

## Ruling On FERC's Tolling Orders Could Slow Pipelines

By **Richard Drom** (February 12, 2020, 4:13 PM EST)

On March 20, all of the members of the U.S. Court of Appeals for the D.C. Circuit will hear arguments challenging the Federal Energy Regulatory Commission's use of so-called tolling orders. The court's decision in this matter could have major impacts on FERC, which routinely fails to issue substantive orders on rehearing in a timely manner.

Parties that object to any FERC order have 30 days to file a request for rehearing of such decision. Congress statutorily requires FERC to issue orders addressing challenges to their initial orders within 30 days of the filing of requests for rehearing.



Richard Drom

Both the Federal Power Act, or the FPA, and the Natural Gas Act, or the NGA, expressly state that unless FERC "acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." In practice, however, FERC has routinely met this statutory requirement by issuing tolling orders within 30 days after requests for rehearing are filed at FERC.

FERC's tolling orders are normally titled "Order Granting Rehearing for Further Consideration." Such orders frequently state that:

[I]n order to afford additional time for consideration of the matters raised or to be raised, rehearing of the Commission's order is hereby granted for the limited purpose of further consideration, and timely-filed rehearing requests will not be deemed denied by operation of law. Rehearing requests of the above-cited order filed in this proceeding will be addressed in a future order.

In other words, FERC simply tolls the 30-day requirement that it either issue a substantive order or have the request for rehearing deemed to be denied.

This 30-day time limitation is very significant, in part, because aggrieved parties are only entitled to seek appellate review of FERC orders after FERC has issued an order denying a request for rehearing. Therefore, until FERC issues a substantive order on rehearing, parties are effectively prevented from seeking legal redress from a FERC order.

The consequences of tolling orders might not be too significant if FERC routinely issued orders on rehearing in a relatively timely manner. That, however, has not been FERC's common practice for many decades.

In part due to the complexity of cases, FERC does not issue some orders on rehearing until six to 12 months (or more) after parties have filed requests for rehearing with FERC. During this tolling period, parties that are aggrieved by a FERC order have no practical recourse.

The subject court hearing on FERC's use of tolling orders is based, in part, upon a situation where FERC had issued an order on Feb. 3, 2017, granting a certificate of public convenience and necessity to an interstate pipeline project being built by Transco, a Williams Cos. Inc. unit. This certificate allowed Transco to condemn property along the pipeline's proposed right of way using eminent domain authority under the NGA, and to commence construction of the pipeline.

Affected landowners filed timely requests for rehearing of FERC's certificate decision, and on March 3, 2017, FERC issued a tolling order in which it offered no explanation whatsoever for its delay in responding to the rehearing requests. FERC did not issue a final, appealable certificate decision until Dec. 6, 2017, several months after Transco had already begun construction of the pipeline.

The affected landowners ultimately sought judicial review of the matter, and the court issued its decision on Aug. 2, 2019, upholding FERC's certificate order. In her concurring opinion, U.S. Circuit Judge Patricia Millett agreed with the majority that circuit court precedent "tied [the court's] hands" in objecting to FERC's use of tolling orders.

Judge Millett argued, however, that FERC's tolling orders were basically inequitable:

[T]he Commission has twisted our precedent into a Kafkaesque regime. Under it, the Commission can keep homeowners in seemingly endless administrative limbo while energy companies plow ahead seizing land and constructing the very pipeline that the procedurally handcuffed homeowners seek to stop. The Commission does so by casting aside the time limit on rehearing that Congress ordered — treating its decision as final enough for the pipeline companies to go forward with their construction plans, but not final for the injured landowners to obtain judicial review. ... My concern is about fair process and, in particular, the ability of those who are directly injured — the individuals whose property is taken in whole or in part by Commission order — to have their day in court before it is too late.

Some have defended FERC's practice of issuing tolling order because: (1) the 30-day requirements in the FPA and the NGA are simply too short to afford FERC a reasonable opportunity to review allegations of error in its decisions; and (2) parties are permitted to seek stays or interim relief from the courts.

In practice, however, FERC's final orders on rehearing generally just endorse the initial order; and thus, in a practical sense, the majority of rehearing requests "may be deemed to have been denied." Second, courts do not uniformly grant stays or interim relief while FERC orders are pending rehearing.

In the Transco pipeline matter, for example, the landowners promptly sought relief from federal courts. However, both FERC and Transco sought dismissal of the landowner's petition for a stay as "incurably premature." Because FERC had not resolved the pending rehearing requests, the court denied the request for stay.

Moreover, the Transco situation is not an isolated example. On Dec. 19, 2019, FERC issued a critically important PJM Interconnection LLC order implementing minimum offer pricing rule price floors in Docket No. EL18-178-000, et al., for many new resources that arguably receive state subsidies.

On Jan. 21, 2020, over 30 parties filed requests for rehearing regarding provisions of the order that will significantly affect the financial outcome of PJM's next capacity auction. It is very likely that FERC will issue a tolling order this month that will prevent parties from seeking judicial review of the order.

If FERC does not issue a substantive rehearing order in a timely manner, then the next capacity auction may be conducted without any appellate review. In fact, given the length of time that the court will take to hear arguments and to issue an opinion, it is conceivable that PJM will conduct more than one capacity auction based upon the order, prior to a court decision on the just and reasonableness of the minimum offer pricing rule price floors.

Once PJM conducts such capacity auctions, of course, it will be virtually impossible to "squeeze the toothpaste back in the tube" and to ever know what the appropriate capacity prices should have been in PJM's region for the auction period.

On the other hand, a timely decision by the court regarding the March 20 arguments could have significant impacts. If the court determined that tolling orders violated the FPA and NGA, it would accelerate judicial review by determining, for example, that the December 2019 order should be "deemed to have been denied" by FERC 30 days after requests for rehearing were filed. This result would appear to be equitable because, as the legal maxim says, "justice delayed is justice denied."

If the court ultimately determines that tolling orders constitute a denial of rehearing requests, then it

is likely that FERC would permit many of its orders to be “deemed to have been denied.” This is likely, in part, because it would be administratively difficult for FERC to review and draft substantive orders on hearing in situations where many parties have sought rehearing.

If so, then parties seeking rehearing would immediately be able to seek appellate review of the underlying orders (and/or request stays of the FERC order), without fear of FERC claiming that such appellate review is incurably premature.

But in the wake of such a decision by the court, appellate review could result in more frequent orders granting a stay of FERC’s initial order (for example, where an interstate pipeline is seeking to exercise eminent domain rights under the NGA). Although affected landowners might appreciate this development, construction of necessary interstate pipelines could be delayed for months (or years) while an appellate court considers the merits of a FERC pipeline certificate order.

---

*Richard A. Drom is a member at Eckert Seamans Cherin & Mellott LLC.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*