

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

Narragansett Indian Tribal Historic Preservation Office,)	
Petitioner,)	
)	
v.)	No. 18-1069
)	
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 Narragansett Indian Tribal Historic Preservation Office’s Response to FERC’s Motion to Dismiss.

The Preservation Office simultaneously seeks agency rehearing and judicial review of *Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 (2018) (“Rehearing Order”). But a “request for administrative reconsideration renders an agency’s otherwise final action non-final with respect to the requesting party,” and the appeal “incurably premature.” *E.g., Clifton Power Corp. v. FERC*, 294 F.3d 108, 110 (D.C. Cir. 2002) (dismissing such an appeal). The Court should therefore dismiss the Preservation Office’s petition for review.

The Preservation Office's intervention in the FERC proceeding underlying this appeal was first considered in the Rehearing Order challenged here. Rehearing Order PP 9-10, 12-18. The Natural Gas Act requires that the Preservation Office seek rehearing of the Commission's adverse decision on that issue, and that the agency act on that rehearing, before the Preservation Office presents it for judicial review. 15 U.S.C. § 717r(b) (judicial review follows denial of rehearing). The Preservation Office filed a request for agency rehearing of the Rehearing Order, and that request remains pending before the Commission. Opp. at 2-3.

The Preservation Office argues that it must appeal the final rulings made in the Rehearing Order within 60 days of that decision, or it will lose its chance to do so. See Opp. at 1-2 (citing 15 U.S.C. § 717r(b)), 10. But a timely petition for rehearing of an agency decision tolls the running of a statutory limitation period until the request for rehearing has been resolved. *E.g.*, *Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 334-35 (D.C. Cir. 2006) (citing *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987)); *Clifton Power*, 294 F.3d at 110. The Preservation Office has, therefore, done all that is necessary to preserve its right to appeal, in the future, both the substantive issues already resolved in the Rehearing Order, and any adverse procedural decision that may result on rehearing of that order.

Even in cases where a petitioner must choose between seeking agency rehearing and judicial review, requesting rehearing renders the underlying agency action non-final, and therefore unreviewable, as to the petitioning party. *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989) (citing *United Transp. Union v. ICC*, 871 F. 2d 1114 (D.C. Cir. 1989)). The Preservation Office’s request for rehearing therefore rendered the entire Rehearing Order – not just the relevant paragraphs of that order – non-final. *See Bellsouth Corp. v. FCC*, 980 F.2d 1487, 1489 (D.C. Cir. 1994) (“[A]gency action cannot be considered nonfinal for one purpose and final for another.”). Moreover, final agency action does not ripen a prematurely-filed petition for review; the moving party can only cure this jurisdictional defect by filing a new notice of appeal from the final agency action. *TeleSTAR*, 888 F.2d at 134. It is “usually preferable to require the parties to wait for appellate review until the lawsuit is ultimately resolved – to insist on the standard of one case, one appeal.” *State of Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992). This remains true even if the issues that the Preservation Office continues to raise before the agency on rehearing are different than those it hopes to present immediately to the Court. *See Bellsouth*, 17 F.3d at 1489 (“[F]inality with respect to agency action is a party-based concept.”).

But as a practical matter, there is little difference – other than record-keeping – between holding the petition in abeyance to await further agency action that

might aggrieve (or satisfy) the Preservation Office, and dismissing the petition to await further agency action that might aggrieve (or satisfy) the Preservation Office. If the Court is not persuaded that dismissal is appropriate here, then it should hold the case in abeyance, as the Preservation Office requests, pending the conclusion of agency proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Elizabeth E. Rylander
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April 9, 2018

Narragansett Indian Tribal Historic Preservation Office v. FERC

Docket No. CP15-88

D.C. Cir. No. 18-1031

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 9th 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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