

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Allegheny Defense Project, <i>et al.</i> ,	)	
Petitioners,	)	
	)	
v.	)	Nos. 17-1098, <i>et al.</i>
	)	
Federal Energy Regulatory	)	
Commission,	)	
Respondent.	)	

**MOTION OF FEDERAL ENERGY REGULATORY COMMISSION  
TO STAY ISSUANCE OF MANDATE**

Pursuant to Rules 27 and 41(d) of the Federal Rules of Appellate Procedure and Circuit Rule 41(a)(2), Respondent Federal Energy Regulatory Commission (“Commission” or “FERC”) moves this Court for a stay of issuance of the mandate in this case for ninety days. The Court has ordered that the mandate be issued on July 7, 2020. *See* June 30 Order (Doc. No. 1849494).

There is good cause for a ninety-day stay of the mandate as it would permit the Commission to assess how to implement the Court’s June 30, 2020 Opinion (Doc. No. 1949493) into the Commission’s decades-old, judicially-sanctioned rehearing process. A stay would also allow the federal government to consider whether to file a petition for a

writ of certiorari in the Supreme Court with respect to the substantial question of law addressed in the Court's opinion.

The Commission has consulted with counsel for Petitioners and Intervenor. Petitioners have not yet advised whether they will take a position with respect to this motion. Intervenor takes no position.

### **BACKGROUND**

In August 2019, a panel of this Court denied petitions for review of the Commission's orders authorizing the construction and operation of Transcontinental Gas Pipe Line Company's Atlantic Sunrise Project. *Allegheny Defense Project v. FERC*, 932 F.3d 940 (D.C. Cir. 2019) (per curiam). The Court subsequently granted the Homeowner Petitioners' petition for rehearing *en banc* to address whether the Commission "acts upon" applications for rehearing within the meaning of section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), when it issues tolling orders which grant rehearing solely for the purpose of further consideration of the matters raised in rehearing applications. In its June 30 Opinion, the Court found that tolling orders do not amount to "action" on rehearing applications, within the meaning of the statute, and thus do

not prevent requests for rehearing from being “deemed” denied after thirty days.

The Court explained that a tolling order does not constitute a “grant” of rehearing because it does not reflect any “substantive engagement with the application.” Opinion at 23. Moreover, such orders are typically issued by the Commission’s Secretary, who has not been delegated any authority to “act upon” requests for rehearing and may only “toll the time for action.” *Id.* at 25. The Court recognized that the Commission has “substantial responsibilities” and operates in a “complicated area of law,” but found itself “bound to enforce the statutory text . . . as Congress wrote it.” *Id.* at 29.

If the Commission needs more than 30 days to act on a rehearing request, the Court found that the statute, by its terms, provides some flexibility: (1) the agency can direct “further hearing processes”; or (2) the agency can reconsider an earlier order until the date the agency, following a petition for review, has filed its record of decisionmaking with the court of appeals. *Id.* at 30-31.

## ARGUMENT

A ninety-day stay of issuance of the mandate, under Federal Rule of Appellate Procedure 41(d)(2) and Circuit Rule 41(a)(2), is appropriate here: a stay is supported by good cause and is consistent with the public interest, and this case presents a substantial legal question. *See* Circuit Rule 41(a)(2) (providing good cause standard); *see also Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1129 (D.C. Cir. 1978) (the Court generally balances the equities in evaluating whether good cause exists).

### **A. The Practical Impact Of The Court's Decision Constitutes Good Cause For Staying The Mandate.**

As the Court is aware, the Commission has recently prioritized requests for rehearing of natural gas infrastructure orders that implicate landowner rights and has reallocated resources to expedite action on such requests. *See* FERC Br. at 50-52 (noting recent initiatives of FERC Chairman Chatterjee). And the Commission has revised its regulations to “ensure[] that construction of an approved natural gas project will not commence until the Commission has acted upon the merits of any request for rehearing, regardless of land ownership.” Order No. 871, *Limiting Authorizations to Proceed with*

*Construction Activities Pending Rehearing*, 171 FERC ¶ 61,201, P 11 (June 9, 2020). But the impact of the Court’s decision extends well beyond landowner cases and affects all requests for rehearing under the Natural Gas Act, and presumably those under the Federal Power Act as well. *See* Opinion at 28 (noting Federal Power Act is a “close relative” of the Natural Gas Act).

For more than fifty years, the Commission has understood – with judicial approval – that the Natural Gas Act authorizes it to grant rehearing for the purpose of further consideration. Such tolling orders have become a critical tool for Commission to carry out its “substantial” responsibilities in a “complicated area of law.” *Id.* at 29. They allow the Commission to manage its large case load and bring its expertise to bear on complex, technical matters before they are presented to the courts of appeals. *See* FERC Br. at 31 (Commission averages more than 1,100 orders and 285 rehearing requests per year); Concurring Op. at 3 (noting “Congress’s expectation that generalist judges will, in the ordinary course, consider complex pipeline cases only after expert review”). A stay of the Court’s mandate would afford the Commission time to consider how to revise its processes and allocate its resources so

that it can fulfill its statutory role on rehearing in the absence of these interim orders. *See id.* at 4 (noting that Commission needs time to “evaluate the arguments and evidence presented by aggrieved parties”). This analysis would apply both with respect to future rehearing requests, as well as those that have already been granted for the purpose of further consideration or for which section 717r(a)’s thirty-day clock has yet to expire.

A stay of the mandate would also allow the Commission time to consider the implications of the Court’s decision. The Court found, based upon its assessment of the clarity of section 717r(a), that an order granting rehearing solely for the purpose of further consideration does not prevent a rehearing request from being deemed denied by operation of law. The Court also indicated that the Natural Gas Act does not require the Commission to necessarily resolve the merits of rehearing requests within thirty days. Opinion at 29 (barring tolling orders “is not the same thing as saying the Commission must actually decide the rehearing application within that thirty-day window”); *see also* Concurring Op. at 2 (“the Commission can grant rehearing *without* making a merits decision”). The Court’s opinion also suggests that

there may be statutorily-authorized interim orders that lie between those two extremes. *See* Opinion at 29-30 (declining to address interim orders that grant rehearing for further consideration coupled with a request “for supplemental briefing or further hearing processes”).

The concurring judges noted that the Court’s opinion does not “offer guidance on what counts as a Commission ‘grant’ of rehearing.” Concurring Op. at 3. They further indicated that the Commission is “free to grant rehearing by agreeing to consider the applicant’s arguments for modifying or revoking its previous action” through an order that announces that fact coupled with “a concrete step operationalizing that intent.” *Id*; *see also* Opinion at 23 (“grant” of rehearing requires some type of “substantive engagement”). A stay of the mandate would afford the Commission time to consider the extent of its statutory authority to “grant” rehearing, consistent with the Court’s decision, and establish some additional process for the purpose of further consideration of rehearing applications. And a stay would allow for time to develop internal agency practices, and to reexamine agency priorities and staffing needs, to assess when and how to issue such interim orders.

A stay of the mandate would not impose a hardship on rehearing petitioners. With respect to landowners – the primary focus of the Court’s concern – the Commission’s recent rule barring any construction activity during the rehearing process “defangs much of the injustice associated with deferred judicial review.” Concurring Op. at 5; *see also* Opinion at 17-18 n.2 (noting no-construction rule). And nothing bars district courts from holding eminent domain actions in abeyance while agency rehearing is pending or after petitions for judicial review are filed. *See* Concurring Op. at 5-6. Other rehearing petitioners are free to seek a stay from the Commission if they can demonstrate irreparable harm in those circumstances when the agency needs more than 30 days to resolve the merits of a rehearing application.

**B. The Court’s Decision Presents A Substantial Legal Question.**

The Court’s decision is the first to find that the Commission lacks authority to issue tolling orders under the Natural Gas Act (or the Federal Power Act). The Court states that this result is compelled by the “plain language” of 15 U.S.C. § 717r(a). *See* Opinion at 4, 19, 32. The Court explains that “acts upon the application” as used in section 717r(a) means “some substantive engagement with the application” (*id.*

at 23), but not necessarily a “deci[sion] [on] the rehearing application” within 30 days. *Id.* at 29; *see also* Concurring Op. at 2 (“Nothing in the statute suggests that Congress really meant ‘decide the merits’ when it said ‘grant . . . rehearing.’”). But this same language was previously read to require the Commission to actually decide the merits of rehearing requests within 30 days, indicating there is some doubt as to the proper construction of the section. *See Allegheny Defense Project*, 932 F.3d at 951 (Millett, J., concurring) (“Congress, in other words, gave the Commission 30 days to fish or cut bait”); *id.* at 952 (“Congress presumably expected that rehearing decisions would be resolved within 30 days, as the statute says”); *id.* at 956 (“Congress . . . prescribed the 30-day timeframe for decision”); Petitioners Opening Br. at 12-15 (asserting that plain language of 15 U.S.C. § 717r(a) requires FERC to decide rehearing requests within 30 days and precludes interim orders).

In addition, every other court of appeals to consider the issue has determined that the term “act” encompasses tolling orders that grant rehearing for further consideration. *See 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). Whether the Court's conclusion as to the plain language of Natural Gas Act section 717r(a) warrants Supreme Court review is something that the Commission and the Solicitor General will need time to consider without the added burden of the Court's decision immediately taking effect.<sup>1</sup> *See* Dissenting Op. at 6 (decision "creates a circuit split that could force the Supreme Court to weigh in").

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<sup>1</sup> The ultimate decision whether the federal government will petition the Supreme Court for a writ of certiorari lies not with the Commission, but with the Solicitor General and the Department of Justice. *See* 28 U.S.C. § 518; 42 U.S.C. § 7171(i); 28 C.F.R. § 0.20.

## CONCLUSION

The Commission respectfully requests that the Court stay issuance of the mandate in this case for ninety days.

Respectfully submitted,

David L. Morenoff  
Acting General Counsel

Robert H. Solomon  
Solicitor

/s/ Robert M. Kennedy  
Robert M. Kennedy  
Senior Attorney

Federal Energy Regulatory  
Commission  
888 First Street, NE  
Washington, D.C. 20426  
Tel.: (202) 502-8904  
Fax: (202) 273-0901  
Email: robert.kennedy@ferc.gov

July 6, 2020

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g), I certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(C) because it contains 1,829 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I further certify that this filing complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this filing has been prepared in Century Schoolbook 14-point font using Microsoft Word 2010.

*/s/ Robert M. Kennedy*  
Robert M. Kennedy  
Senior Attorney

Federal Energy Regulatory  
Commission  
Washington, D.C. 20426  
Tel.: (202) 502-8904  
Fax: (202) 273-0901  
Email: [robert.kennedy@ferc.gov](mailto:robert.kennedy@ferc.gov)

July 6, 2020

**CERTIFICATE OF SERVICE**

I hereby certify that, on July 6, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

*/s/ Robert M. Kennedy*  
Robert M. Kennedy  
Senior Attorney