

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

Allegheny Defense Project,	)	
Petitioner,	)	
	)	
v.	)	No. 18-1031
	)	
Federal Energy Regulatory Commission,	)	
Respondent.	)	

**RESPONDENT’S REPLY IN SUPPORT OF ITS MOTION TO DISMISS**

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27, Respondent Federal Energy Regulatory Commission (Commission or FERC) replies to Petitioner Allegheny Defense Project’s Response to FERC’s Motion to Dismiss.

Allegheny’s response misses the mark – its arguments concerning exhaustion of remedies, the validity of the Commission’s tolling order, and delegation of authority do nothing to blunt the force of two basic points:

- Allegheny’s request for rehearing of an order challenged here – *Tennessee Gas Pipeline Company, L.L.C.*, 160 FERC ¶ 61,144 (2017) (“Certificate Order”) – remains pending before the Commission; and
- The Commission will act on that rehearing in a timely manner.

The Commission will address the rehearing request, 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.

If, however, this Court does not dismiss the petition for review, it should hold it in abeyance pending issuance of a final agency order.

**I. The Certificate Order Will Not Be Final and Appealable Until the Commission Issues Its Rehearing Order**

This Court has jurisdiction to review “only final orders of the Commission.” *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995). As this Court has clarified, 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. As Allegheny acknowledges, its recent request for Commission rehearing of the Certificate Order remains pending before the agency. *Opp.* at 2. The Commission must issue at least one more order, addressing that rehearing request, before the Certificate Order is reviewable. *See, e.g., Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (petition for review filed before rehearing order issues is

“incurably premature” and “must be dismissed”); *Papago Tribal Utility Auth. v. FERC*, 628 F.3d 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 requests for rehearing is the final, reviewable agency order).

## **II. The Tolling Order Extended the Time for the Commission to Consider Allegheny’s Rehearing Request**

Allegheny contends 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 Deputy Secretary lacks authority to act on requests for rehearing that are paired with motions for stay. Opp. at 5-17. Allegheny is mistaken.

### **A. The Tolling Order Constituted An “Act” on the Rehearing Requests Under Natural Gas Act Section 19(a)**

Allegheny’s contention that the Commission’s tolling order is not an “act” for purposes of the Natural Gas Act does not conjure finality. *See* Mot. 5-9 (referring to *Tennessee Gas Pipeline Co., L.L.C.*, Docket No. CP15-88-002 (Nov. 29, 2017) (“Tolling Order”)). As explained in the Commission’s Motion to Dismiss, this and other courts have uniformly determined that Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does not require the Commission to act on the

merits of a rehearing request within 30 days. Mot. 5-8. Rather, the Commission appropriately “acts upon the application for rehearing” by providing notice within that 30-day timeframe, as it did here, that it intends to further consider a rehearing request. *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”).

Moreover, there is no “merit to petitioner’s contention that this court should treat FERC’s orders tolling the period for resolving petitioner’s requests for agency rehearing as effectively denying rehearing; the 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). *See Opp.* at 8-9 (contending that the Tolling Order, which expressly granted rehearing for purposes of further consideration, actually denies rehearing).

Allegheny contends that cases in this circuit that uphold the Commission’s use of tolling orders rely on an incorrect interpretation of the Natural Gas Act, and that this Court should adopt a narrower reading of the statute. *Opp.* at 5-6 (citing *Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993); *Cal. Co.*, 411 F.2d at 721)). But courts of appeals in other circuits have uniformly reached the same conclusions as this Court. *See Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988); *Gen. Am. Oil Co. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969); *see also Del.*

*Riverkeeper Network v. FERC*, 243 F. Supp. 3d 141, 145-46 (D.D.C. 2017) (“The D.C. Circuit has held that section 717r’s language requiring the Commission to take action with regard to a rehearing request within 30 days, or have it deemed denied, does not require FERC to act on the merits.”) (collecting cases), *on appeal*, D.C. Cir. No. 17-5084. In fact, just last month, two other courts of appeals have dismissed near-identical petitions for review of FERC pipeline certificate orders that were followed by a tolling order affording the agency additional time to act on rehearing requests. *Appalachian Voices, et al. v. FERC*, No. 18-1114 (4th Cir. Mar. 21, 2018); *Coalition to Reroute Nexus, et al. v. FERC*, No. 17-4302 (6th Cir. Mar. 15, 2018) (“the pendency of requests for rehearing before FERC precludes judicial review of the [earlier] FERC decision because there is no final agency action to review.”).

**B. The Commission Can Delegate its Tolling Authority to its Secretary**

Allegheny contends that the Natural Gas Act expressly requires the Commission to act on rehearing requests, and does not specifically authorize the Commission to delegate authority to act on rehearing requests. *Opp.* at 12-13. Allegheny reasons that Congress knows how to provide for delegation of functions, and so the absence of language to this effect means that Congress intends that only the Commission act on rehearing requests. *Id.* at 13.

But the Commission, as a federal agency, is presumed to have authority to delegate its functions to subordinate agency officials. *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’s 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 (or her designee, 18 C.F.R. § 375.302), 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).

That makes sense, as Congress has entrusted the Commission with substantial responsibilities under the Natural Gas Act and 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 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.”).

**C. 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 the “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.

Allegheny points to the preamble of the 1995 rulemaking promulgating that regulation<sup>1</sup> to argue that the Commission’s Secretary cannot toll the time for action on rehearing requests that are combined with a stay request. Opp. at 9-12. But “[t]he preamble to a rule is not more binding than the 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.

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<sup>1</sup> *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).

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.”).

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 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.” *Cal. Co.*, 411 F.2d at 721.

### III. Alternatively, the Petition for Review Should Be Held in Abeyance

If the Court does not dismiss the petition for review, then it should hold the petition in abeyance until the Commission issues the promised order on the pending request for rehearing. *See* FERC Mot. at 9. Allegheny’s argument that abeyance is inappropriate is premised on its erroneous notion that its rehearing request has been denied by operation of law. *Opp.* at 18. As detailed *supra*, the Commission has not denied Allegheny’s rehearing request, and will issue a further order in this proceeding. As this Court has noted in the past, “a favorable decision from the agency might yet obviate the need for review by the court,” *Clifton Power*, 294 F.3d at 111, and so abeyance is appropriate while the scope of any eventual appeal becomes clear.

Respectfully submitted,

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April 23, 2018

## **CERTIFICATE OF COMPLIANCE**

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/s/ Elizabeth E. Rylander  
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April 23, 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 23rd day of April 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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