

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

Appalachian Voices, <i>et al.</i> ,)	
Petitioners,)	
)	No. 17-1271
v.)	(consolidated with
)	Nos. 18-1002 and 18-1006)
Federal Energy Regulatory Commission)	
Respondent.)	

**MOTION TO DISMISS PETITIONS 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 petitions for review in these consolidated cases for lack of jurisdiction. The challenged agency order, *Mountain Valley Pipeline, LLC*, 161 FERC ¶ 61,043 (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 this Court’s standards, “incurably premature.”

In the alternative, if the Court does not dismiss the petitions, it should hold them in abeyance pending completion of the agency proceedings.

BACKGROUND

I. Statutory And Regulatory Background

The petitioners, Appalachian Voices, *et al.* (petitioners in Nos. 17-1271 and 18-1006) and Blue Ridge Environmental Defense League (“Blue Ridge;” petitioner in No. 18-1002), 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.

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. *Process Gas Consumers Grp. v. FERC*, 912 F.2d 511, 514 (D.C. Cir. 1990); *see also Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 336 (D.C. Cir. 2006) (“Statutory jurisdictional requirements, such as the provisions of 15 U.S.C. § 717r, are not mere technicalities that can be brushed aside by a court.”); *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (a petition for review filed before the 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 Mountain Valley 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 Mountain Valley Pipeline project. Certificate Order, 161 FERC ¶ 61,043 PP 1-3. In accordance with Natural Gas Act section 19, a number of parties to the FERC proceeding, including Appalachian Voices and Blue Ridge, filed requests for rehearing of the Certificate Order. Some parties, including Appalachian Voices and Blue Ridge, also requested that the Commission stay the certificate’s effectiveness.

On December 13, 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. *Mountain Valley Pipeline, LLC*, Docket No. CP16-10-001 (Dec. 13, 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 ¶ 61,043 (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)[¹] 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.

Just nine and 21 days after the Tolling Order issued, Appalachian Voices and Blue Ridge, respectively, filed petitions 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.

¹ “*See San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the California Independent System Operator and the California Power Exchange, et al.*, 95 FERC ¶ 61,173 (2001) (clarifying that a single tolling order applies to all rehearing requests that were timely filed).”

ARGUMENT

I. The Petitions 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 [it] ha[s] jurisdiction to review only final orders of the Commission.” *Transwestern 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)). 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) (internal quotation and citation omitted). “Final agency action is that which ‘mark[s] the consummation of the agency’s decisionmaking process.’” *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (alteration by Court)).

The Certificate Order is not final agency action. The rehearing requests by Appalachian Voices, Blue Ridge, and other parties, which are pending before the Commission, rendered the Certificate Order non-final. *Clifton Power*, 294 F.3d at 110; *see also Papago Tribal Utility Auth. v. FERC*, 628 F.2d 235, 238-239 & 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). As this Court 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, “mak[ing] the case moot and [the court’s] efforts supererogatory.” *Clifton Power*, 294 F.3d at 112-13. The petitions for review of the non-final Certificate Order are “incurably premature” and should be dismissed. *Id.* at 110-11.

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

Appalachian Voices’ and Blue Ridge’s petitions for review 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 § 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. Appalachian Voices Pet. at 2; Blue Ridge Pet. at 2-3. Appalachian Voices and Blue Ridge are mistaken.

(i) 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.” This and other 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 California Co. v. Federal 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) (“[t]he 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. Federal 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).²

As this Court has 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 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)); *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”).

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. *Delaware 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).

**(ii) The Plain Language Of The Commission’s 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.” This regulation does not contain any language limiting the rehearing requests the Secretary may toll.

Appalachian Voices and Blue Ridge point to the preamble of the 1995 rulemaking promulgating that regulation³ to argue that the Commission’s Secretary cannot toll the time for action on rehearing requests that are combined with a stay request. Appalachian Voices Pet. at 2; Blue Ridge Pet. at 2-3. 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)); *see also Nat’l Wildlife Fed’n*, 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.”).

³ *Delegation of Authority to the Secretary, the Director of the Office of Electric Power Regulation and the General Counsel*, 60 Fed. Reg. 62,326 (Dec. 6. 1995), FERC Stats. & Regs., Reg. Preambles Jan. 1991-June 1996 ¶ 31,030 (1995).

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)). While this course of conduct may not be dispositive, "it does indicate a time honored interpretation of the section involved, worthy of judicial deference." *California Co.*, 411 F.2d at 721.

(iii) 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.”).

II. Alternatively, The Petitions For Review Should Be Held In Abeyance

If the Court determines not to dismiss the petitions for review, they should be held in abeyance until the promised order on the pending requests for rehearing issues. As this Court has noted, it “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)); *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 Appalachian Voices' and Blue Ridge's petitions for review because they seek review of a non-final Commission order. 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,

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January 26, 2018

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P 32(g)(1), I certify that this Motion complies with type-volume limitations because it contains 3,000 words and was prepared in Times New Roman 14-point font using Microsoft Word 2010.

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January 26, 2018

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D.C. Cir. Nos. 17-1271, 18-1002 and 18-1006 (consolidated)

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 26th day of January 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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