



## The D.C. Circuit Clarifies the Timing for Filing Petitions for Review of FERC Orders

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The case arose from a hydroelectric relicensing proceeding. The Smith Lake Improvement and Stakeholders Association (“Association”), composed primarily of persons owning property abutting Alabama Power Company’s (“Alabama Company”) Smith Lake Development, intervened in the Smith Lake relicensing proceeding at FERC. The Association objected to Alabama Power’s proposal to maintain the lake at the same water levels as under its prior license. FERC denied the Association’s proposed water-level change and issued a new license authorizing Alabama Power to operate under existing water-level benchmarks. The Association timely filed for rehearing of the license order. FERC affirmed the license order with regard to the water levels that interested the Association, but issued a clarification on another matter. The Association then filed a second rehearing request, which FERC summarily denied, stating that its first rehearing request had addressed the Association’s arguments. Sixty days after FERC’s summary denial of the second rehearing petition, the Association petitioned the D.C. Circuit for review.

The D.C. Circuit concluded that it lacked jurisdiction to hear the petition. Under Section 313(b) of the Federal Power Act (FPA), a party petitioning for judicial review of a FERC order must file its petition within 60 days.<sup>5</sup> However, although the Association had filed its petition within 60 days of the **second** rehearing order, the filing occurred 124 days after the **first** rehearing order. As the court explained, it was the **first** rehearing order that started the 60-day clock, and the second request for rehearing did not toll it.

Under FPA 313(b), an appellate court has jurisdiction to review a FERC order only when a petitioner has exhausted its administrative remedies and then petitions the court for review within 60 days. Normally, filing a petition for rehearing, and receiving an order denying

rehearing from FERC, serves to exhaust administrative remedies. However, “a second rehearing petition *must* be filed [with FERC] if—and *only if*—the first rehearing order modified the results of [FERC’s initial order] in a significant way.”<sup>6</sup> The “significant” modification must also be a change in the **outcome** of the case, and not merely the reasoning.<sup>7</sup> In *Smith Lake*, however, FERC’s first order on rehearing did not alter the outcome of the license order with regard to the issues of concern to the Association. Therefore, the Association was not required to file a second request for rehearing to exhaust its administrative remedies. Instead, pursuant to FPA 313(b), the Association had to file for review within 60 days of the **first** rehearing order. Unfortunately for the Association, it chose to file another request for rehearing, perhaps because FERC’s first order on rehearing included a notation that “[t]he licensee’s failure to file a request for rehearing shall constitute acceptance of this order.”<sup>8</sup> In their statement accompanying the court’s denial of rehearing *en banc*, the judges noted that this was not the first time this had occurred, and it advised that “it would help interested parties to its decisions if FERC took greater care with this type of guidance.”<sup>9</sup>

In its briefs, the Association raised a further complication that the court attempted to address. The Association described a “trap” where FERC, in an order on rehearing, does not change the **outcome** of its prior order, but does change its **reasoning**. Under existing precedent, a party cannot “simultaneously seek both agency reconsideration and judicial review of an agency’s order.”<sup>10</sup> However, FPA 313(b) states that a party cannot seek review of a FERC order if it has not previously objected to that order in a request for rehearing.<sup>11</sup> So, what should a party do if the request for rehearing alters only the FERC’s reasoning, and the party objects to that new reasoning?

Drawing on precedent under the FPA’s sister statute, the Natural Gas Act, the D.C. Circuit concluded that the petitioner caught in this “trap” should petition for review, rather than seek rehearing. “[W]hen a party seeks judicial review following a rehearing order that changes the reasoning without altering the result,”<sup>12</sup> then that party may have reasonable grounds under the FPA for not having raised its objections earlier<sup>13</sup> “and therefore be entitled to consideration of those arguments.”<sup>14</sup> In the amended version of the order, the court clarified its discussion of the hypothetical situation where the party is unsure whether or not a change to the outcome in a rehearing order is “significant.” In that case, the court urges parties to file

a petition with the court, based again on having “reasonable grounds” for not having raised their arguments with the FERC a second time.

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<sup>1</sup> *Smith Lake Improvement and Stakeholders Ass’n v. FERC*, No. 13-1074 (D.C. Cir. Sept. 26, 2014).

<sup>2</sup> See Brief for Respondent, *Smith Lake Improvement and Stakeholders Ass’n v. FERC*, No. 13-1074.

<sup>3</sup> Order, *Smith Lake Improvement and Stakeholders Ass’n v. FERC*, No. 13-1074.

<sup>4</sup> The court also reissued the September opinion, amended to recognize that the requirement that requests for rehearing be filed at FERC within 30 days is a statutory, jurisdictional requirement.

<sup>5</sup> 16 U.S.C. 825l(b) (2012).

<sup>6</sup> *Smith Lake Improvement and Stakeholders Ass’n v. FERC*, No. 13-1074, slip op. at 4 (D.C. Cir. Jan. 30, 2015) (“Amended Order”) (internal quotes omitted) (emphasis added).

<sup>7</sup> *Id.*

<sup>8</sup> Statement of Cir. Judges Brown and Wilkins and Senior Cir. Judge Silberman at 2, *Smith Lake Improvement and Stakeholders Ass’n v. FERC*, No. 13-1074 (quoting *Alabama Power Co.*, 130 FERC ¶ 62,271, at 64,719 (2010)).

<sup>9</sup> *Id.*

<sup>10</sup> *Tennessee Gas Pipeline Co. v. FERC*, 9 F.3d 980, 980 (D.C. Cir. 1993).

<sup>11</sup> 16 U.S.C. 825l(b).

<sup>12</sup> Amended Order at 6.

<sup>13</sup> 16 U.S.C. 825l(b) (2012).

<sup>14</sup> Amended Order at 6-7.

## Categories

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