

**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.	)	

**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 orders, *Tennessee Gas Pipeline Co., L.L.C.*, Letter Order, Docket No. CP14-529-000 (Apr. 12, 2017) (“Letter Order”), *reh’g denied, Tennessee Gas Pipeline Co., L.L.C.*, 162 FERC ¶ 61,013 (2018) (“Rehearing Order”), are not final orders; a request for rehearing of the Rehearing Order – filed by the petitioner here – is 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

Petitioner Narragansett Indian Tribal Historic Preservation Office (“Preservation Office”) filed its petition for review pursuant to Natural Gas Act section 19(b), 15 U.S.C. § 717r(b). *See* Petition for Review at 1.

### **I. Rehearing and Judicial Review Under the Natural Gas Act**

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 March 11, 2016, the Commission issued a certificate of public convenience and necessity that conditionally authorized Tennessee Gas Pipeline Co., L.L.C. (“Tennessee Gas”) to build and operate its Connecticut Expansion Project (“Project”). *Tennessee Gas Pipeline Co., L.L.C.*, 154 FERC ¶ 61,191 (2016) (“Certificate Order”), *on reh’g*, 160 FERC ¶ 61,027 (2017). The Project includes a 3.81-mile, 36-inch diameter loop of existing pipeline near the Town of Sandisfield, Massachusetts. Certificate Order P 5. As part of a cultural resources survey along the pipeline loop, 73 ceremonial stone landscapes were identified as significant to tribes. *Id.*

On April 10, 2017, 13 months after the Commission issued the Certificate Order, the Preservation Office requested late intervention in the agency proceeding. Rehearing Order P 2. Commission staff issued the Letter Order on

April 12, 2017, authorizing Tennessee Gas to proceed with tree clearing and construction activities related to the Project. Letter Order at 1. The Preservation Office requested rehearing of the Letter Order. Rehearing Order P 3.

In the Rehearing Order, the Commission denied the Preservation Office's motion to intervene as untimely, and rejected its request for rehearing of the Letter Order. *Id.* PP 3, 10, 12-18, 46. (The agency nonetheless addressed the substantive issues that the Preservation Office raised, either directly or as part of its response to a different party. *Id.* PP 46-48.) The Preservation Office filed a request for rehearing of the Rehearing Order, challenging the Commission's denial of its motion to intervene. Request for Rehearing, Docket No. CP14-529-000 (Feb. 2, 2018).

On March 5, 2018, 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 Rehearing Order. *Tennessee Gas Pipeline Co., L.L.C.*, Docket No. CP14-529-003 (Mar. 5, 2018) ("Tolling Order"). The Tolling Order stated that in order to allow additional time for consideration, "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." *Id.*

Also on March 5, 2018, less than sixty days after the Rehearing Order issued, the Preservation Office filed a petition for review of the Letter Order and the Rehearing Order, without waiting for the Commission to issue the promised further rehearing order addressing the matters raised in the Preservation Office's second request for rehearing. The Preservation Office immediately asked the Court to hold the petition for review in abeyance, acknowledging that the petition was "not fit for judicial review because the Commission has issued a final order on the [Preservation Office's] request for rehearing of the [Letter] Order, but not on the [Preservation Office's] request for rehearing of the denial of its motion to intervene." Motion to Hold the Proceeding in Abeyance at 4 (Mar. 5, 2018).

### **ARGUMENT**

As the Preservation Office itself notes, the Letter Order and the Rehearing Order are not yet final, reviewable orders under the Natural Gas Act. The pendency of a request for rehearing before FERC renders them incurably premature. Accordingly, the Court should dismiss the petition for review.

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 Letter Order and the Rehearing Order do not comprise final agency action. Petitioner’s rehearing request rendered the orders non-final. *See 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). The Tolling Order affirmatively indicates the Commission’s intention to issue a further order in this proceeding. *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).

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. *See also Alcoa Power Generating Inc. v. FERC*, 643 F.3d 963, 967 (D.C. Cir. 2011) (citing *Devia v. NRC*, 492 F.3d 421, 424 (D.C. Cir. 2007) (claim may be unripe because the court may never need to decide it)).

The petition for review of the non-final Letter Order and Rehearing Order therefore is “incurably premature” and should be dismissed. *Clifton Power*, 294 F.3d at 110-11. Indeed, in the last two weeks, 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 pending rehearing requests). *See 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 the requests for rehearing before

FERC precludes judicial review of the [earlier] FERC decision because there is no final agency action for the court to review”).

Respectfully submitted,

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March 23, 2018

## **CERTIFICATE OF COMPLIANCE**

This document complies with the word limit of Fed. R. App. P. 27(d)(2) because it contains 1,668 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 23, 2018

*Narragansett Indian Tribal Historic  
Preservation Office v. FERC*  
D.C. Cir. No. 18-1031

Docket No. CP15-88

**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 March 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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