

163 FERC ¶ 61,159
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

PennEast Pipeline Company, LLC

Docket Nos. CP15-558-002
CP15-558-003

ORDER ON REHEARING

(Issued May 30, 2018)

1. On January 19, 2018, the Commission issued an order under section 7(c) of the Natural Gas Act authorizing PennEast Pipeline Company, LLC (PennEast) to construct and operate a new 116-mile natural gas pipeline from Luzerne County, Pennsylvania, to Mercer County, New Jersey, along with three laterals extending off the mainline, a compression station, and appurtenant above ground facilities (PennEast Project).¹
2. Between January 23 and February 21, 2018, numerous entities and individuals, including Delaware Riverkeeper Network (Riverkeeper) and Sourland Conservancy (Sourland), filed for rehearing of the January Order. Section 19(a) of the Natural Gas Act provides that, “[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed,” a request for rehearing “may be deemed to have been denied.”² On February 22, 2018, pursuant to authority delegated by the Commission in 1995,³ the Secretary of the Commission issued a procedural order tolling that statutory

¹ *PennEast Pipeline Co., LLC*, 162 FERC ¶ 61,053 (2018) (January Order).

² 15 U.S.C. § 717r(a) (2012); *see also* 18 C.F.R. § 385.713(f) (2017) (“Unless the Commission acts upon a request for rehearing within 30 days after the request is filed, the request is denied.”).

³ *See Delegation of Authority to the Secretary, the Director of the Office of Electric Power Regulation and the General Counsel*, 60 Fed. Reg. 62,326 (Dec. 6, 1995), FERC Stats. & Regs., Reg. Preambles Jan. 1991-June 1996 ¶ 31,030 (1995) (codified in 18 C.F.R. § 375.302(v) (2017)).

time period.⁴ The Tolling Order granted rehearing “for the limited purpose of further consideration” of the timely-filed requests for rehearing of the January Order.⁵

I. Requests For Rehearing Of The Tolling Order

3. On March 16, 2018, Riverkeeper sought rehearing of the Tolling Order. Riverkeeper argues that section 19(a) of the Natural Gas Act prohibits the Commission from taking more than thirty days to resolve requests for rehearing.⁶ Riverkeeper asserts that the issuance of tolling orders within the thirty-day period thwarts “Congress’s goal of allowing for timely judicial review of Commission orders.”⁷ Riverkeeper contends that, as a result of the Tolling Order, landowners cannot challenge the January Order, which “courts hearing the condemnation proceedings necessarily rely upon for issuing judgments against landowners.”⁸

4. On March 22, 2018, Sourland sought rescission of the Tolling Order arguing that it has the effect of blocking judicial review indefinitely while allowing the project to proceed.⁹ Sourland asserts that the Tolling Order denies the “due process rights to a judicial hearing on the validity of [the January Order] to homeowners before their land is taken” and before environmental impacts occur.¹⁰ Finally, Sourland argues that the Tolling Order allows these impacts to occur even though all regulatory approvals from other government agencies have yet to be secured.

5. On April 13, 2018, the Commission issued a second procedural order tolling the statutory time period for consideration of the requests for rehearing of the Tolling Order.¹¹ On May 8, 2018, Delaware Riverkeeper sought rehearing of the April Tolling

⁴ *PennEast Pipeline Co., LLC*, Docket No. CP15-558-001 (Feb. 22, 2018) (Tolling Order).

⁵ *Id.*

⁶ Riverkeeper Request for Rehearing, filed Mar. 16, 2018, at 4 (citing 15 U.S.C. § 717r(a)) (Riverkeeper Request for Rehearing).

⁷ *Id.* at 5.

⁸ *Id.* at 7.

⁹ Sourland Request for Rescission at 1.

¹⁰ *Id.*

¹¹ *PennEast Pipeline Co., LLC*, Docket No. CP15-558-001 (April 13, 2018) (April Tolling Order).

Order.¹² This second rehearing request repeated, virtually verbatim, Riverkeeper's arguments regarding the Tolling Order.

II. Procedural Matters

6. On April 2, 2018, PennEast filed a motion for leave and answer to Riverkeeper's request for rehearing of the Tolling Order. Rules 213(a)(2) and 713(d)(1) of the Commission's Rules of Practice and Procedure prohibit answers to a request for rehearing.¹³ Therefore, we reject PennEast's answer.

III. Commission Determination

7. For the reasons discussed below, the Commission denies the requests for rehearing and rescission.

8. Initially, we disagree with Riverkeeper's contention that section 19(a) of the Natural Gas Act prohibits "the Commission from taking more than thirty days 'to grant or deny rehearing.'"¹⁴ According to Riverkeeper, the issuance of a tolling order "is plainly not one of the 'acts' Congress authorized the Commission to take in section 717r(a)."¹⁵ But that is incorrect. As the First Circuit explained in addressing identical language in the Federal Power Act, "the statutory language, although requiring FERC to 'act' upon the application for rehearing within thirty days after filing, lest the application is deemed denied, does not state, as [Riverkeeper] would have it, that FERC must 'act on the merits' within that time lest the application is deemed denied."¹⁶ And in a case arising out of the PennEast Project itself, a federal court has held that, although "[t]olling orders have no

¹² Riverkeeper Request for Rehearing filed May 8, 2018 (Riverkeeper Second Request for Rehearing).

¹³ 18 C.F.R. §§ 385.213(a)(2) and 385.713(d)(1) (2017).

¹⁴ Riverkeeper Request for Rehearing at 4 (quoting 15 U.S.C. § 717r(a)); Riverkeeper Second Request for Rehearing at 5 (quoting 15 U.S.C. § 717r(a)).

¹⁵ Riverkeeper Request for Rehearing at 5; Riverkeeper Second Request for Rehearing at 5.

¹⁶ *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988). *See also California Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969) (holding that, under the Natural Gas Act, "the Commission has power to act on applications for rehearing beyond the 30-day period so long as it gives notice of this intent"); *Gen. Amer. Oil Co. of Tex. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969) (Commission "acted" for purposes of Natural Gas Act section 19 by providing notice that it intends to further consider rehearing requests).

explicit statutory basis,” they “have been upheld by the First and Fifth Circuits, as well as by the D.C. Circuit in several unpublished orders.”¹⁷

9. Riverkeeper and Sourland assert that the issuance of tolling orders precludes timely judicial review, particularly where a pipeline receives eminent domain authority and construction may be permitted to proceed while rehearing is pending. But the Tolling Order does not affect either of these interests; it is merely a procedural ruling that affords the Commission additional time to consider the requests for rehearing. Moreover, the sequence of events highlighted by Riverkeeper and Sourland is consistent with the Natural Gas Act, which explicitly states that, unless the Commission grants a stay, a request for rehearing shall not operate as a stay of the Commission’s order.¹⁸

10. The Commission works diligently on all matters pending before it. Moreover, while requests for rehearing are under consideration, parties are free to seek stays from the Commission or other interim relief from the courts, as Riverkeeper itself has done in numerous cases.¹⁹

11. As the Commission has explained in other proceedings, the issuance of a tolling order followed by a substantive rehearing order does not deprive parties of due process.²⁰ “Due process is flexible and calls for such procedural protections as the particular situation demands.”²¹ Here, Riverkeeper and Sourland contend that the Tolling Order affects property rights of landowners by potentially delaying judicial review of the

¹⁷ *Delaware Riverkeeper Network v. FERC*, 243 F.Supp. 3d 141, 146 (D.D.C. 2017).

¹⁸ 15 U.S.C. § 717r(a) (“The filing of an application for rehearing ... shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order.”). *See also Panhandle Eastern Line Co. v. FERC*, 881 F.2d 1101, 1119 (D.C. Cir. 1989) (application for rehearing or judicial review does not stay a natural gas certificate).

¹⁹ *See also Transcontinental Gas Pipeline Co.*, 162 FERC ¶ 61,192, at P 15 (2018) (rejecting similar arguments regarding tolling orders); *Transcontinental Gas Pipeline Co.*, 161 FERC ¶ 61,250, at PP 36-39 (2017) (same). In addition, a number of petitions for review of the Commission’s January 19, 2018 certificate order and associated tolling orders have already been filed. *See, e.g., Homeowners Against Land Takings v. FERC*, D.C. Cir. No. 18-1079; *Delaware Riverkeeper, et al. v. FERC*, D.C. Cir. No. 18-1128 ; *New Jersey Department of Environmental Protection, et al. v. FERC*, D.C. Cir. 18-1144.

²⁰ *See Transcontinental Gas Pipeline Co.*, 161 FERC ¶ 61,250 at P 38.

²¹ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

January Order until after PennEast commences eminent domain proceedings.²² But where “property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate.”²³

12. Sourland asserts that the Tolling Order permits “irreparable harm to occur now, even though the project has yet to meet all of the regulatory requirements of other agencies before the project can be constructed.”²⁴ As explained in the January Order, however, “no construction will be allowed to commence until PennEast provides documentation that it has received all applicable authorizations required under federal law.”²⁵

13. Finally, Riverkeeper argues that there is no need for the Commission to issue tolling orders because the “scope and depth of the Commission’s inquiry” on rehearing is narrow given that new issues may not, as a general matter, be raised for the first time on rehearing.²⁶ We disagree. The purpose of rehearing is to afford the Commission an opportunity to review allegations of error in its initial decision.²⁷ Here, approximately thirty requests for rehearing of the January Order have been filed raising a host of purported errors. The Commission is obligated to respond meaningfully to the matters

²² See Sourland Request for Recession at 2; Riverkeeper Request for Rehearing at 6, 7; Riverkeeper Second Request for Rehearing at 6, 7-8.

²³ *Phillips v. Comm’r of Internal Revenue*, 283 U.S. 589, 596-597 (1931). See also *Council of & for Blind of Delaware Cty. Valley, Inc. v. Regan*, 709 F.2d 1521, 1533-34 (D.C. Cir. 1983) (“In order to state a legally cognizable constitutional claim, appellants must allege more than the deprivation of the *expectation* that the agency will carry out its duties.”) (emphasis in original); see also *Polk v. Kramarsky*, 711 F.2d 505, 508-509 (2d Cir. 1983) (plaintiff’s property right, while delayed, was not extinguished, and that no deprivation of property interest occurred).

²⁴ Sourland Requests for Rescission at 2.

²⁵ January Order, 162 FERC ¶ 61,053 at P 129; see also *id.* at Appendix A, ¶ 10.

²⁶ Riverkeeper Request for Rehearing at 8-9; Riverkeeper Second Request for Rehearing at 9.

²⁷ See *Ecee, Inc. v. FERC*, 611 F.2d 554, 565 (5th Cir. 1980) (“The purpose of a rehearing requirement is to give the administrative agency an initial opportunity to correct its errors”); *Transcontinental Gas Pipe Line Co.*, 161 FERC ¶ 61,250 at P 97 (“The purpose of the rehearing requirement, however, is [to] identify alleged errors in the Commission’s initial decision”).

raised therein.²⁸ Doing so will of course require considerable time beyond that afforded by the thirty-day period set forth in section 19(a) of the Natural Gas Act.²⁹

The Commission orders:

Riverkeeper's requests for rehearing of the Tolling Order and the April Tolling Order, and Sourland's request for rescission of the Tolling Order are hereby denied.

By the Commission. Commissioner Glick is concurring with a separate statement attached.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁸ See, e.g., *PSEG Energy Resources & Trade LLC v. FERC*, 665 F.3d 203, 208 (D.C. Cir. 2011) (“Among other things, an agency’s failure to respond meaningfully to objections raised by a party renders its decision arbitrary and capricious.”) (internal quotations omitted).

²⁹ See *Cal. Co.*, 411 F.2d 720, 722 (“We are reluctant to impute to Congress a purpose to limit the Commission to 30 days’ consideration of applications for rehearing, irrespective of the complexity of the issues involved, with jurisdiction then passing to the courts to review a decision which at that moment would profitably remain under active reconsideration by the agency.”).

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GLICK, Commissioner, *concurring*:

Today's order affirms the Commission's authority under the Natural Gas Act (NGA) to toll the date for issuing a merits determination on a request for rehearing. As the Commission explains, the rehearing process affords it an opportunity to review the underlying decision and further explain the basis for its actions. This process frequently requires more than the thirty-day period set forth in section 19(a) of the NGA, particularly when parties have submitted requests for rehearing raising significant and complex arguments.¹ It is nonetheless critical that the Commission respond to rehearing requests as quickly as possible, especially where—as here—parties have raised serious questions regarding the Commission's conclusion that a new natural gas pipeline facility is needed and in the public interest.

Until the Commission issues its ultimate order on rehearing, the NGA precludes parties from challenging the Commission's decision in federal court.² However, the pipeline developer has the right to pursue eminent domain³ and, in many cases, to begin construction on the new pipeline facility while the Commission addresses the rehearing requests. As a result, landowners, communities, and the environment may suffer needless and avoidable harm while the parties await their opportunity to challenge the Commission's certificate decision in court.

This proceeding, in particular, illustrates the need for prompt action on rehearing requests. As I explained in my dissent from the underlying order, I disagree with the Commission's finding that the PennEast Project is needed and in the public interest. I

¹ 15 U.S.C. § 717r(a) (2012).

² *Id.* § 717r(b).

³ *Id.* § 717f(h).

believe that the Commission's reliance on affiliate precedent agreements is, without more, insufficient to demonstrate that a new natural gas pipeline is needed.⁴ I also have serious concerns regarding the Commission's practice of issuing conditional certificates—which, notwithstanding their name, vest the pipeline developer with full eminent domain authority—in cases where the record does not contain adequate evidence to conclude definitively that the pipeline is in the public interest.⁵

In short, when the Commission issues a tolling order, it is critical that the Commission issue a subsequent order addressing the merits of the rehearing request as expeditiously as reasonably possible in order to both protect the public from unnecessary harm and permit the parties to timely seek their day in court.⁶

Richard Glick
Commissioner

⁴ *PennEast Pipeline Company, LLC*, 162 FERC ¶ 61,053, at 1–2 (2018) (Glick, Comm'r, dissenting).

⁵ *Id.* at 2–4 (Glick, Comm'r, dissenting).

⁶ This statement is not intended to reflect in any way concerns regarding how timely Commission staff currently processes rehearing orders for Commission consideration.

Document Content(s)

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