

## Reduced Speed Ahead: New LNG and Interstate Natural Gas Pipeline Facilities Likely To Face Construction Delays Following Recent D.C. Circuit Opinion and FERC Rule

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For decades, the Federal Energy Regulatory Commission's ("FERC") practice has been to allow interstate natural gas pipeline owners to commence construction activities while requests for rehearing of the pipeline's Natural Gas Act ("NGA") certificate were pending before the agency. The Commission effectuated that practice by issuing orders, commonly referred to as "tolling orders," to provide itself additional time – in some cases years – to consider arguments raised on rehearing, while permitting construction activities to proceed before FERC concluded its review by issuing an order addressing the merits of the rehearing requests. Although that practice repeatedly had been upheld by the courts, it increasingly has come under attack in recent years by parties concerned that it precludes meaningful judicial review of the agency's decision because, under the NGA, the agency's decision cannot be appealed to court until after FERC issues a merits rehearing order.

On June 30, 2020, the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") issued an [opinion](#) overturning its prior precedent and invalidating FERC's use of tolling orders in this way.<sup>1</sup>

The D.C. Circuit issued its opinion weeks following FERC's issuance of [Order No. 871](#), which was intended to address landowner concerns about pipelines being constructed before the agency had completed its rehearing process, by amending the agency's regulations to limit authorizations to commence construction of LNG export and import facilities and interstate natural gas pipeline facilities certificated pursuant to Sections 3 and 7(c) of the NGA<sup>2</sup> while requests for rehearing are pending.<sup>3</sup> Both the D.C. Circuit's opinion and FERC's Order No. 871 represent

marked changes in the law and FERC's policy respectively. These changes are likely to delay construction and, as a result, increase project costs and create uncertainty for new FERC-approved projects.

## The D.C. Circuit's Opinion

Under the NGA, no party may seek judicial review of a FERC order until after it requests rehearing of the agency's decision and the agency issues an order addressing the rehearing request. Under the statute, a request for rehearing is deemed to be denied by operation of law if FERC fails to act on it within 30 days, which then allows an aggrieved party to seek judicial review of FERC's decision in a federal court of appeals.<sup>4</sup> However, in order to respond on the merits to the many issues raised in requests for rehearing, FERC's long-time practice had been to issue tolling orders to provide itself additional time to consider the issues, while simultaneously allowing a certificate holder to proceed with construction. Over the years, various litigants had alleged this practice is unfair to affected landowners and interested parties, but the D.C. Circuit (and other courts) had upheld FERC's ability to issue tolling orders in this manner in various proceedings since originally ruling on the question in 1969.<sup>5</sup> The recent opinion in *Allegheny Defense Project v. FERC* overturns that precedent and invalidates FERC's use of tolling orders to buy itself more than 30 days to address rehearing requests.

The opinion was issued following oral arguments before the *en banc* court in an appeal of a FERC certificate order authorizing the construction and operation of an interstate natural gas pipeline project. The *en banc* court granted rehearing of an earlier decision by a panel of three D.C. Circuit judges, which upheld FERC's certificate order and tolling order in the proceeding. In conjunction with the original panel's decision, D.C. Circuit Judge Patricia Millett filed a lengthy concurring opinion calling into question the fairness of FERC's practice of issuing tolling orders and the continued viability of the D.C. Circuit's precedent upholding FERC's practice.<sup>6</sup>

In its opinion, the D.C. Circuit overturned more than 50 years of precedent and held that "tolling orders are not the kind of action on a rehearing application that can fend off a deemed denial and the opportunity for judicial review." The court found that FERC could not disregard the jurisdictional consequence of its inaction given Congress's explicit 30-day deadline for action upon requests for rehearing. In addition, the court found that Congress explicitly provided FERC with four options in the NGA for how it could act upon a request for rehearing: (1) grant rehearing, (2) deny rehearing, (3) abrogate its order without further hearing or (4) modify its order without further hearing. The court found that FERC's use of tolling orders is not among those options.

Accordingly, the D.C. Circuit invalidated FERC's use of tolling orders to extend the time to consider issues raised in requests for rehearing.

## FERC's Rule Change in Order No. 871

Prior to Order No. 871, the holder of an NGA certificate for interstate natural gas pipeline facilities or LNG import or export facilities could commence construction of its proposed facilities if it satisfied all the environmental conditions included in its FERC certificate order and received authorization from FERC to commence construction. In Order No. 871, FERC revised its regulations to preclude the agency from authorizing the holder of an NGA certificate to proceed with construction of FERC-approved interstate natural gas pipeline and LNG facilities until (i) FERC acts on the merits of timely filed requests for rehearing or (ii) the time to seek rehearing has passed without any requests for rehearing being submitted. FERC stated that the rule change is intended to balance the agency's need to address the concerns raised on rehearing with the concerns related to proceeding with construction before the agency has completed its review, the latter of which were raised by Justice Millett in her concurring opinion discussed above.

FERC issued Order No. 871 as an instant final rule, meaning the rule change was finalized without notice or the opportunity for public comment under the Administrative Procedure Act because it concerns only matters of agency procedure. While certain members of the interstate natural gas pipeline industry, and their representative trade association, have sought rehearing of Order No. 871, it remains unclear how other stakeholders, including potentially affected landowners and environmental groups, will view FERC's rule change, nor is it clear whether historically aggrieved stakeholders will consider it sufficient, together with the opinion, to address their concerns.

## Remaining Open Issues

While the D.C. Circuit's opinion forecloses FERC's issuance of tolling orders under the NGA going forward, it does not categorically require FERC to act on the merits of all requests for rehearing within 30 days.

The possibility remains that FERC could still take more than 30 days to address the merits of requests for rehearing. The opinion left room for that possibility by declining to foreclose FERC from granting rehearing to establish further procedures, including

briefing or further hearings. Moreover, the D.C. Circuit noted that even in cases where FERC fails to take action within the NGA's prescribed 30-day deadline, FERC would still have time, up to 100 days following the 30-day deadline, to issue an order modifying or abrogating its decision before FERC is required to file the evidentiary record in the proceeding with the federal court of appeals, thereby transferring jurisdiction to the court. Thus, even if petitioners sought judicial review as soon as the NGA allows, FERC typically would still have at least 70 days to act on requests for rehearing.

Notably, separate from its impact on FERC's proceedings, the opinion could have significant implications for court proceedings that interstate natural gas pipeline developers commence to exercise eminent domain authority associated with their NGA certificates. The D.C. Circuit did not make any explicit findings about developers' ability to exercise eminent domain authority under NGA section 7(h) immediately upon the issuance of a FERC certificate, regardless of whether any requests for rehearing or petitions for review are pending before FERC or a federal court of appeals. However, the opinion calls into question the finality of a FERC certificate order for which rehearing is requested, which may impact the timeline and substantive outcome of eminent domain proceedings involving the developer's associated NGA certificate. In a concurring opinion joined by two of his colleagues, D.C. Circuit Judge Thomas Griffith expressly suggested that district courts could hold eminent domain proceedings in abeyance until FERC completes its rehearing process.

## Looking Ahead

It is likely that the opinion and FERC's Order No. 871 will combine to delay construction and ultimately increase the cost of FERC-approved gas pipelines and LNG facilities, which could create uncertainty for project developers and investors.

Depending on how FERC decides to adapt its procedures in light of the opinion, the agency could alleviate those concerns to some degree. For example, months before the D.C. Circuit issued its opinion, FERC issued a statement indicating that it intended to act on the merits of landowner-related requests for rehearing within 30 days and [reorganized its Office of General Counsel](#) to create a separate landowner rehearings group. That type of expedited rehearing process has the potential to provide a final, merits rehearing order sufficiently quickly to minimize potential construction delays posed by rehearing requests.

In addition to the implications for LNG and interstate natural gas pipeline proceedings, the opinion could have significant impacts in FERC proceedings under its Federal

Power Act (“FPA”) jurisdiction. The relevant provisions of the the FPA and NGA are identical,<sup>7</sup> and FERC has followed the same historic practice of issuing tolling orders in response to rehearing requests in proceedings under both the NGA and the FPA. Thus, it is likely that FERC will no longer issue tolling orders in FPA proceedings and whatever new practice the agency adopts going forward might be applied to both NGA and FPA proceedings.

Litigation is certain to continue in the aftermath of the recent court and FERC actions, and there is significant uncertainty regarding the resolution of the various follow-on issues and agency actions. On July 6, 2020, FERC filed with the D.C. Circuit a motion requesting a 90-day stay of the court’s mandate, to allow FERC to assess how to address the court’s decision and whether to file a petition for writ of *certiorari* in view of the circuit split. On July 23, 2020, the D.C. Circuit granted FERC’s motion to stay the mandate through October 5, 2020. As noted above, because FERC issued Order No. 871 as an instant final rule, without undertaking the customary notice and comment rulemaking procedures outlined in the Administrative Procedure Act, there currently is no evidentiary record in the Order No. 871 docket which the agency could use to assess its likely impact on industry, interested parties, or the market. Consequently, parties have sought rehearing, and may subsequently seek judicial appeal, not only on the merits of the rule change, but also based on the procedural mechanism FERC used to make the change.

In any event, some projects might not be affected by FERC’s new rule. For example, some project developers are unable to begin construction after receiving a FERC certificate because some environmental authorizations (e.g., water quality certifications issued under Clean Water Act section 401) remain outstanding. In these cases, the certificate holder would not have been able to begin construction prior to the rule change due to the certificate holder’s inability to meet the environmental conditions in the certificate.

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1. *Allegheny Defense Project v. FERC*, \_\_\_ F.3d \_\_\_ (D.C. Cir. 2020) (“Opinion”).↵

2. 15 U.S.C. §§ 717f(c) and 717b.↵

3. *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 171 FERC ¶ 61,201 (2020).↵

4. 15 U.S.C. § 717r.↵

5. *Cal. Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969) (per curiam).↵

6. See *Allegheny Def. Project v. FERC*, 932 F.3d 940, 948 (D.C. Cir. 2019) (Millett, J., concurring).↵

7. Compare 15 U.S.C. § 717r with 16 U.S.C. § 825o.↵

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