Client Alert

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En Banc D.C. Circuit Increases the Possibility for Swift Judicial Review of FERC Proceedings

As practitioners well know, the Natural Gas Act and the Federal Power Act limit judicial review of orders issued by the Federal Energy Regulatory Commission in various ways. A frequently encountered hurdle is the rehearing requirement: "No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for rehearing thereon." 15 U.S.C. § 717r(a); 16 U.S.C. § 825*l*(a). When presented with a request for rehearing, the Commission has the "power" to take four actions: (1) "grant" rehearing; (2) "deny" rehearing; (3) "abrogate" the initial order; or (4) "modify" the initial order. *Id.* If the Commission fails to "act[] upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." *Id.* After the Commission "acts" or is "deemed" to have acted, the challenging party is permitted to seek judicial review.

The Commission has long interpreted the statutory rehearing requirement as permitting it to issue so-called "tolling orders," which generally are issued by the Commission's Secretary and state that rehearing is granted to give the Commission more time to consider the rehearing request, thereby avoiding having the request deemed denied by operation of law. The D.C. Circuit approved that practice in *California Co. v. Federal Power Commission*, 411 F.2d 720 (D.C. Cir. 1969) (per curiam) and reaffirmed it as recently as 2018 in *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018). Other circuits addressing the issue have reached the same conclusion. *E.g.*, *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 941 (2019); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) (per curiam); *Gen. Am. Oil Co. of Tex. v. Fed. Power Comm'n*, 409 F.2d 597, 599 (5th Cir. 1969) (per curiam). Nonetheless, however, some courts have noted the often-long delays before the Commission enters an order on the merits of a rehearing request. *E.g.*, *N.C. Utilities Comm'n v. FERC*, 741 F.3d 439, 447 (4th Cir. 2014) ("For reasons that remain unsatisfactorily explained even after oral argument, FERC failed to issue its Order Denying Rehearing until almost four years after its initial order . . . .").

On June 30, 2020, the en banc D.C. Circuit, by a vote of 11-1, concluded that the Commission cannot use tolling orders "solely to override the deemed-denied provision" of the Natural Gas Act. Slip op. 22. According to the court, it is not sufficient that the tolling orders state that rehearing is granted—"[t]he question is not one of labels, but of significance." *Id.* at 23. To constitute a "grant" under the Natural Gas Act, the Commission's order must contain "some substantive engagement with the application," and cannot be issued "solely" to obtain "additional time to decide whether to grant rehearing." *Id.* Because the tolling order issued in the case under review did not substantively engage with the request for rehearing, the request was deemed denied for purposes of judicial review. *Id.* at 34.

Interestingly, although the decision reflects a sea change in FERC's practice of issuing tolling orders in virtually every case where rehearing of a certificate order is sought,[1] the court's ruling had no material

[1] The decision referred to statistics claiming that, over the preceding twelve years, FERC had "issued a tolling order in all thirty-nine cases in which a landowner sought rehearing in a proceeding involving natural gas pipeline construction." *Id.* at 16.

effect on the underlying pipeline project—a 200-mile pipeline project through portions of Pennsylvania that FERC approved in 2017 and was constructed and put into service in the fall of 2018. Slip op. 35. The en banc court agreed with the panel's decision last year that the Commission properly found sufficient market need for the pipeline project at issue. *Id*. In addition, the decision did not address other issues addressed in the panel decision, such as certain constitutional due process questions raised by the appellants. The court explained that it granted en banc review solely to address the "focused question of statutory construction" of whether FERC's tolling order practices were authorized under "Section 717r of the Natural Gas Act." *Id*. at 15.

Unless reversed by the U.S. Supreme Court, the D.C. Circuit's recent opinion will undoubtedly increase access to judicial review in cases arising out of FERC—but it will also pose new traps for the unwary. At the most basic level, entities that participate in matters before the Commission should anticipate significant changes to the rehearing process. For example, any orders purporting to "grant" rehearing will have to be issued by the Commission itself, as opposed to the Secretary, in order to constitute substantive agency action. *Id.* at 25. Interested parties also need to pay close attention to the statutory deadlines for seeking judicial review to either (1) avoid forfeiting their right to review or (2) ensure that opposing parties meet their deadlines. Lastly, entities involved in electric-related proceedings under the Federal Power Act should pay close attention to the D.C. Circuit's decision. Although the current case addressed the Natural Gas Act, the judicial-review provision in the Federal Power Act is identical in all meaningful respects.

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