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## D.C. Circuit Tolls the Bell on Tolling Orders

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*Frances Bishop Morris and Sharon White*

On June 30, 2020, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), sitting *en banc*, issued a decision that could radically disrupt and fundamentally alter the way the Federal Energy Regulatory Commission (FERC) handles challenges to its orders.

The court held that the Natural Gas Act (NGA) does not authorize FERC to issue “tolling orders” solely to prevent the expiration of the 30-day statutory period for FERC to act on requests for rehearing, which under the NGA results in the request for rehearing being “deemed denied.” The court left open the possibility that FERC could grant rehearing for the purpose of substantively considering a prior decision through the use of further record-building pleadings or proceedings. Because the Federal Power Act (FPA) contains an identical provision requiring FERC to act on rehearing requests within 30 days, the decision has important implications across FERC-regulated industries.

Petitioners in *Allegheny Defense Project v. FERC* challenged FERC’s use of a tolling order in response to a request for rehearing of an order issuing a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Company for the Atlantic Sunrise Project. The rehearing requirement, which is present under both the NGA and the FPA, requires any aggrieved party seeking to challenge a FERC order on appeal to first file a request for rehearing with the agency. While that request is pending, the requesting party may not file an appeal in court until FERC issues a final decision. If FERC fails to respond within the 30-day statutory time period, the rehearing request is deemed denied.

Because rehearing requests often include numerous, complex arguments, FERC developed a practice over at least the last 50 years of issuing “tolling orders” within 30 days of the filing of requests for rehearing. Tolling orders are wholly procedural, granting rehearing for the sole purpose of further consideration, thereby effectively prolonging the 30-day statutory deadline for substantive action on rehearing requests. Under prior D.C. Circuit precedent, FERC’s issuance of tolling orders had been held to foreclose petitions for judicial review until FERC issued a decision on the merits of a rehearing request.

In *Allegheny Defense Project*, FERC issued a tolling order with respect to the petitioner landowners’ requests for rehearing of the order issuing a certificate. While their rehearing requests were pending, a district court authorized condemnation of the landowners’ property, and construction of the project commenced. This is because once FERC issues a certificate of public convenience and necessity for a natural gas pipeline, the NGA automatically grants the holder of the certificate the power of eminent domain to condemn private property within the project’s right of way. In practice, this means that FERC may issue a tolling order, as it did in the Atlantic Sunrise proceeding, that prevents a party from seeking judicial review even while pipeline construction and the condemnation of private property proceed. As the court noted in its opinion, by the time a party is allowed to seek judicial review before a court, the project may be completed and operational.

The court’s *en banc* decision follows a decision last [August](#), in which a three-judge panel relied on circuit precedent to affirm FERC’s use of tolling orders, but which included a robust concurring opinion from Judge Millett, who described FERC’s use of tolling orders as a “bureaucratic purgatory” and strongly urged a “second look” at D.C. Circuit precedent.

The D.C. Circuit sitting *en banc* held that FERC’s routine use of tolling orders is contrary to the plain language of the NGA and prevents aggrieved parties from obtaining timely judicial review. According to the court, a “grant” of rehearing requires some substantive response. The court concluded that tolling orders do not constitute a grant of rehearing—rather they impermissibly “kick the can down the road.” The court said that FERC “has no authority to erase and replace the statutorily prescribed jurisdictional consequences of its inaction.”

The decision indicates that the court's concerns were not assuaged by FERC's recently issued rule ([Order No. 871](#)), in which FERC amended its regulations to preclude the issuance of notices to proceed with construction for newly authorized natural gas pipeline and liquefied natural gas projects until (i) the 30-day deadline for filing a request for rehearing has lapsed without a request being filed; or (ii) FERC has acted upon the merits of any timely-filed rehearing request. Order No. 871 came on the heels of an earlier commitment to expedite responses to rehearing requests brought by landowners. Issued as an Instant Final Rule without notice and comment, Order No. 871 does not take effect until 30 days after publication in the *Federal Register*, which to date has not occurred.

Although the court invalidated the use of tolling orders to avoid the "deemed-denied" provision, the court clarified that it was not requiring FERC to decide on issues raised on rehearing within a 30-day window in all cases, and declined to rule on a scenario in which FERC grants rehearing for the purpose of substantively reconsidering a prior decision through the use of additional pleadings, hearings or other record-building proceedings. The court also noted that even if FERC takes no action on a rehearing request within 30 days, it retains the authority to modify or set aside an order until the administrative record is filed with the court of appeals, typically within 40 days of the filing of a petition for review. A court may extend that deadline for submission of the administrative record, upon FERC's request.

An immediate question arising out of the court's decision is the treatment of parties with pending rehearing requests before FERC, for which tolling orders have been issued and for which the statutory period for filing petitions for judicial review has expired. Effectively, this would apply to any parties that have sought rehearing of a FERC order within the last 60 days, and for which a tolling order has been issued. But the fact that other circuits observe the norms that the D.C. Circuit just eliminated suggests that at least some review petitions will find their way to those other circuits. A parallel question arises about the many cases now being held in abeyance or which are the subject of motions to hold in abeyance in the D.C. Circuit while FERC considers rehearing requests in related cases. Presumably, the court will apply the precepts of its decision and begin to move those cases along to the next procedural stage.

The court's decision also strongly suggests that FERC might well establish procedures to consider requests for rehearing in a more rigorous manner. Whatever else might be said about FERC's tolling order regimen, it afforded FERC and its staff additional time to consider complex issues and to manage a burdensome case load. If FERC elects to use the procedures suggested by the court's decision, natural gas project developers can anticipate that it will take substantially longer to obtain a final order authorizing their projects. And, when combined with Order No. 871, it may take even longer for FERC to authorize construction. While additional procedures would certainly add expense for all parties, putting FERC orders on a new foundation by obviating some of the basis for challenges in the courts to FERC orders appears to be a potential consequence of the D.C. Circuit decision. On the other hand, unless FERC is able to act on the merits of rehearing requests within the statutory 30 days, FERC will no longer be able to use its rehearing orders as a way to bolster its initial orders and those issued by FERC staff under delegated authority, potentially making FERC orders more vulnerable in the courts.

It is too early to know whether what is now a split between the D.C. Circuit and other circuits that had followed the D.C. Circuit's prior acceptance of tolling orders will support a petition for a writ of certiorari.

## FOR MORE INFORMATION

If you are interested in additional information regarding the case, or would like to discuss its implications, please contact [Michael Pincus](#) (for gas pipelines and certificates), [Larry Acker](#) (for gas pipelines, electric and appellate issues), [Joe Nelson](#) or [Vincenzo Franco](#) (for electric), or [Mike Swiger](#) or [Sharon White](#) (for hydropower), or any members of the [gas](#), [electric](#), or [hydro](#) practices at (202) 298-1800 in Washington, D.C. or in Seattle at (206) 623-9732.