

For Whom the FERC Tolls: Federal Court Rejects Agency “Tolling Orders”

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In *Allegheny Defense Project v. FERC*, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) addressed the legitimacy of “tolling orders,” a longstanding procedural tool utilized by the Federal Energy Regulatory Commission (FERC) to administer the [Natural Gas Act](#) (NGA). FERC’s use of tolling orders, which is not expressly authorized by statute, has long been a source of controversy, drawing criticism from [environmental groups](#), [state attorneys general](#), and [FERC Commissioners](#), among others. Nonetheless, until this year, the practice had been widely used and generally accepted. However, in *Allegheny Defense Project*, the D.C. Circuit rejected FERC’s use of a tolling order, and in so doing created uncertainty about the regulatory process for pipeline certification and construction as well as other administrative efforts to prolong deadlines through the use of tolling orders.

After an overview of the NGA and FERC’s use of tolling orders, this post analyzes the D.C. Circuit’s *Allegheny Defense Project* decision and examines its potential impact.

Overview of Tolling Orders Under the NGA

The NGA creates the federal framework for regulation of interstate natural gas pipelines and wholesale natural gas transactions administered by FERC. Among other things, the NGA [requires](#) a company seeking to build or operate an interstate natural gas pipeline to obtain a “certificate of public convenience and necessity” from FERC. The NGA also [empowers](#) holders of these certificates to exercise the power of eminent domain in order to obtain “the necessary right-of-way to construct, operate and maintain” the pipeline, assuming the holder has tried and failed to obtain the rights through negotiation with the landowner. The NGA does not authorize immediate judicial review of a FERC decision to grant a certificate of public convenience and necessity. Instead, anyone who wishes to appeal these decisions must first apply for rehearing at FERC—and wait for FERC to either deny rehearing or reach a conclusion on the merits—before they can seek judicial review. [Section 717r\(a\)](#) of the NGA states:

Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. 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 a rehearing thereon.

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The NGA's 30-day deadline for FERC to "act[] upon" a request for rehearing is the focal point of a longstanding dispute over the common FERC practice of issuing "tolling orders." Under this practice, FERC issues a [tolling order](#) within 30 days of a request for rehearing that grants rehearing "only for the limited purpose of further consideration." The purpose of the process is to provide the agency more time to review rehearing requests without triggering the 30-day automatic denial by agency inaction under Section 77r(a) of the NGA. Under this practice, there is no deadline by which FERC must reach a conclusion on a tolled rehearing request. Therefore, a tolling order may indefinitely delay any efforts by aggrieved parties to obtain judicial review of FERC's decision to grant a certificate of public convenience and necessity. This includes landowners who may be impacted by the exercise of eminent domain by the certificate holder and parties concerned about the environmental impact of the pipeline construction and operation. Notably, litigation to exercise eminent domain can commence while the certificate of public convenience and necessity is still potentially subject to FERC rehearing, although the certificate holder bears the risk of construction costs should the certificate be withdrawn or amended at rehearing or on appeal.

The D.C. Circuit's *Allegheny Defense Project* Decision involves the Atlantic Sunrise Pipeline, whose proposed route included a 200-mile segment through southeastern Pennsylvania. FERC granted a certificate of public convenience and necessity to its developer, Transcontinental Gas Pipe Line Company (Transco), on February 3, 2017. Less than two weeks later, Transco initiated condemnation proceedings against two Pennsylvania homeowners in the U.S. District Court for the Eastern District of Pennsylvania. The homeowners and environmental groups both applied for rehearing of Atlantic Sunrise's certificate order at FERC. FERC quickly responded with a [tolling order](#) granting rehearing "for the limited purpose of further consideration." In August of 2017, the district court [granted](#) a series of injunctions giving Transco the necessary rights of way through the homeowners' property. Transco broke ground on the project in September of 2017 pursuant to a [FERC order](#) authorizing the start of construction. In December of 2017, approximately nine months after granting the rights-of-way and four months after Transco began construction, [FERC denied rehearing](#) of the certificate order to open the door for the parties to challenge FERC's decision in court.

The homeowners' and environmental groups' case was first heard by a three-judge panel at the D.C. Circuit which rejected their arguments and [ruled](#) in favor of FERC and the pipeline. The court subsequently granted a petition for rehearing of that decision en banc (i.e., before the full panel of D.C. Circuit judges). This en banc [decision](#) focused on whether the language of NGA Section 717r allows for tolling orders like the one that allowed Transco to proceed with eminent domain proceedings and construction of the Atlantic Sunrise pipeline without affording parties a chance to challenge FERC's decision in court.

The court [framed](#) the question before it explicitly:

Does the Federal Energy Regulatory Commission 'act[] upon' an application for rehearing within the meaning of Section 717r of the Natural Gas Act by issuing a tolling order that does nothing more than prevent the application from being deemed denied by agency inaction and preclude the applicant from seeking judicial review until the Commission acts?

As the court [stated](#), tolling orders can "prevent aggrieved parties from obtaining timely judicial review of the Commission's decision." The court [noted](#) that this practice can "split the atom of finality," allowing pipeline companies to go to court to take private property by eminent domain but not allowing aggrieved parties to challenge the agency's decisions. After recounting other judicial and administrative opinions highlighting this "problem," the court turned to interpreting the plain language of the NGA to determine if it allowed for tolling orders.

The court began its analysis by [finding](#) that the usual deference in statutory interpretation afforded to agencies under *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.* was not applicable here. According to the court, *Chevron* deference "is available only when an agency interprets a statutory

provision that Congress has charged it with administering through application of its expertise” and that “statutory provisions addressing the jurisdiction of federal courts do not fit the mold.” FERC argued that it should be entitled to deference because the provision is not about judicial jurisdiction, but about its own jurisdiction to entertain rehearing requests. The court rejected this argument, [noting](#) that it “slices the salami a little too thinly.” The court [concluded](#) that “the responsibility for interpreting Section 717r(a) falls to the courts, not to the Commission,” and, thus, *Chevron* deference is inapplicable in this context.

The court next evaluated whether Section 717r allows FERC to issue the tolling orders. It concluded that it does not. The court [analyzed](#) Section 717r(a)’s plain language providing that the agency “shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing.” The court [noted](#) that this provision gives FERC just four options upon receipt of a request for rehearing in an NGA matter: (1) it could grant rehearing; (2) it could deny rehearing; (3) it could abrogate its order without further hearing; or (4) it could modify the order without further hearing. The court [further noted](#) that the statute clearly provides that a rehearing request should be “deemed denied” if none of the four enumerated options occurs within 30 days.

The only remaining question, therefore, was whether granting rehearing only “for the limited purpose of further consideration,” as is done in tolling orders, constitutes one of the four permissible actions that could be considered acting upon the application and thus avoid “deemed denied” status under [Section 717r](#). The court [found](#) that it does not. The court [characterized](#) a true grant of rehearing as necessarily requiring “at least some substantive engagement with the application” and “cannot consist solely of a grant of additional time to decide whether to grant rehearing.” The court determined that a tolling order violates both of these principles. The court also [pointed out](#) that the tolling order was not even issued by the Commission itself, but rather by a Commission Secretary who “has not been delegated authority to ‘act on’ the rehearing application.” The court [concluded](#):

At bottom, what the Tolling Order did was delete the thirty-day time limit and the deemed-denied provision from the statute. Section 717r(a) says in straightforward terms that the Commission’s failure to act on a rehearing application within thirty days means that rehearing can be deemed denied and the applicant can obtain judicial review . . . The Commission has rewritten the statute to say that its failure to act within thirty days means nothing.

After discussing the impact of the Commission’s practice on applicants’ ability to obtain judicial review of the agency’s action, the court [found](#) that “the Commission has no authority to erase and replace the statutorily prescribed jurisdictional consequences of its inaction. Agencies, no less than courts, cannot render statutory language a nullity and leave entire operative clauses with ‘no job to do.’”

The court also [pointed out](#) other legislation that explicitly allows for agencies to “modify the consequences of their inaction,” suggesting that Congress did not contemplate the use of tolling orders because it did not authorize them with similarly explicit language.

Finally, the court [acknowledged](#) that it was breaking with previous judicial decisions in rejecting FERC’s use of tolling orders. Rather than attempt to draw a factual distinction, the court simply concluded that it was appropriate to do so in this case [because](#) the previous decisions took the “wrong path” and [because](#) “intervening developments” in the law altered the foundation on which the previous decisions were made.

Based on this analysis, the court [held](#) that “after thirty days elapsed from the filing of a rehearing application without Commission action, the Tolling Order could neither prevent a deemed denial nor alter the jurisdictional consequences of agency inaction.” As a result, the court denied motions to dismiss the petitions for review of the FERC certificate order and heard the petitioners’ substantive arguments to that order (which it [denied](#), holding that FERC was justified in finding market need for the Atlantic Sunrise project).

Potential Impact of the *Allegheny Defense Project* Decision

The *Allegheny Defense Project* decision has the potential to substantially alter FERC proceedings going forward, not just in pipeline certificate proceedings, but perhaps also in proceedings under the Federal Power Act (FPA). The [language](#) in the FPA governing review of administrative orders under the Act is substantially similar to the [language](#) in the NGA that FERC has relied on in issuing tolling orders under that act. As a result, the D.C. Circuit's decision in *Allegheny Defense Project* will likely affect the agency's ability to issue tolling orders in FPA proceedings, as well. Indeed, in anticipation of the court's decision in *Allegheny Defense Project*, FERC [issued](#) new regulations in June that delay construction of certificated pipelines until the Commission has acted on the merits of any requests for rehearing that it receives. Congress could play a role in the debate over tolling orders. If it chose, Congress could amend the NGA (and the FPA) to codify the requirement that rehearing requests be heard on the merits prior to construction. Legislation that would accomplish this has already been [introduced](#) in the 116th Congress. Alternatively, Congress could establish new requirements for FERC rehearing proceedings, including by amending the number of days that must pass before the deemed-denied provision applies or re-establishing FERC's right to issue tolling orders.

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