



D.C. Circuit Ends FERC's Use of Tolling Orders to Delay Judicial Review, Leaves More Questions than Answers

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Although *Allegheny Defense* addresses Tolling Orders under the Natural Gas Act (NGA),⁴ the Federal Power Act (FPA)⁵ includes nearly identical language, which is noted in the Opinion.⁶ The NGA and the FPA are sister statutes, and decisions interpreting them are frequently cited interchangeably when the relevant provisions of each statute “are in all material respects substantially identical.”⁷ It is therefore likely that *Allegheny Defense* has brought an end to the routine issuance of Tolling Orders under the FPA as well as the NGA. What that means in practice, however, is not entirely clear.

Rehearing and Judicial Review of FERC Orders

The NGA and the FPA both require that a party seeking rehearing of a Commission order must request rehearing within 30 days of the issuance of that order. Once a request for rehearing is received, the Commission may “grant or deny rehearing or [] abrogate or modify its order without further hearing.”⁸ If the Commission does not act on the request for rehearing within 30 days, the request is deemed denied and, at that point, the order would be ripe for judicial review. Until FERC acts on the request for rehearing, or it is denied by operation of law, no party may seek judicial review of a FERC order.

As noted above, the issuance of Tolling Orders, which “grant rehearing” but only for the limited purpose of giving the Commission more time to act on a rehearing request, precludes parties aggrieved by a FERC order from seeking judicial review until such time as the Commission chooses to act on the merits of a rehearing request. Often, the delay was only a

few months, but it has at times stretched into years, particularly in natural gas pipeline certificate cases.⁹

Where the D.C. Circuit previously considered the lawfulness of Tolling Orders, it has upheld them as a reasonable exercise of agency discretion.¹⁰ In *Allegheny Defense*, however, the D.C. Circuit revisited those earlier decisions. The petitioners in *Allegheny Defense* were landowners opposing the construction of a natural gas pipeline across their land. FERC issued a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Co. (“Transco”) in February 2017. The landowners sought rehearing. FERC issued a Tolling Order in March 2017. While the substantive order on rehearing was pending, Transco sought and received eminent domain authority in court, and FERC granted authorization to construct the pipeline. By the time a substantive order on rehearing was issued by FERC in December 2017, the pipeline was already under construction. By the time the case was heard by a panel of the D.C. Circuit in December 2018, the pipeline had been fully constructed and operational for two months.

The Impact of *Allegheny Defense* on FERC Litigation

Allegheny Defense is a procedural decision that has no effect on the substantive rights of landowners to challenge the issuance of a FERC order authorizing construction of a natural gas pipeline across their land. In fact, the court denied the landowners’ petitions for review of FERC’s certificate order on the merits, finding that FERC had reasonably found a market need for Transco’s project. But its effect on FERC litigation will be far reaching.

As an initial matter, it will shorten the time between the issuance of a FERC order and judicial review in NGA cases. Although the *Allegheny Defense* court did not require that FERC affirmatively act by the 30-day deadline, it did find that if that deadline passes without FERC action, the rehearing request will be deemed denied, and the order would then be ripe for judicial review. However, the court noted that the wording of the statute allows FERC to revise its decision or even set it aside at any point until the record of the proceeding is filed with the appellate court, a period of at least 40 additional days after a petition for review is filed.¹¹

Ironically, the Opinion itself may not result in major changes for pipeline developers, because in response to this litigation, FERC had voluntarily begun making changes to how it handles rehearing requests from landowners. FERC had already issued an order amending its

regulations to preclude issuing a notice to proceed with construction while rehearing is pending.¹² Likewise, the Commission had previously reorganized its Office of the General Counsel to prioritize landowner requests for rehearing.¹³ These changes prevent the scenario on which the court focused in the Opinion—that the pipeline was constructed and operational before the landowners could make their arguments before a court. But these changes do not correct the impact of Tolling Orders on other proceedings under both the NGA and the FPA. Extended delays in issuing substantive orders on rehearing can, among other things, run out refund periods that are limited by statute, or moot a dispute due to the passage of time, denying one party or another a meaningful remedy. Unlimited tolling periods also increase regulatory and litigation uncertainty, as there is no way to predict when FERC will act on a particular request for rehearing. For example, FERC recently took nearly two years to respond to rehearing requests concerning PJM Interconnection, L.L.C.’s Minimum Offer Price Rule (MOPR), leading to vast uncertainty for investors concerning future capacity prices and a limited period to implement complicated new rules.¹⁴ By invalidating the use of Tolling Orders to extend the time for judicial review, the Opinion prevents these other impacts.

The Opinion also raises a number of questions in its own right, however. Perhaps the most pressing is the impact on those FERC proceedings in which the Commission has already issued a Tolling Order. Are litigants in those proceedings now free to seek judicial review without FERC issuing a substantive order on rehearing? Or are those litigants now precluded from seeking judicial review because the Tolling Order was issued more than 30 days ago, such that the time for seeking judicial review has already passed? Or should the Opinion only apply to future Tolling Orders?

Second, the Opinion does not make clear exactly how much action FERC has to take to prevent parties from seeking judicial review within 30 days of a FERC order. For example, the court expressly states that the Opinion does not address how the relevant statutory provisions of the NGA and FPA, “the ripeness doctrine, or exhaustion principles might apply if the Commission were to grant rehearing for the express purpose of revisiting and substantively reconsidering a prior decision, and needed additional time to allow for supplemental briefing or further hearing processes.”¹⁵ The Opinion also does not prevent the Commission from authorizing pipeline construction while rehearing is pending, though as noted above, FERC has already issued an order amending its regulations to preclude issuing a notice to proceed with construction while rehearing is pending.¹⁶

Third, it is not clear how *Allegheny Defense* will affect the Commission and its practices. The Commission argued before the court that one reason for the issuance of Tolling Orders is that FERC attempts to provide a substantive response to all requests for rehearing, but lacks the resources to do so within a 30-day period. How the Commission will solve this resource allocation problem after *Allegheny Defense* may result in a significant change in practice. FERC may need to issue *pro forma* orders when denying rehearing, which will result in a less thorough record on appeal unless FERC takes substantive action to modify that order during the approximately 40-day period prior to the date the record is filed with the appellate court, or FERC may have to seek funding to hire a significant number of additional staff.

FERC has until September 28, 2020, to seek review of the Opinion from the Supreme Court, though the Commission has not yet expressed an interest in doing so. Instead, on July 2, 2020, FERC Chairman Neil Chatterjee and the Commission's only Democrat, Commissioner Richard Glick, made a bipartisan request to Congress, asking the legislature to "consider providing FERC with a reasonable amount of additional time to act on rehearing requests involving orders under both the [NGA] and the [FPA]," noting their belief that "any such legislation should make clear that, while rehearing requests are pending, the Commission should be prohibited from issuing a notice to proceed with construction and no entity should be able to begin eminent domain proceedings involving the projects addressed in the orders subject to those rehearing requests."¹⁷ Meanwhile, we expect a wave of delayed petitions for review to hit the appellate courts, particularly the D.C. Circuit, especially in natural gas pipeline certificate cases where FERC previously issued Tolling Orders but has not yet taken action on the merits of rehearing requests.

¹ *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. June 30, 2020) ("Opinion").

² *Id.* at 15.

³ See, e.g., *Tenn. Gas Pipeline Co., L.L.C.*, 160 FERC ¶ 61,027 (2017) (order on rehearing issued 473 days after issuance of Tolling Order); *Equitrans, L.P.*, 143 FERC ¶ 61,108 (2013) (order on rehearing issued 595 days after issuance of Tolling Order).

⁴ 15 U.S.C. § 717r(a).

⁵ 16 U.S.C. § 825l(a).

⁶ Opinion at 6.

⁷ See, e.g., *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981) (quoting *Fed. Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348, 352-353 (1956)).

⁸ 15 U.S.C. § 717r(a); see also 16 U.S.C. § 825l(a).

⁹ See *supra* note 3.

¹⁰ See Opinion at 32.

¹¹ *Id.* at 30-31.

¹² See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020).

¹³ See *FERC Chairman Reorganizes OGC to Speed Landowner Rehearing Process* (Jan. 31, 2020), <https://www.ferc.gov/news-events/news/ferc-chairman-reorganizes-ogc-speed-landowner-rehearing-process-0>.

¹⁴ See *Calpine Corp.*, 171 FERC ¶ 61,034 (2020) (addressing requests for rehearing of the Commission's June 2018 order establishing a paper hearing in April 2020). Much of the uncertainty around the MOPR proceeding arose because FERC took a similarly extended period of time to issue an order on the paper hearing initiated in June 2018, but parties also requested rehearing of the order instituting the paper hearing in the first place. Thus, the use of Tolling Orders prevented parties from challenging the decisions that led up to the paper hearing. The ability to delay rehearing facilitated FERC's ability to delay resolving the core disputes.

¹⁵ Opinion at 29-30.

¹⁶ See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 171 FERC ¶ 61,201 (2020).

¹⁷ *FERC Chairman Neil Chatterjee and Commissioner Richard Glick Issue Joint Statement on Allegheny Defense Project v. FERC* (July 2, 2020), <https://ferc.gov/news-events/news/ferc->

chairman-neil-chatterjee-and-commissioner-richard-glick-issue-joint-statement.

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