this. *See Fleming*, 331 U.S. at 121-22; *U.S. Telecom Ass’n*, 359 F.3d at 565; *see also Ethicon*, 812 F.3d at 1033 (“both as a matter of inherent authority and general rulemaking authority” the agency there had authority to delegate its function to a subordinate).

This makes sense, as Congress has entrusted the Commission with substantial responsibilities under the Natural Gas Act and the other statutes it administers, and has “authorized [the Commission] to appoint . . . such officers,

attorneys, examiners, and experts as may be necessary for carrying out its functions,” Natural Gas Act section 18, 15 U.S.C. § 717q. *See Fleming*, 331 U.S. at 122 (“the overwhelming nature of the . . . program entrusted to the Administrator suggests that the Act should be construed so as to give it the administrative flexibility necessary for prompt and expeditious action on a multiple of fronts;” “We would hesitate to conclude that all the various functions granted the Administrator need be performed personally by him or under his personal direction.”).

D. Petitioners’ Contentions Do Not Render Their Petition Timely

Nothing raised in Petitioners’ Response alters the fact that the challenged agency orders are not final orders, and that the petition for review is “incurably premature.” *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002); *see also* Mot. at 7-8 (citing cases). Petitioners 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.”).

Indeed, Petitioners’ core factual justification for their premature appeal is that pipeline construction activities and condemnation proceedings have commenced before the Commission has issued a judicially reviewable rehearing order. *See* Resp. at 3, 12, 18, 21. The Natural Gas Act expressly confers the right of eminent domain to “any holder of a certificate of public convenience and necessity.” Section 7(h), 15 U.S.C. § 717f(h); *see E. Tenn. Nat. Gas Co. v. Sage*, 361 F.3d 808, 828 (4th Cir. 2004) (holding that, district court may, in a condemnation action under the Natural Gas Act, grant immediate possession through a preliminary injunction). The Act further specifies that the filing of a rehearing request “shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order.” Section 19(c), 15 U.S.C. § 717r(c). Accordingly, Congress designed the Natural Gas Act to produce this very process; neither construction nor eminent domain awaits Commission action on rehearing. *Cf. Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1174 (D.C. Cir. 2016) (explaining, as to the FERC-administered Federal Power Act, that, where judicial review is limited due to an operation of law, “[a]ny unfairness associated with this outcome inheres in the very text of the [statute]. Accordingly, it lies with Congress, not this Court, to provide the remedy.”).

Finally, even assuming, *arguendo*, that the December 11, 2017 Tolling Order did effectively deny the pending rehearing requests, the Certificate Order **still**

would not be final. The Commission has stated in the Tolling Order that it will issue a rehearing order addressing the substantive merits of the numerous objections raised on rehearing. The Commission’s statutory prerogative to do so is clear: Until the agency record is filed in a court of appeals, “the Commission **may at any time**, upon reasonable notice and in such manner as it shall deem proper, **modify or set aside, in whole or in part, any finding or order made or issued** by it under the provisions of this chapter.” 15 U.S.C. § 717r(a) (emphases added).

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

Even if the Court does not dismiss the petition for review for lack of jurisdiction, the Court should not direct the Commission to file the certified index to the record, and should instead hold the petition in abeyance pending completion of the FERC proceeding. *See, e.g., 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 [underlying proceeding] is ultimately resolved — to insist on the standard of one case, one appeal.”). As the Tolling Order states, the Commission intends to issue a substantive merits order on all pending requests for rehearing (and stay), by Petitioners, the pipeline company and other parties, of the challenged 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).

CONCLUSION

For the reasons stated herein and in the Commission’s Motion to Dismiss, the petition for review should be dismissed. If not dismissed, the petition should be held in abeyance to allow the agency to issue a final, judicially-reviewable rehearing order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 2,585 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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 2010.

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Docket No. CP15-554, *et al.*

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I hereby certify that I have, this 14th day of March 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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