

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

Delaware Riverkeeper Network, <i>et al.</i> ,)	
Petitioners,)	
)	
v.)	Nos. 18-1128 & 18-1144
)	(consolidated)
Federal Energy Regulatory Commission,)	
Respondent.)	

**MOTION TO DISMISS PETITIONS 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 petitions for review in these consolidated cases for lack of jurisdiction. The petition in No. 18-1128, filed by the Delaware Riverkeeper Network and Maya Van Rossum (collectively, “Riverkeeper”), challenges three non-final agency orders: Order Issuing Certificates, *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) (“Certificate Order”); February 22, 2018 Order Granting Rehearings for Further Consideration, FERC Dkt. No. CP15-558 (“February Tolling Order”); and April 13, 2018 Order Granting Rehearing for Further Consideration (“April Tolling Order”). The petition in No. 18-1144, filed by the New Jersey Department of Environmental Protection and the Delaware and

Raritan Canal Commission (collectively, “New Jersey”), challenges the non-final Certificate Order.

Under this Court’s standards, both petitions for review are “incurably premature.” After the Commission issued the Certificate Order (just four months ago), it received and is still considering over 30 timely requests for rehearing by many different groups and individuals, including Petitioners in these consolidated cases. Those rehearing requests—which include over 2,100 pages of materials—challenge nearly every part of the Commission’s analysis of a proposed natural gas pipeline project, including: (1) the finding of the need for the project; (2) the grant of eminent domain authority that (allegedly) violates the Fifth Amendment’s Takings Clause; (3) the issuance of conditional certificates; (4) an alleged failure to consider another pipeline project as part of the cumulative impacts analysis; and (5) the allegedly deficient environmental impact statement upon which the Commission relied in issuing the Certificate Order. Among those rehearing requests, the Commission also is considering Riverkeeper’s requests for rehearing of the February and April Tolling Orders.

In the alternative, if the Court does not dismiss the consolidated petitions, it should hold them in abeyance pending completion of agency proceedings.

BACKGROUND

Riverkeeper filed its petition for review (No. 18-1128) pursuant to Natural Gas Act sections 19(a) and (b), 15 U.S.C. §§ 717r(a)-(b), while New Jersey's petition for review (No. 18-1144) is based on Natural Gas Act section 19(b). Riverkeeper Petition at 2; New Jersey Petition at 1. This Court, on its own motion, consolidated Nos. 18-1128 and 18-1144 on May 23, 2018.

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. *See generally* Certificate Order. Riverkeeper, a party in the proceeding, filed a timely request for rehearing of the Certificate Order, as did many other parties. New Jersey timely sought both rehearing and a stay 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 it to issue an order addressing the matters raised in the requests for rehearing of the Certificate Order. On April 13,

2018, the Commission issued another tolling order. Both the February and April Tolling Orders 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.” Riverkeeper timely sought rehearing of the February and April Tolling Orders on March 15 and May 8, respectively. It filed its May 9, 2018 petition for review (No. 18-1128) with this Court just one day after its latest rehearing request to FERC.

And the very same day Riverkeeper filed its petition for review, it also filed in a separate docket (No. 18-1127) a petition for a writ of mandamus to compel the Commission “to grant or deny on the merits” its requests for rehearing of the Certificate Order.

New Jersey filed its petition for review of the Certificate Order (No. 18-1144) on May 21, 2018, and this Court on its own motion consolidated Nos. 18-1128 and 18-1144 on May 23rd.

Besides the consolidated petitions for review, another petition for review of the interlocutory Certificate Order issued to PennEast is already pending in this Court. *Homeowners Against Land Takings v. FERC*, D.C. Cir. No. 18-1079 (petition filed Mar. 16, 2018). The Commission filed a motion to dismiss No. 18-

1079 for lack of jurisdiction, or in the alternative to hold the case in abeyance, on April 16, 2018, and PennEast filed its own motion to dismiss for lack of jurisdiction on May 7, 2018—those motions are still pending before the Court.

ARGUMENT

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

As Riverkeeper itself acknowledges, neither the Certificate Order nor either of the Tolling Orders constitutes a “final decision” by the agency (i.e., a reviewable order under the Natural Gas Act). Riverkeeper Petition at 2. Between January and February of this year, FERC received over 30 requests for rehearing, totaling more than 2,100 pages of briefs and exhibits, as to those three orders. The Commission has not yet acted on the merits of those requests. The consolidated petitions for review thus are incurably premature and should be dismissed for lack of jurisdiction.

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. The various rehearing requests, including those by Petitioners here, 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). And the same goes for the Tolling Orders as a result of Riverkeeper’s requests for rehearing of those orders.

The Tolling Orders themselves reflect the non-final status of the agency proceeding, as the Commission therein stated its intent to issue a further order. *See Cal. Co. v. Fed. Power Comm’n*, 411 F.2d 720, 721 (D.C. Cir. 1969) (“[T]he 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 consolidated petitions for review of the non-final orders therefore are “incurably premature” and should be dismissed. *Clifton Power*, 294 F.3d at 110-11. Indeed, just two months ago, 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.”). This Court should do the same.

II. New Jersey’s Failure To Seek Rehearing Of the February Tolling Order Precludes Review Of That Order

New Jersey argues that FERC’s Deputy Secretary lacked authority, under FERC’s regulations, to toll the time for acting on a rehearing request, like New Jersey’s, that was combined with a request for other Commission action. New Jersey Petition at 2. Under this theory, the February Tolling Order could not apply to New Jersey’s rehearing request, and so that request was deemed denied by FERC by operation of law under 15 U.S.C. § 717r(a). *Id.* at 3.

But this argument was not presented to the agency. New Jersey’s petition for review effectively challenges not just the Certificate Order, but also the February Tolling Order. New Jersey did not seek rehearing of that Tolling Order and, as a result, the Court lacks jurisdiction to consider this premature appeal.¹

“No proceeding to review any order of the Commission shall be brought by any person unless the person shall have made application to the Commission for a rehearing thereon[.]” 15 U.S.C. § 717r(a). This Court has “no discretion to

¹ In the ongoing agency proceedings, Riverkeeper sought rehearing of both Tolling Orders. The Commission’s decision on those requests for rehearing is pending.

ignore” the statute’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).

Courts have uniformly determined that section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), does not require the Commission to act on the merits of a rehearing request within 30 days. Rather, the Commission appropriately “acts upon the application for rehearing” by providing notice within the 30-day period that it intends to further consider rehearing requests, as it did here. *See Cal. Co.*, 411 F.2d at 721; *see also Coalition to Reroute Nexus*, No. 17-4302, slip op. at 2-3 (noting that FERC is authorized to issue tolling orders under 18 C.F.R. § 375.302(v), and that the tolling order “does not resolve the requests for rehearing and is not independently subject to judicial review”); *City of Glendale, Cal. v. FERC*, No. 03-1261, 2004 WL 180270, at *1 (D.C. Cir. Jan. 22, 2004) (“Nor is there 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.”).

Even assuming, arguendo, that the February Tolling Order did effectively deny New Jersey’s pending rehearing request, that would not stop the Commission from issuing another order. The Commission stated, in both Tolling Orders, that it

will issue a rehearing order addressing the substantive merits of the numerous objections raised on rehearing. *Supra* p.5. And the Commission’s statutory prerogative to do so is evident from the text of the Act: Until the agency record is filed in a court of appeals, “the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.” 15 U.S.C. § 717r(a).

III. If Not Dismissed, the Petitions for Review Should Be Held in Abeyance

If the Court determines not to dismiss the consolidated petitions for review, they should be held in abeyance until a final 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”).

In addition to the consolidated petitions, there is another petition for review of the interlocutory PennEast Certificate Order pending in this Court.

Homeowners Against Land Takings v. FERC, D.C. Cir. No. 18-1079 (petition filed Mar. 16, 2018; motions to dismiss pending). Moreover, the Commission should be

given room to carefully consider the many requests for rehearing submitted quite recently by numerous parties. It received more than 30 requests for rehearing (over 2,100 pages of materials) between January and February of this year that raise numerous issues related to the Certificate Order and the Tolling Orders.

Abeyance is warranted under these circumstances, should the Court decide not to dismiss the consolidated petitions for review.

Respectfully submitted,

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May 29, 2018

CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with Fed. R. App. P. 27(d)(2) because it contains 2,580 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that the foregoing complies with the requirements of Fed. R. App. P. 27(d)(1)(D)-(E) because it has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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May 29, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on May 29, 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/ Anand R. Viswanathan
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