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Appellate Review of FERC Orders Potentially Accelerated

On June 30, in a 10-1 en banc decision in *Allegheny Defense Project v. FERC* that will likely have a profound effect on current and future proceedings before the Federal Energy Regulatory Commission (FERC), the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Natural Gas Act (NGA) does not allow FERC to delay appellate review of its substantive orders through its common practice of issuing "tolling" orders.

FERC has for decades been routinely issuing tolling orders in response to identical language in both the NGA and the Federal Power Act (FPA) that requires any party seeking to challenge a FERC order on appeal to first request a rehearing before FERC, and FERC to act within 30 days after receiving any such requests. If FERC does not act within that time, the rehearing request is deemed denied and the FERC order is final and ripe for appeal. A tolling order is a brief order issued within 30 days of receiving an application for rehearing that does not address the merits of the rehearing request, but rather explicitly "grants" rehearing for the purpose of giving the agency more time to consider the arguments. FERC then treats the tolling order as indefinitely suspending the 30-day statutory deadline in order to afford more time to fully address the rehearing request.

The *Allegheny Defense Project* decision at the very least modifies—if not wholly overrules—a long-unbroken line of cases that rejected as premature appeals from FERC orders while applications for rehearing were pending. While the case was decided under the NGA, there is little doubt that the court's rejection of FERC's long-standing tolling policy will impact proceedings arising under the FPA as well.

Description of the Decision

In *Allegheny Defense Project*, the petitioners challenged FERC's use of a tolling order in response to their applications for rehearing of a FERC order that issued a certificate of public convenience and necessity to the Atlantic Sunrise Project. Those rehearing applications were pending for nine months before FERC ruled on them. When the appeals were filed, FERC and others sought to use the pending rehearing requests as the basis for dismissing the petitions as "incurably premature." Since the applications for rehearing did not stay FERC's issuance of the certificate, the petitioners also sought a stay from FERC, which FERC did not act on for almost seven months. While the rehearings and requests for stay were still before FERC, the pipeline sponsors of the Atlantic Sunrise Project proceeded to condemn land and begin construction activities. By the time the first panel of the court heard oral arguments on the petitions for review, the project had been built and in service for two months.

In a majority opinion by Judge Patricia Millett, the court rejected FERC's motion to dismiss the petitioner's appeal from the certificate order as premature. In so doing, Judge Millett observed that "until [FERC] chooses to act, the applicant is trapped, unable to obtain judicial review." Noting that FERC's tolling practice of "kicking the can down the road" has "real-world consequences," particularly in this case, the court held that the NGA does not authorize FERC to issue such orders simply to prevent the expiration of the 30-day statutory period for it to act on rehearing requests. Instead, according to the court, a "grant" of rehearing requires some substantive response. Accordingly, the court held that "after thirty days elapsed from the filing of a rehearing application without Commission action, the Tolling Order could neither prevent a deemed denial nor alter the jurisdictional consequences of agency inaction. To the extent our prior decisions upheld the use of tolling orders in that manner, they are overruled in relevant part." The court then proceeded to consider and reject all of the petitioners' arguments on the merits, upholding FERC's issuance of a certificate of public convenience and necessity to the Atlantic Sunrise Project.

To be sure, the court made clear that its decision was not meant to require FERC to act substantively on rehearing applications within 30 days. Rather, the court allowed for the possibility that FERC could grant rehearing for the purpose of reconsidering its decision by establishing additional evidentiary procedures. The court also noted that, even if FERC takes no action on a rehearing request within 30 days, it nevertheless retains the authority to modify its order until the administrative record is filed with the court of appeals (usually within 40 days after a petition for review has been filed).

Judge Thomas Griffith, writing on behalf of three of the panel judges, concurred separately to clarify that there are three "strands" in the "legal web that can ensnare land owners in pipeline cases": delayed judicial review, uninterrupted construction and district courts' swift transfer of property. The concurrence argues that delayed judicial review is "not the primary driver of unfairness" and notes that the remaining factors should also be curtailed.

Judge Karen LeCraft Henderson concurred in the judgment on the merits, but dissented in part with respect to the court "overrul[ing] a statutory construction that our court has employed for over fifty years." The dissent would "leave it to the political branches to determine whether and how to limit FERC's use of tolling orders."

Now What Happens?

The *Allegheny Defense Project* decision raises immediate questions that need to be considered. First, what are the implications for parties that currently have pending rehearing requests before FERC? If tolling orders have not yet been issued, or have been issued less than 60 days ago, then should an applicant for rehearing file an appeal within the 60 days allowed for such an appeal in order to protect its rights? Every region of the country will have its set of issues. By way of example, early appeals have already been filed in the heavily contested PJM proceeding on its Minimum Offer Price Rule, although petitioners in those proceedings have requested the appellate court to hold such appeals in abeyance while the requests for rehearing at FERC are pending. In New England, applications were recently filed for rehearing of FERC's treatment of critical infrastructure protection costs incurred by generators to maintain interconnection reliability.

Related to the first question, if tolling orders have already been issued, but the statutory period for filing a petition for review from those tolling orders has lapsed, then what options are available to litigants? The fuel security litigation in New England and the litigation over appropriate returns on equity for transmission service both involve numerous FERC orders with numerous pending rehearings; in some cases, the tolling orders were issued more than two years ago.

Second, what can be reasonably expected from the appellate courts? FERC proceedings are typically quite complex, with numerous parties and issues. There are likely scores of cases, like the PJM case above, that are currently being held in abeyance in the appellate courts while numerous rehearing requests in related cases, and on related issues, are still pending at FERC. What, if anything, happens now in those proceedings given the court's decision?

Going forward, the picture is no more clear. At least as it relates to future circumstances like those presented in *Allegheny Defense Project*, FERC has already modified its regulations effectively to stay construction of natural gas facilities while related applications for rehearing are pending. Two days following the decision, FERC Chairman Neil Chatterjee and Commissioner Richard Glick issued a joint statement asking Congress to consider providing FERC with additional time to act on rehearing requests. Regardless of whether that request succeeds, FERC may act to adopt new procedures for more expeditiously evaluating rehearing requests under both the NGA and FPA. Such procedures undoubtedly would increase burdens on both FERC and parties in its dockets. Whatever the immediate outcome however, it is reasonably certain that future litigants dissatisfied with a FERC order will be far quicker to seek appellate review so as to preemptively protect their appellate rights.

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