

**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.)	

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

Riverkeeper’s and New Jersey’s arguments in opposition to dismissal or abeyance of their petitions—regarding the validity of Commission tolling orders, delegations of authority, and due process—do not blunt the force of two basic facts:

- Both sets of petitioners seek judicial review of a non-final Commission order, *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) (“Certificate Order”), issued in an ongoing agency proceeding; and
- Their (and many other) requests for rehearing of the Certificate Order remain pending before FERC, thus making their petitions for review incurably premature.

Just as the Natural Gas Act contemplates, the Commission will address the rehearing requests, respond to all arguments, complete the record, and offer the

Court, at the conclusion of the administrative proceeding, all of its findings for judicial review. That statutory process should not be set aside here.

I. The Certificate Order Will Not Be Final and Appealable Until the Commission Issues Its Rehearing Order

This Court has jurisdiction to review “only final orders of the Commission.” *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C. Cir. 1995). As this Court has clarified, the “presumption that Congress intends judicial review of administrative action applies . . . *only* to final agency action.” *Pub. Citizen 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 2018 Certificate Order is not final agency action. Many requests for rehearing of the Certificate Order remain pending before the agency. FERC Motion at 2. And the Commission still “may modify that decision,” as New Jersey concedes. New Jersey Opp. at 18. The Commission must issue at least one more order, addressing the numerous rehearing requests, before the Certificate Order is reviewable. *See, e.g., Clifton Power Corp. v. FERC*, 294 F.3d 108, 111-12 (D.C. Cir. 2002) (petition for review filed before rehearing order issues is “incurably premature” and “must be dismissed”); *Papago Tribal Utility Auth. v. FERC*, 628 F.3d 235, 238-39 & n.11 (D.C. Cir. 1980) (explaining that a party must seek

Commission rehearing before it may file a petition for review, and that the order denying rehearing requests is the final, reviewable agency order).

Although the Commission recently (on May 30) denied rehearing requests on the February 22 and April 13 Tolling Orders, Riverkeeper's petition for review as to those Orders is still "incurably premature" because they were still pending when it petitioned for judicial review. *See* Riverkeeper Opp. at 1 n.1; *Clifton Power*, 294 F.3d at 110 ("subsequent action by the agency on a motion for reconsideration does not ripen the petition for review or secure appellate review") (internal quotation marks omitted); *City of New Orleans v. SEC*, 137 F.3d 638, 639 (D.C. Cir. 1998).

II. Each Tolling Order Constitutes An "Act" on the Rehearing Requests Under Natural Gas Act Section 19(a)

Riverkeeper's contention that a Commission tolling order is not an "act" for purposes of the Natural Gas Act does not conjure finality. *See* Riverkeeper Opp. at 10-15. This and other courts have uniformly determined that Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does not require the Commission to act on the merits of a rehearing request within 30 days. FERC Motion at 10. Rather, the Commission appropriately "acts upon the application for rehearing" by providing notice within that 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 this intent”). Additional time to act on rehearing is particularly appropriate here, where the Commission recently has been presented with over 30 petitions for rehearing raising an array of different issues.

FERC Motion at 2, 6.

Riverkeeper selectively distinguishes several of the decisions that FERC cited on tolling orders based on their factual context. Opp. at 13-15. But this is no answer to the recent dismissals of near-identical petitions for review of FERC pipeline certificate orders that were followed by tolling orders affording the agency additional time to act on rehearing requests. *See Appalachian Voices v. FERC*, No. 18-1114 (4th Cir. Mar. 21, 2018); *Coalition to Reroute Nexus 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.”); *see also* FERC Motion at 8-10 (citing *Appalachian Voices* and *Coalition* orders). And New Jersey offers no support for its attempt to minimize the Fourth Circuit’s *Appalachian Voices* order as a mere “clerk’s order.” *See* New Jersey Opp. at 12 n.1.

III. The Delegation Of Authority Here Was Valid

Riverkeeper contends that the Natural Gas Act expressly requires the Commission to act on rehearing requests, and does not specifically authorize the

Commission to delegate authority to its staff to act on rehearing requests. Opp. at 16.

But it is well established that federal agencies like the Commission are presumed to have authority to delegate functions to subordinate agency officials. *See U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent.”); *see also Ethicon Endo-Surgery, Inc. v. Covidien L.P.*, 812 F.3d 1023, 1031-32 (Fed. Cir. 2016) (describing agency’s “implicit power to delegate to subordinates” as “firmly entrenched” and “unexceptional”); *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947) (Congress’s grant of broad rulemaking power to an agency may itself be sufficient to show that the agency has authority to delegate).

Not only is the Commission (as a federal agency) inherently presumed to have authority to delegate the issuance of tolling orders to its Secretary (or her designee, 18 C.F.R. § 375.302), the pertinent statutory provisions granting the Commission broad rulemaking authority confirm that authority. The statute establishing the Commission, the 1977 Department of Energy Organization Act, 42 U.S.C. § 7171, contains broad language similar to the statutory provision found to confer authority to delegate in *Fleming*: “The Commission is authorized to

establish such procedural and administrative rules as are necessary to the exercise of its functions.” 42 U.S.C. § 7171(f). So too with the Natural Gas Act, section 16, 15 U.S.C. § 717o, which provides that “The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter.”

That makes sense, as Congress has entrusted the Commission with substantial responsibilities under the Natural Gas Act and other statutes it administers, and has “authorized [the Commission] to appoint . . . such officers, attorneys, examiners, and experts as may be necessary for carrying out its functions,” Natural Gas Act section 18, 15 U.S.C. § 717q; *see also Fleming*, 331 U.S. at 122 (“We would hesitate to conclude that all the various functions granted the Administrator need be performed personally by him or under his personal direction.”).

Moreover, the plain language of the Commission’s regulation at issue here, 18 C.F.R. § 375.302(v), delegates authority to issue tolling orders. It provides that the “Commission authorizes the Secretary, or the Secretary’s designee to: Toll the time for action on requests for rehearing.” It does not contain any language limiting the rehearing requests the Secretary may toll.

Both Riverkeeper and New Jersey point to the preamble of the 1995 rulemaking promulgating that regulation¹ to argue that the Commission's Secretary cannot toll the time for action on rehearing requests that are combined with a stay request. Riverkeeper Opp. at 18; New Jersey Opp. at 7-8. But "[t]he preamble to a rule is not more binding than the preamble to a statute." *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 569 (D.C. Cir. 2002). Thus, the "language in the preamble of a regulation is not controlling over the language of the regulation itself." *Entergy Servs., Inc. v. FERC*, 375 F.3d 1204, 1209 (D.C. Cir. 2004) (quoting *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999)); *see also Nat'l Wildlife Fed'n*, 286 F.3d at 570 ("Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble.").

Consistent with the plain language of the regulation, FERC's Secretary has tolled the time period to act on rehearing requests (whether combined with stay requests or not) since shortly after 18 C.F.R. § 375.302(v) was promulgated. *See, e.g.*, FERC Docket No. CP98-280, Accession Nos. 19981207-0192 (Dec. 3, 1998 Request for Rehearing and Stay) and 19981210-0098 (Secretary's Dec. 9, 1998

¹ *Delegation of Authority to the Secretary, the Director of the Office of Electric Power Regulation and the General Counsel*, 60 Fed. Reg. 62,326 (Dec. 6, 1995), FERC Stats & Regs., Reg. Preambles Jan. 1991 – June 1996 ¶ 31,030 (1995).

order tolling rehearing request); FERC Docket No. ER09-1682 Accession Nos. 20091125-5125 (Nov. 25, 2009 Request for Rehearing and Stay) and 20091224-3007 (Secretary's Dec. 24, 2009 order tolling rehearing request); *Nat'l Fuel Gas Supply Corp.*, 138 FERC ¶ 61,048 (2012) (order in FERC Docket No. CP11-128 noting that an order issued by the Secretary tolled a rehearing request that was combined with a request for stay). While this course of conduct may not be dispositive, "it does indicate a time honored interpretation of the section involved, worthy of judicial deference." *Cal. Co.*, 411 F.2d at 721.

IV. There Is No Due Process Concern Here

There also is no merit to Riverkeeper's claim that the Tolling Orders violated petitioners' due process rights by obstructing, "for an unbound period, Petitioners' right to be heard at a meaningful time and place" prior to the alleged deprivation of their liberty and property interests. Opp. at 2.

Riverkeeper has not established a federally-protected liberty or property interest. While Article I, section 27 of the Pennsylvania Constitution may confer a public right to sue Pennsylvania for failing to protect the environment, it does not create a federally-protected liberty or property interest for Fifth Amendment purposes. *Del. Riverkeeper Network v. FERC*, 243 F. Supp. 3d 141, 153 (D.D.C. 2017), *on appeal*, D.C. Cir. No. 17-5084. The Pennsylvania Supreme Court decisions upon which Riverkeeper relies do not help its cause. Opp. at 5. Those

cases merely confirm that section 27 might permit a suit against Pennsylvania for failing to protect the environment. *See Pa. Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 930-35 (Pa. 2017); *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 951-59 (Pa. 2013).

Even if Riverkeeper could establish a federally-protected liberty or property interest, its due process claim would fail on the merits. Its concern is that the Commission's tolling of the time to consider rehearing requests impedes its members' ability to challenge the validity of the Certificate Order prior to the commencement of construction activities on their property. *See Opp.* at 8-9.

Yet Congress designed the Natural Gas Act to produce that default outcome. Natural Gas Act section 19(c), 15 U.S.C. § 717r(c), specifically provides that neither the filing of an application for rehearing nor a petition for judicial review operates as a stay of the effectiveness of the Commission's order unless the Commission or a court expressly orders a stay. *See also Pub. Citizen*, 839 F.3d at 1174 (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."). And this and other courts have repeatedly found that Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), does not require the Commission to act on the merits of a rehearing request within 30 days. FERC Motion at 10 (citing cases); *Del. Riverkeeper*

Network, 243 F. Supp. 3d at 145-46 (“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.”). The Certificate Order itself does not allow the pipeline from proceeding with construction immediately—i.e., “no construction will be allowed to commence until PennEast provides documentation that it has received all applicable authorizations required under federal law.” Certificate Order P 129.

This Court has explained that the “presumption that Congress intends judicial review of administrative action applies . . . *only* to final agency action.” *Pub. Citizen*, 839 F.3d at 1171. And this Court’s jurisdiction extends only to final Commission orders. *See Transwestern Pipeline*, 59 F.3d at 226. The Certificate Order remains non-final because requests for rehearing, including those of petitioners here, remain pending at the agency. *See Clifton Power*, 294 F.3d at 110. Riverkeeper’s irreparable injury claims do not change these fundamental (jurisdictional) finality principles. *See Pub. Citizen*, 839 F.3d at 1171 n.4 (“practical and prudential considerations, however compelling, cannot provide the basis for our jurisdiction absent demonstrated final agency action”); *see also Clifton Power*, 294 F.3d at 112. 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 Orders.

At least part of Riverkeeper's argument is based on its perceived inability to defend its members in condemnation actions initiated after the issuance of the Certificate Order. *See* Opp. at 8-9. District courts or state courts, not the Commission, have jurisdiction over eminent domain proceedings. Natural Gas Act § 7(h), 15 U.S.C. § 717f(h); *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000). Any challenge Riverkeeper raises here as to eminent domain proceedings taking place in New Jersey and Pennsylvania courts is not properly before this Court.

V. Alternatively, the Petitions for Review Should Be Held in Abeyance

If the Court does not dismiss the petitions for review, then it should hold them in abeyance until the Commission issues the promised order on the pending requests for rehearing. *See* FERC Motion at 9. Although New Jersey cites a procedural order in which a motions panel of this Court denied a FERC motion for abeyance in another case, *see* Opp. at 12, that order is not binding precedent and would not constrain this Court from reaching a different conclusion on FERC's motion here. This is especially so given that the Certificate Order challenged here issued just this year, and the dozens of rehearing petitions and rehearing issues have been pending before the Commission for only 3-4 months. *See* FERC Motion at 2.

The Commission, understandably, has not yet acted on the merits as to the many pending rehearing requests, and will issue a further order in this proceeding. As this Court previously has noted, “a favorable decision from the agency might yet obviate the need for review by the court,” *Clifton Power*, 294 F.3d at 111, or alter the number or identity of issues ultimately presented for review, and so abeyance is appropriate while the scope of any eventual appeal becomes clear.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with Fed. R. App. P. 27(d)(2) because it contains 2,560 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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June 13, 2018

CERTIFICATE OF SERVICE

I hereby certify that, on June 13, 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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