

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

Allegheny Defense Project, <i>et al.</i> ,	)	
Petitioners,	)	
	)	
v.	)	No. 18-1031
	)	
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, *Tennessee Gas Pipeline Co., L.L.C.*, 160 FERC ¶ 61,144 (2017) (“Certificate Order”), is not a final order; requests for rehearing of that order – including a request filed by the petitioners here – are pending before the Commission. Thus, the petition for review is, under this Court’s standards, “incurably premature.”

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

## BACKGROUND

The petitioners, Allegheny Defense Project, Kentucky Resources Council, and Kentucky Heartwood, filed their petition for review pursuant to Natural Gas Act section 19(b), 15 U.S.C. § 717r(b). *See* Petition 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 prerequisites 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 September 29, 2017, the Commission issued the challenged order, which conditionally granted Tennessee Gas’s application, filed under Natural Gas Act sections 7(b) and (c), 15 U.S.C. § 717f(b)-(c), for authorization to abandon certain segments of pipeline, and to construct and operate additional pipeline and appurtenant facilities. Certificate Order PP 1, 3-6. In accordance with Natural Gas Act section 19, a number of parties to the FERC proceeding, including Allegheny Defense Project, Kentucky Resources Council, and Kentucky Heartwood, filed requests for rehearing of the Certificate Order. The petitioners here also asked the Commission to stay the effectiveness of the Certificate Order pending resolution of their request for rehearing.

On November 29, 2017, FERC’s Deputy 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. *Tennessee Gas Pipeline Co., L.L.C.*, Docket No. CP15-88-002

(Nov. 29, 2017) (“Tolling Order”). That order stated:

Rehearing has been timely requested of the Commission’s order issued on September 29, 2017, in this proceeding. *Tennessee Gas Pipeline Company, L.L.C.*, 160 FERC ¶ 61,144 (2017). In the absence of Commission action within 30 days from the date the rehearing request was 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.* (citing *San Diego Gas & Electric Co. v. Sellers of Energy and Ancillary Services into Markets Operated by the Cal. Indep. Sys. Operator and the Cal. Power Exch., et al.*, 95 FERC ¶ 61,173 (2001)).

On January 29, 2018, sixty days after the Tolling Order issued, the petitioners filed a 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. On February 20, 2018, the Commission denied petitioners’ motion to stay the Certificate Order.

*Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,143 (2018).

## ARGUMENT

### I. The 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 [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 petitioners 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, 238-39 & 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). As this Court has explained, “[t]here is good reason to prohibit any litigant from pressing its cause concurrently against both the judicial and the 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 111-12. The petition for review of the non-final Certificate Order is “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**

The petition for review contends that requests for rehearing of the Certificate Order were denied by operation of law because, purportedly, the staff-issued Tolling Order was invalid and does not constitute an “act” on a request for rehearing under the Natural Gas Act. Pet. at 2. Petitioners are mistaken.

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 on 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 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. 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 the rehearing requests).<sup>1</sup>

As this Court has explained 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 936539, at \*1 (D.C. Cir. Jul. 31, 2001) (“In light of the agency’s tolling order and subsequent clarification order, it is clear petitioners’

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<sup>1</sup> These and other relevant court authorities are listed in a recent district court decision denying interlocutory relief while another pipeline proceeding (PennEast) was pending 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) (briefing completed).

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”).

Finally, the Tolling Order is not invalid simply because it was issued by Commission staff rather than the Commission itself. The Commission’s Rules of Practice and Procedure specifically permit the Secretary or her designee to toll the time for action on requests for rehearing. 18 C.F.R. § 375.302(v); *see also id.* § 375.301(b) (permitting office directors, such as the Secretary, to further delegate authority to take specific actions). This authority is acknowledged in the very Commission order that petitioners cite to this Court in support of their contention that a tolling order is not an “act” on a request for rehearing. *Agency Operations in the Absence of a Quorum*, 158 FERC ¶ 61,135 P 2 & nn.5-6 (2017). *See also Algonquin Gas Transmission, LLC and Maritimes & Northeast Pipeline LLC*, 160 FERC ¶ 61,106 P 7 (2017) (citing *City of Glendale*, No. 03-1261, 2004 WL 180270 at \*1) (Secretary’s tolling order under 18 C.F.R. § 375.302(v) extended the time for the Commission to consider rehearing requests and issue a substantive decision).



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

If the Court determines not to dismiss the petition for review, the petition 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 the petition for review. Alternatively, the Commission requests that the Court hold the petition for review in abeyance pending the issuance of a final order in the underlying FERC proceeding.

Respectfully submitted,

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March 5, 2018

## **CERTIFICATE OF COMPLIANCE**

This document complies with the word limit of Fed. R. App. P. 27(d)(2) because it contains 2,122 words.

This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word 2013, in 14-point Times New Roman.

/s/ Elizabeth E. Rylander  
Elizabeth E. Rylander

March 5, 2018

## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **A. Parties**

The following parties have appeared before this Court in this appeal:

Allegheny Defense Project  
Federal Energy Regulatory Commission  
Kentucky Heartwood  
Kentucky Resources Council  
Tennessee Gas Pipeline Company, L.L.C.

The following parties appeared before the Federal Energy Regulatory Commission in the proceeding underlying this appeal:

Anadarko Energy Services Company  
Athens Utilities Board  
James R. Angel, M.D.  
James R. Angel and Sherri Angel  
Athens Utilities  
Atmos Energy Corporation  
Atmos Energy Marketing LLC  
Bay State Gas Company d/b/a Columbia Gas of Massachusetts  
The Berkshire Gas Company  
Boston Gas Company, Colonia Gas Company, collectively d/b/a/National Grid  
Bridgeport Utilities  
The Brooklyn Union Gas Company d/b/a/ National Grid NY  
Joan Spalding Brown, Larry Spalding et al.  
John Brown Ltd. Inc.  
Rock E. Bryant  
Cabot Oil & Gas Corporation  
Calpine Energy Services, L.P.  
Center for Biological Diversity  
Centerpoint Energy Resources Corp.  
Chattanooga Gas Company  
Chesapeake Energy Marketing, L.L.C  
Chevron U.S.A. Inc.  
City of Clarksville Gas and Water Department, City of Clarksville  
City of Corinth Public Utilities Commission

City of Danville, Kentucky  
City of Florence, Alabama  
City of Holyoke, Massachusetts Gas and Electric Department  
City of Huntsville, Alabama  
City of Waynesboro  
CNX Gas Company LLC  
Connecticut Natural Gas Corporation  
ConocoPhillips Company  
Consolidated Edison Company Of New York, Inc.  
Cookeville Gas Department  
Delta Natural Gas Company, Inc.  
Direct Energy Business Marketing, LLC  
East Kentucky Power Cooperative, Inc.  
Elk River Public Utility District  
Etowah Utilities Gas Department  
EQT Energy, LLC  
Exelon Corporation  
Fayetteville Public Utilities  
Fitchburg Gas and Electric Light Company  
FreshWater Accountability Project  
Gallatin Natural Gas System  
Gas Appalachian Natural Gas Distribution Company  
Greater Dickson Gas Authority  
Hardeman Fayette Utility District  
Michael Harford  
Harriman Utility Board  
Hartselle Utilities  
Hawkins County Gas Utility District  
Heartwood, Inc.  
Henderson Utility Department  
Holly Springs Utility Department  
Humphreys County Utility District  
Independent Oil & Gas Association of West Virginia, Inc.  
Indicated Shippers  
Jamestown Gas System  
Jefferson-Cocke County Utility District  
Kaiser Marketing Northeast, LLC  
Kentuckians for the Commonwealth  
Kentucky Conservation Committee  
Kentucky Heartwood

Kentucky Resources Council, Inc.  
Kentucky State Nature Preserves Commission  
KeySpan Gas East Corporation d/b/a National Grid  
Knoxville Utilities Board  
Lenoir City Utilities Board  
Lewisburg Gas Department  
Liberty Utilities (EnergyNorth Natural Gas) Corp. d/b/a Liberty Utilities  
Livingston Gas Department  
Loudon Utility Gas Department  
Louisiana Department of Wildlife and Fisheries  
Louisiana Municipal Gas Authority  
Louisville Gas and Electric Company  
Madisonville Gas System  
Marion County Fiscal Court  
Marion Natural Gas System  
Middle Tennessee Natural Gas Utility District  
Morehead Utility Plant Board  
Mt. Pleasant System  
Municipal Gas Authority of Mississippi  
The Narragansett Electric Company d/b/a National Grid  
National Fuel Gas Distribution Corporation  
New Jersey Natural Gas Company  
New York Public Service Commission  
New York State Electric & Gas Corporation  
Niagara Mohawk Power Company d/b/a National Grid  
NiSource Distribution Companies (Columbia Gas of Kentucky, Inc., Columbia Gas of Ohio, Inc., and Columbia Gas of Pennsylvania, Inc.)  
NJR Energy Service Company  
North Alabama Gas District  
Northern Illinois Gas Company d/b/a Nicor Gas Company  
Northern Utilities, Inc.  
NSTAR Gas Company  
Oak Ridge Utility District  
Ohio Valley Environmental Coalition  
Orange and Rockland Utilities Inc.  
Piedmont Natural Gas Company, Inc.  
Pivotal Utility Holdings, Inc. d/b/a Elizabethtown Gas Company  
Portland Natural Gas System, City of Portland  
Powell Clinch Utility District  
PSEG Energy Resources & Trade LLC

Range Resources-Appalachia LLC  
Repsol Energy North America Corporation  
Rockwood Water & Gas  
Savannah Utilities  
Sequent Energy Management, L.P.  
Sevier County Utility District  
Sheffield Utilities  
Shell Energy North America (US), L.P.  
The Southern Connecticut Gas Company  
Springfield Gas System, City of Springfield  
SWEPI LP  
Sweetwater Utilities Board  
Talisman Energy USA Inc.  
Tenaska Marketing Ventures  
Tennessee Gas Pipeline Company, L.L.C.  
Tennessee Valley Authority  
Terri Slater  
Town of Linden  
Tuscumbia Utilities  
UGI Utilities, Inc.,  
UGI Penn Natural Gas, Inc.  
UGI Central Penn Gas, Inc.  
Unicoi County Gas District  
U.S. Fish and Wildlife Service  
West Tennessee Public Utility District  
Westfield Gas & Electric Department  
Yankee Gas Services Company  
Michael Younger

**B. Ruling Under Review**

*Tennessee Gas Pipeline Company, L.L.C.*, 160 FERC ¶ 61,144 (Sept. 29, 2017).

**C. Related Cases**

This case has not previously been before this Court or any other court; however, as detailed *supra*, the Federal Energy Regulatory Commission is still

considering requests for rehearing of the order on review – including a request for rehearing from the petitioners in this appeal.

/s/ Elizabeth E. Rylander  
Elizabeth E. Rylander

March 5, 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 5th 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, as indicated below:

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