

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

Coalition to Reroute Nexus, <i>et al.</i> ,)	
Petitioners,)	
)	
v.)	No. 17-4302
)	
Federal Energy Regulatory Commission,)	
Respondent.)	
<hr style="border-top: 1px solid black;"/>		
)	Not yet consolidated
)	
City of Oberlin, Ohio,)	
Petitioner,)	
)	
v.)	No. 17-4308
)	
Federal Energy Regulatory Commission,)	
Respondent.)	

**MOTION OF RESPONDENT FEDERAL ENERGY
REGULATORY COMMISSION TO DISMISS PETITIONS
FOR LACK OF JURISDICTION**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) hereby moves this Court to dismiss both of the above-captioned cases for lack of subject matter jurisdiction.

The challenged agency order, Order Issuing Certificates and Granting Abandonment, *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (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 petitions for review are, under longstanding case law, “incurably premature.” (For the same reasons offered in support of this Motion to Dismiss, the Commission supports the similar motions filed by Intervenor NEXUS Gas Transmission, LLC (“NEXUS”) in each of these cases.)

In the alternative, if the Court does not dismiss the petitions, these cases should be consolidated and held in abeyance pending completion of the agency proceedings.

BACKGROUND

Statutory And Regulatory Background

The petitioners, Coalition to Reroute NEXUS (“Coalition”), *et al.* (petitioners in No. 17-4302) and City of Oberlin, Ohio (“Oberlin”) (petitioner in No. 17-4308), filed their petitions for review pursuant to Natural Gas Act section 19(b), 15 U.S.C. § 717r(b). *See* Petitions for Review at 1.

As this Court has explained, “[t]he Natural Gas Act sets forth a highly reticulated procedure for obtaining, and challenging, a FERC certificate to build an interstate pipeline.” *Am. Energy Corp. v. Rockies Express Pipeline LLC*, 622 F.3d 602, 605 (6th Cir. 2010). Section 19(a) of the Natural Gas Act 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[.]” 15 U.S.C. § 717r(a). *Cf. New Eng. Power Generators Ass’n v. FERC*, No. 16-1023, 2018 WL 472545, at *3-4 (D.C. Cir. Jan. 19, 2018) (finding, under the substantially identical provision of the FERC-administered Federal Power Act,¹ that the court has “no discretion to ignore this express statutory limitation on [its] jurisdiction” pursuant to “this unusually demanding exhaustion scheme”) (internal quotation marks and citations omitted).

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 prerequisites deprives the reviewing court of jurisdiction. *See Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990); *see also Ky.*

¹ Relevant provisions of the Federal Power Act and Natural Gas Act are “in all material respects substantially identical.” *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353 (1956); *accord Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1298 (2016) (“This Court has routinely relied on NGA cases in determining the scope of the FPA, and vice versa.”).

Utils. Co. v. U.S. FERC, 789 F.2d 1210, 1214 (6th Cir. 1986) (failure to comply with substantially identical provisions of Federal Power Act “creates a jurisdictional bar to judicial review”); *Mun. Resale Serv. Customers v. FERC*, 43 F.3d 1046, 1051 (6th Cir. 1995) (“noncompliance with [the Federal Power Act] imposes a jurisdictional bar to appellate review”).

Factual Background

On August 25, 2017, the Commission issued the challenged order, which conditionally granted NEXUS’s application, filed under Natural Gas Act section 7(c), 15 U.S.C. § 717f(c), for authorization to construct and operate the NEXUS Project, a new interstate pipeline system spanning Pennsylvania, West Virginia, Ohio, and Michigan. In accordance with Natural Gas Act section 19, a number of parties, including the Coalition and Oberlin, filed requests for rehearing of the Certificate Order. (The Coalition alone filed two separate requests for rehearing.) Oberlin (and other parties) included in those filings requests that the Commission stay the certificate’s effectiveness; the Coalition subsequently filed a motion for stay.

On October 23, 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. *NEXUS Gas Transmission, LLC*, Docket Nos. CP16-22-001, *et al.* (Oct. 23, 2017) (“Tolling Order”). That order stated:

Rehearings have been timely requested of the Commission order issued on August 25, 2017, in this proceeding. *NEXUS Gas Transmission, LLC*, 160 FERC ¶ 61,022 (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).

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.

(footnote omitted). The order noted that “a single tolling order applies to all rehearing requests that were timely filed.” *Id.* n.1 (citing *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. into Markets Operated by the Cal. Indep. Sys. Operator & the Cal. Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001)).

On December 21 and 22, 2017, the Coalition, together with John Selzer and Elaine Selzer (59 days after the Tolling Order issued), and Oberlin (60 days after the Tolling Order) filed their respective petitions seeking judicial review of the Certificate Order, without waiting for the Commission to issue the promised rehearing order addressing the matters raised in the various requests for rehearing.

On January 10, 2018, the Commission issued an order denying the stay requests. *NEXUS Gas Transmission, LLC*, 162 FERC ¶ 61,011 (2018). The Commission noted that it had “yet to consider the merits of any of the requests for rehearing.” *Id.* P 3 n.5.

Separate from the FERC proceeding, in May 2017, Petitioners John Selzer and Elaine Selzer, with other landowners, filed a complaint in the U.S. District Court for the Northern District of Ohio, naming the Commission, two FERC Commissioners, and NEXUS as defendants, and asking the court to enjoin the Commission from issuing the Certificate Order. In December 2017, the district court dismissed the complaint for lack of subject matter jurisdiction. *Urban v. FERC*, No. 5:17CV1005, 2017 WL 6461823 (N.D. Ohio Dec. 19, 2017).

ARGUMENT

This Court should dismiss both petitions for lack of jurisdiction because there is not yet a final, appealable order on rehearing in the underlying agency proceeding and because the petitions are incurably premature, as both the Coalition and Oberlin filed requests for agency rehearing that remain pending. In addition, the Court should dismiss the Selzers, petitioners in Case No. 17-4302, because their failure to seek agency rehearing leaves them statutorily barred from pursuing judicial review.

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

Courts have long held that they “have jurisdiction to review only final orders of the Commission.” *Transw. 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)). Final agency action “mark[s] the ‘consummation’ of the agency’s decisionmaking process.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citation omitted); accord *Berry v. U.S. Dep’t of Labor*, 832 F.3d 627, 633 (6th Cir. 2016). See, e.g., *Dayton Power & Light Co. v. FERC*, No. 84-3542 (6th Cir. June 16, 1986) (unpublished) (dismissing appeal, under the Federal Power Act, of a non-final FERC order; citing *Marshall v. Health Review Comm’n*, 635 F.2d 544, 548 (6th Cir. 1980)).

The Certificate Order is not final agency action. The rehearing requests by the Coalition, Oberlin, and other parties, which are pending before the Commission, rendered the Certificate Order non-final. See *Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002); see also *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 238-39 & 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); *Am.*

Energy, 622 F.3d at 605 (“Once FERC concludes the rehearing, the aggrieved party may petition for review . . .”). As the D.C. Circuit has explained, “[t]here is good reason to prohibit any litigant from pressing its cause concurrently upon both the judicial and administrative fronts: a favorable decision from the agency might yet obviate the need for review by the court,” or the agency rehearing might alter the issues ultimately presented for review, possibly “mak[ing] the case moot and [the court’s] efforts supererogatory.” *Clifton Power*, 294 F.3d at 112.

Moreover, under longstanding case law, the Coalition’s and Oberlin’s petitions for judicial review are incurably premature because their requests for rehearing remained pending before the agency when they filed the petitions. *See, e.g., Clifton Power*, 294 F.3d at 112 (“prematurity is an incurable defect”); *accord TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133-34 (D.C. Cir. 1989), *cited in B.J. Alan Co. v. ICC*, No. 90-3715 (6th Cir. Dec. 13, 1990) (“A court of appeals cannot have jurisdiction over a petition for review when a petition for reconsideration brought by the same party is pending before the agency. . . . A premature petition for review does not ripen and become effective to vest this court with jurisdiction once an agency issues its final decision on reconsideration.”) (also citing other D.C. Circuit cases). (The Selzers, for their part, cannot save the petition in Case No. 17-4302 from the Coalition’s incurable prematurity, because their failure to request

agency rehearing at all, as required by the “highly reticulated procedure” of the Natural Gas Act, is a strict jurisdictional bar. *See* Part C, *infra*.)

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

Both petitions purport to seek review of the October 23, 2017 Tolling Order. That order, however, did not resolve the rehearing requests but properly extended the time to consider them.

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.” The 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. *See Cal. Co. v. FPC*, 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. Am. Oil Co. of Tex. v. FPC*, 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).²

C. Neither The Selzer Petitioners Nor The Proposed Grassroots Intervenors Have Met The Strict Jurisdictional Requirements Of The Natural Gas Act

As explained *supra* at p. 8, the Coalition’s petition for review is incurably premature because it also filed a request for rehearing that is still pending. The Coalition’s co-petitioners, however, must be dismissed for a different jurisdictional failure: they did not seek agency rehearing at all. “No 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[.]” 15 U.S.C. § 717r(a); *see Am. Energy*, 622 F.3d at 605; *Ky. Utils.*, 789 F.2d at 1214. Nor can the Selzers cite membership in the Coalition to rely on that entity’s rehearing request (even aside from the prematurity of the appeal). *See New Eng. Power Generators Ass’n*, 2018 WL 472545 at *4 (rejecting argument that association and its members were interchangeable; court lacks jurisdiction “unless ‘*such entity*’ — that is, the entity petitioning our court for review — requested rehearing”).

² 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 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).

The proposed Grassroots Intervenors, for their part, seek to intervene for the express purpose of pursuing arguments beyond the scope of the petition for review. They have moved to intervene only in Case No. 17-4302, to raise arguments that the petitioners in that case (the Coalition and the Selzers) did not raise on agency rehearing. The Grassroots Intervenors assert that the Coalition “duplicated almost none of the contentions raised by the Grassroots Intervenors during the certificate case before FERC.” Motion for Leave to Intervene at 14. Therefore, the Grassroots Intervenors propose not to support the Coalition’s arguments on appeal, but to expand the scope of the appeal by introducing additional arguments, without having sought judicial review themselves. The Court should reject this end-run around the Natural Gas Act’s “highly reticulated procedure” (*Am. Energy*, 622 F.3d at 605) for judicial review. *See, e.g., Platte River Whooping Crane Critical Habitat Maint. Trust v. FERC*, 962 F.2d 27, 37 n.4 (D.C. Cir. 1992) (declining to reach intervenor’s argument that petitioner had not raised), *cited in R.R. Ventures, Inc. v. Surface Transp. Bd.*, 299 F.3d 523, 556 (6th Cir. 2002); *Ill. Bell Tel. Co. v. FCC*, 911 F.2d 776, 786 (D.C. Cir. 1990) (“An intervening party may join issue only on a matter that has been brought before the court by another party.”), *cited in R.R. Ventures; Petro Star Inc. v. FERC*, 835 F.3d 97, 110 (D.C. Cir. 2016) (intervenors “may only argue issues that have been raised by the principal parties;

they simply lack standing to expand the scope of the case to matters not addressed by petitioners in their request for review”).³

CONCLUSION

Accordingly, the Commission requests that the Court dismiss both petitions for review for lack of jurisdiction. Alternatively, the Commission requests that the Court consolidate the petitions for review and hold them in abeyance pending the issuance of a final order in the underlying FERC proceeding.

Respectfully submitted,

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³ The Grassroots Intervenors imply that they do have arguments in common with Oberlin, the petitioner in Case No. 17-4308 — as to whose petition they have not sought to intervene. *See* Motion to Intervene at 14. If the Court consolidated the cases, the Grassroots Intervenors’ arguments might be appropriate, unless (as they suggest) Oberlin were to withdraw its petition.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(g) and Circuit Rule 32(a), I certify that this Motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this Motion contains 2,630 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/ Carol J. Banta
Carol J. Banta

CERTIFICATE OF SERVICE

I certify that on January 29, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Carol J. Banta
Carol J. Banta