

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

Homeowners Against Land Takings –)	
Penneast, Inc.,)	
Petitioner,)	
)	
v.)	No. 18-1079
)	
Federal Energy Regulatory Commission,)	
Respondent.)	

**MOTION TO DISMISS PETITION FOR REVIEW
OR, IN THE ALTERNATIVE, MOTION FOR ABEYANCE**

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, Order Issuing Certificates, *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018), and Order Granting Rehearings for Further Consideration, FERC Dkt. No. CP15-558 (Feb. 22, 2018), are not final orders. Requests for rehearing—including a request filed by the petitioner 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 agency proceedings.

BACKGROUND

Petitioner Homeowners Against Land Takings – PennEast, Inc. (“HALT”) filed its petition for review pursuant to Natural Gas Act section 19(b), 15 U.S.C. § 717r(b). 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. *E.g., 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. Procedural Background

On January 19, 2018, the Commission issued a certificate of public convenience and necessity that conditionally authorized PennEast Pipeline Co., LLC (“PennEast”) to build and operate new natural gas pipeline facilities in Pennsylvania and New Jersey. Order Issuing Certificates, *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) (“Certificate Order”). HALT, a party in the proceeding, filed a timely request for rehearing of the Certificate Order. Petition for Review at 1-2. Numerous other parties also filed requests for rehearing of the Certificate Order.

On February 22, 2018, the Commission issued a procedural order pursuant to 18 C.F.R. § 375.302(v), tolling the time for the Commission to issue its order addressing the matters raised in the requests for rehearing of the Rehearing Order. Order Granting Rehearings for Further Consideration, FERC Dkt. No. CP15-558

(Feb. 22, 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.*

ARGUMENT

I. The Petition for Review Should Be Dismissed for Lack of Jurisdiction

As HALT itself notes, the Certificate Order and Tolling Order are not yet final, reviewable orders under the Natural Gas Act. Petition for Review at 2. The pendency of requests for rehearing before FERC renders the petition incurably premature; the Commission has not yet acted on the merits of those requests. 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 challenged orders do not comprise final agency action. Petitioner’s rehearing request rendered the Certificate Order 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 orders therefore is “incurably premature” and should be dismissed. *Clifton Power*, 294 F.3d at 110-11. Indeed, just last month, two other courts of appeals dismissed 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) (“[T]he 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.”).

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” issues 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”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on April 16, 2018, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Susanna Y. Chu
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