

D.C. Circuit Overturns Decades of Precedent, Finds FERC Cannot Delay Appellate Review With Tolling Orders

On June 30, 2020, in an *en banc* review, the U.S. Court of Appeals for the D.C. Circuit concluded that the Federal Energy Regulatory Commission cannot delay judicial review of its decisions by issuance of tolling orders.[1] The opinion overturns decades of D.C. Circuit precedent and guts FERC's long-standing practice. While issued in the context of FERC's natural gas pipeline certificate program, the D.C. Circuit's decision in *Allegheny Defense Project* is likely to have broad impacts on both power and natural gas industry participants litigating before FERC under the Natural Gas Act (NGA) and Federal Power Act (FPA). It also sets up a circuit split that bears on litigation strategy and may make the issue ripe for U.S. Supreme Court review.

Summary

The opinion is the latest relating to FERC's issuance of a certificate of public convenience and necessity (certificate order) under Section 7(c) of the NGA for the Atlantic Sunrise Project. The certificate order was strenuously opposed by homeowners and certain environmental associations. FERC issued the order in early 2017[2] and rehearing requests were timely filed. Under the NGA, upon filing of a rehearing request, FERC "shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing." [3] Moreover, unless FERC acts upon the rehearing request within 30 days after it is filed, the rehearing request may be deemed to have been denied.[4] Only after FERC has acted on its rehearing request may the requesting party petition for judicial review.

As is its common practice, FERC issued a tolling order at the end of the 30-day statutory period to act on rehearing requests.[5] The sole purpose of the tolling order was to grant rehearing "for the limited purpose of further consideration," such that FERC could address the merits of the rehearing requests in a later order without the requests being deemed denied under the NGA. Nine months later, in December 2017, FERC denied rehearing of the certificate order. In the interim, FERC permitted the pipeline to commence construction, and a district court granted a condemnation action brought by the pipeline utilizing eminent domain rights afforded by the certificate order to acquire property necessary for construction of the pipeline.

The court in *Allegheny Defense Project* concluded that FERC lacks the authority under the NGA to issue tolling orders for the sole purposes of preventing rehearing from being deemed denied and delaying the right to judicial review.[6] The court based its decision on its reading of the statute, finding that in response to a rehearing request, FERC can do one of four things: (1) grant rehearing, (2) deny rehearing, (3) abrogate its order without further rehearing, or (4) modify its order without further hearing. The court rejected FERC's position that the tolling order constituted a grant of rehearing, since the tolling order did not substantively address the rehearing requests.

Takeaways

Allegheny Defense Project is likely to have a significant impact on litigation and regulatory strategy for both pipeline developers and opponents. Coupled with FERC's recent Order No. 871,[7] where FERC decided it

would no longer allow pipeline construction to commence before it addresses rehearing requests of the underlying certificate order, *Allegheny Defense Project* will likely result in some delay to the commencement of the pipeline construction process that pipeline developers will need to factor into their planning. However, the opinion provides some regulatory certainty to both developers and opponents, as the timeframe for FERC action on rehearing will be less opaque than when FERC could indefinitely delay substantive action on rehearing.

That said, *Allegheny Defense Project* noted but left unaddressed other avenues FERC could use to afford itself additional time to consider issues raised on rehearing—for example, by granting rehearing within the 30-day statutory period for the explicit purpose of allowing for supplemental briefing or further hearing. The court also noted that the NGA permits FERC to take action after the 30-day period has run, even if a party has petitioned for judicial review upon expiration of the 30-day period.[8] Whether FERC takes any of these approaches going forward, and whether they will hold up in court, remains to be seen.

Importantly, the opinion will have broad implications not only for litigation over certificate proceedings, but also for other cases arising under both the NGA and the FPA. The FPA's provisions regarding rehearing and judicial review of FERC orders are substantially the same as the provisions of the NGA analyzed in *Allegheny Defense Project*. The courts have a long practice of applying precedent created under one statute to cases arising under the other.

The opinion overturns a significant body of precedent from the D.C. Circuit and reaches the opposite conclusion as many other federal courts of appeal, which have upheld FERC's ability to delay judicial review via tolling orders. *Allegheny Defense Project* thus sets up a circuit split on how to view FERC's issuance of tolling orders. Near term, this split may factor into litigants' consideration regarding where to seek judicial review of a FERC order, and whether the potential benefits of judicial review in a different circuit outweigh the ability to seek judicial review sooner in the D.C. Circuit. Longer term, these strategic decisions will be further affected by how FERC adjusts its process in response to *Allegheny Defense Project*.

Finally, since *Allegheny Defense Project* signals a profound change to its long-standing practice of issuing tolling orders, it is possible FERC may petition the Supreme Court for *certiorari* on this question. Resolving a circuit split is a common reason for the Supreme Court to grant cert, though it does not always do so. FERC has until September 28, 2020, to file a petition but so far has not suggested it will do so. On July 2, 2020, FERC Chairman Neil Chatterjee and FERC Commissioner Richard Glick issued a joint statement regarding *Allegheny Defense Project*, urging the U.S. Congress to provide FERC with a "reasonable amount" of additional time to act on rehearing requests under both the NGA and the FPA, and asserted that "[w]e believe that any such legislation should make clear that, while rehearing requests are pending, [FERC] 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."

Endnotes

[1] *Allegheny Defense Project v. FERC*, No. 17-1098 (June 30, 2020) (*Allegheny Defense Project*).

[2] *Transcontinental Gas Pipe Line Co.*, 158 FERC ¶ 61,125 (2017) (certificate order).

[3] 15 U.S.C. § 717r(a).

[4] *Id.*

[5] *Transcontinental Gas Pipe Line Co.*, Docket No. CP15-138-001 (delegated order issued Mar. 13, 2017) (tolling order).

[6] *Allegheny Defense Project* at 19.

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

[8] 15 U.S.C. § 717r(a) (FERC "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" the NGA).

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