

**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.)	

**RESPONDENT’S REPLY IN SUPPORT OF MOTION TO DISMISS
OR, IN THE ALTERNATIVE, HOLD IN ABEYANCE**

The various arguments raised by Homeowners Against Land Takings (HALT) – those regarding eminent domain proceedings, exhaustion of remedies, and the validity of tolling orders – do not blunt the force of three basic facts:

- HALT seeks judicial review of two orders – *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) (Certificate Order), and Order Granting Rehearings for Further Consideration, FERC Dkt. No. CP15-558 (Feb. 22, 2018) (Tolling Order) – issued in an ongoing agency proceeding;
- HALT’s request for rehearing of the Certificate Order remains pending before the Commission; thus, HALT’s petition for review is incurably premature; and
- although a number of parties sought rehearing of the Tolling Order, HALT did not and thus cannot seek judicial review of that order.

The Commission will address the numerous (roughly 35!) pending requests for rehearing of the Certificate Order and the Tolling Order, 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. Judicial Review Must Await The Issuance Of A Rehearing Order.

Relying primarily on *McCarthy v. Madigan*, 503 U.S. 140 (1992), HALT calls for a “practical” application of the exhaustion doctrine. *See* Opposition at 4, 6, 12, 14. But as the *McCarthy* Court recognized, “[w]here Congress specifically mandates, exhaustion is required.” 503 U.S. at 144.¹ At issue here are the “[s]tatutory jurisdictional requirements” of the Natural Gas Act, which “are not mere technicalities that can be brushed aside by a court.” *Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 336 (D.C. Cir. 2006). And as this Court has found, where an order is non-final, it lacks jurisdiction to review that order. *See, e.g., Amoco Production Co. v. FERC*, 271 F.3d 1119, 1123 (D.C. Cir. 2001) (“Then we address the fourth order, which turns out to be non-final and thus beyond our jurisdiction.”); *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 981

¹ *See also John Doe, Inc. v. DEA*, 484 F.3d 561, 567 (D.C. Cir. 2007) (“[E]ven if exhaustion, ripeness, and finality may be difficult to distinguish in some contexts, they must be carefully delineated when, as here, finality is a statutory jurisdictional prerequisite rather than merely a precaution related to concreteness and institutional capacity.”)

(D.C. Cir. 1993) (holding that petition for review of non-final order “must be dismissed for lack of jurisdiction”). Thus, the fundamental premise of HALT’s opposition to the Commission’s motion to dismiss – that, under the Natural Gas Act, finality only concerns “the timing of jurisdiction” (Opposition at 12) – is incorrect.

Section 19(b) of the Natural Gas, 15 U.S.C. § 717r(b), vests this Court with authority to review an “order” of the Commission, which “has long been understood to encompass only ‘final’ orders.” *Amoco Production*, 271 F.3d at 1123. An order is final if it meets two independent conditions: (1) the action marks “the consummation of the agency’s decisionmaking process;” and (2) it is an action “by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). While HALT devotes much time to the legal consequences of the eminent domain rights purportedly conferred by the Certificate and Tolling Orders (*see, e.g.*, Opposition at 6-11), an order “must satisfy both prongs ... to be considered final.” *Soundboard Assoc. v. FTC*, 2018 WL 1972892, at *5 (D.C. Cir. Apr. 27, 2018) (internal quotations omitted). Neither the Certificate Order nor the Tolling Order satisfies these prongs.

A. The Certificate Order Is Not A Final Order.

It is undisputed that the Certificate Order did not mark the consummation of the Commission's decisionmaking process with respect to the PennEast Project. Roughly 35 requests for rehearing of the Certificate Order – including one filed by HALT – are pending before the Commission. And the Tolling Order affirmatively indicates the Commission's intention to issue a further order in this proceeding. As explained in the Commission's motion to dismiss, HALT's request for rehearing renders the Certificate Order non-final and HALT's petition for review "incurably premature." *Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002). *See* Motion at 6.

HALT contends that the Certificate Order is final because it "imposes an obligation on landowners to relinquish their property rights" in eminent domain proceedings. Opposition at 6. But the eminent domain rights referenced by HALT are a consequence of a statute, the Natural Gas Act, which confers the right of eminent domain to "any holder of a certificate of public convenience and necessity." 15 U.S.C. § 717f(h). The Act further specifies that the filing of a rehearing request "shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order." *Id.* § 717r(c). Thus, any impacts on HALT while the rehearing process is pending flow from the statutory framework that Congress established. Those purported impacts do not constitute a valid

excuse to bypass the judicial review process established by the Natural Gas Act. *See Pub. Citizen, Inc. v. FERC*, 839 F.3d 1165, 1174 (D.C. Cir. 2016) (explaining that, where judicial review is limited by statute, “[a]ny unfairness associated with this outcome inheres in the very text of the [statute]. Accordingly, it lies with Congress, not this Court, to provide the remedy.”).

B. The Tolling Order Is Not A Final Order.

HALT makes no effort to show that the Tolling Order satisfies the first prong of the *Bennett* test, nor could it. Rather than marking the end of agency proceedings, the Tolling Order expressly states that further substantive orders will issue. *See* Motion at 3-4. This alone precludes a finding of finality. *See Soundboard Assoc.*, 2018 WL 1972892, at *5 (“An order must satisfy both prongs of the *Bennett* test to be considered final.”) (internal quotations omitted).

HALT nonetheless argues that the Tolling Order is final because it “denies them the possibility of a judicial predeprivation hearing before their land is taken.” Opposition at 6. But again, the fact that judicial review of the Certificate Order must await a rehearing order is a consequence of the Natural Gas Act itself, not the Tolling Order. Moreover, the process provided for by the Takings Clause – namely a right to just compensation – does not entitle a property holder to a pre-deprivation hearing. *See Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 n.14 (1985) (holding that, unlike the Due

Process Clause, the “Just Compensation Clause has never been held to require pretaking process”); *Presley v. City of Charlottesville*, 464 F.3d 480, 489-90 (4th Cir. 2006) (a “physical taking” does not require a hearing or notice prior to the taking).

C. None Of HALT’s Arguments Excuses the Lack Of Finality.

HALT raises multiple arguments in support of its contention that an exception to finality should be recognized in this case. None survives scrutiny.

1. The Tolling Order Extended The Time For The Commission To Consider HALT’s Request For Rehearing Of The Certificate Order.

Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), provides 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.” HALT contends that the Court need not await a final order because the Commission issued the Tolling Order, rather than a merits ruling on HALT’s request for rehearing, within the 30-day period. *See* Opposition at 8, 14. But this Court, like all courts that have ruled on the question, has determined that the Commission “acts upon the application for rehearing” by providing notice within the 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 its intent”).² In fact, earlier this year, two other courts of appeals 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. *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 requests for rehearing before FERC precludes judicial review of the [earlier] FERC decision because there is no final agency action to review.”).

HALT suggests that, in two recent appeals, this Court determined that it possessed jurisdiction to review non-final Commission orders. *See* Opposition at 9 (citing *Appalachian Voices, et al. v. FERC*, D.C. Cir. No. 17-1271; *Allegheny Defense Project, et al. v. FERC*, D.C. Cir. No 17-1098). The Court made no jurisdictional rulings in those proceedings; it simply carried the Commission’s motions to dismiss over to briefing.

² *See also 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); *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.

2. The Certificate Order Is Non-Final As To HALT For All Purposes.

In its request for rehearing of the Certificate Order, HALT primarily argued that the Commission erred by issuing a certificate conditioned on the pipeline obtaining all necessary federal approvals, and violated the Natural Gas Act and the Fifth Amendment by failing to base its public need determination on substantial evidence. *See* HALT Rehearing Request, filed Feb. 20, 2018, at 4-5. In its Opposition, HALT contends that its current appeal should be permitted to go forward because it has “limit[ed] its petition to legal issues” – *i.e.*, whether the Commission has authority to issue conditional certificates and tolling orders. Opposition at 13-14. *See also id.* at 17 (“petitioner is asking this Court to review whether the conditional Certificate Order and the Tolling Order violate the procedures specified in the Natural Gas Act and the Due Process and Takings Clauses”). But because HALT’s request for rehearing of the Certificate Order was pending when it petitioned for court review, the petition is “incurably premature” as to HALT for all purposes. *See Clifton Power*, 294 F.3d at 111-12; *BellSouth Corp. v. FCC*, 17 F.3d 1487, 1489-90 (D.C. Cir. 1994) (“an agency decision cannot be considered nonfinal for one purpose and final for another”). *See also ICG Concerned Workers Ass’n v. U.S.*, 888 F.2d 1455, 1458 (D.C. Cir. 1989) (adopting the “party-based approach to finality”).

3. There Is No Constitutional Exception To Finality.

HALT contends that it is “not obligated to wait for the Commission’s final order because the issues it has raised are constitutional and procedural.”

Opposition at 14. But as this Court recently explained, “[w]e have found no decision of this Court, and no decision of any other circuit court, holding that the presence of constitutional claims eases the Supreme Court’s two-part *Bennett* test for final agency action.” *Soundboard Assoc.*, 2018 WL 1972892 at *10.

4. HALT Has Not Established That Rehearing Is Futile.

Citing a spreadsheet submitted to the Fourth Circuit in another proceeding, HALT asserts that it is unlikely to succeed on rehearing and thus its premature appeal should be permitted to proceed. Opposition at 15.³ The futility exception, however, is “quite restricted” and “limited to situations when resort to administrative remedies would be clearly useless.” *Tesoro Refining and Marketing Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009). “Even if one were to concede

³ HALT also asserts – without any support – the Commission’s approval of infrastructure projects reflects “possible bias” against landowners. Opposition at 15. As this Court has previously found, granting applications from pipelines “adds nothing to the strength of an otherwise unsupported claim.” *NO Gas Pipeline v. FERC*, 756 F.3d 764, 770 (D.C. Cir. 2014). “[U]nder most regulatory schemes, by the time applicants and their expert counsel have worked through changes, adaptations, and amendments, they are not likely to pursue many certificates that are hopeless. The fact that they generally succeed in choosing to expend their resources on applications that serve their own financial interests does not mean that an agency which recognizes merit in such applications is biased.” *Id.*

that an unfavorable decision ... was *highly likely*, that does not satisfy our strict futility standard requiring a *certainty* of an adverse decision.” *Communications Workers of America v. AT&T Co.*, 40 F.3d 426, 433 (D.C. Cir. 1994). HALT makes no effort to meet this standard. Moreover, HALT fails to recognize that the rehearing process affords the Commission an opportunity to correct its errors and bring its “knowledge and expertise to bear on an issue before it is presented to a generalist court.” *Granholm v. FERC*, 180 F.3d 278, 281 (1999).

II. HALT’S FAILURE TO SEEK REHEARING OF THE TOLLING ORDER PRECLUDES REVIEW OF THAT ORDER.

HALT’s Opposition indicates that its premature appeal is directed, at least in part, at the Tolling Order. *See, e.g.*, Opposition at 16 (“Here the petitioner is directly challenging the Commission’s right to issue the Tolling Order”). HALT did not seek rehearing of the Tolling Order and, as a result, the Court lacks jurisdiction to consider HALT’s premature appeal.⁴

The Court has “no discretion to ignore” the Natural Gas Act’s “mandatory petition-for-rehearing requirement.” *New England Power Generators Ass’n v. FERC*, 879 F.3d 1192, 1197-98 (D.C. Cir. 2018) (internal quotations omitted).

While HALT’s request for rehearing of the Certificate Order advised of its intent to

⁴ In the ongoing agency proceedings, other parties have sought rehearing of the Tolling Order. The Commission’s decision on those requests for rehearing is pending.

challenge any tolling order as a violation of the Natural Gas Act and the Fifth Amendment (Request for Rehearing at 16), that does not amount to the mandatory request for rehearing of the Tolling Order itself. *See, e.g., New England Power Generators*, 879 F.3d at 1198 (“While the Association filed a Motion for Clarification of the Tariff Order, it did not file an ‘application to the Commission for a rehearing thereon,’ so we cannot consider its petition to review that order.”).

III. If Not Dismissed, 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 requests for rehearing. Motion at 7. There will likely be other petitions for review arising out of the ongoing agency proceedings. Nothing in HALT’s opposition supports departure from the “standard of one case, one appeal.” *Alaska v. FERC*, 980 F.2d 761, 764 (D.C. Cir. 1992).

CONCLUSION

For the reasons stated herein and in the Commission's Motion to Dismiss, the petition for review should be dismissed. If not dismissed, the petition should be held in abeyance to allow the agency to issue a final, judicially-reviewable rehearing order.

Respectfully submitted,

Robert H. Solomon
Solicitor

/s/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney

Federal Energy Regulatory
Commission
888 First Street, N.E.
Washington, D.C. 20426
Phone: 202-502-8904
Fax: 202-273-0901
E-mail: robert.kennedy@ferc.gov

May 3, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on May 3, 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/ Robert M. Kennedy
Robert M. Kennedy
Senior Attorney