

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PennEast Pipeline Company, LLC)

Docket No. CP15-558-000

**REQUEST FOR REHEARING OF DELAWARE RIVERKEEPER
NETWORK**

Pursuant to Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.713 (2010), Delaware Riverkeeper Network (“DRN”) hereby requests rehearing and rescission of the Commission’s February 22, 2018 Order (“Order”) Granting Rehearing For Further Consideration (“Tolling Order”).

DRN seeks rehearing and rescission of the Commission’s Order because, *inter alia*, the Order violates DRN’s due process rights

I. STATEMENT OF RELEVANT FACTS

On September 24, 2015, PennEast filed an application pursuant to section 7(c) of the Natural Gas Act (“NGA”) and Parts 157 and 284 of the Commission’s regulations, requesting authorization 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”). The project is proposed to carry up to 1,107,000 dekatherms per day (Dth/d) of natural gas. PennEast also requested a blanket certificate under Part 284, Subpart G of the Commission’s

regulations to provide open-access transportation services, and a blanket certificate under Part 157, Subpart F of the Commission's regulations to perform certain routine construction activities and operations.

According to the Environmental Impact Statement ("EIS"), construction of the project will impact 1,613.5 acres of land (1,065.2 acres for pipeline facilities, 110.1 acres for access roads; 372.3 acres for pipe and contractor ware yards, 31.1 acres for above ground facilities). According to the EIS, the project will at least cut through 255 waterbodies (including 159 perennial, 45 intermittent, 40 ephemeral, 11 open water), 633 acres of forest, 91 acres of wetlands, impact "several" vernal pools, and infringe upon and damage habitat for threatened and endangered species of bat, sturgeon, snake, turtle, mussels and more. These impacts are sorely understated, incomplete, and misrepresent the footprint and damage that would be inflicted if the PennEast pipeline were built.

DRN submitted numerous comment letters and expert reports during the public comment period identifying numerous deficiencies in the Commission's review of the Project. Despite these efforts, the Commission issued an Order granting the Project a Certificate of Public Convenience and Necessity ("Certificate") on January 19, 2018. The deficiencies identified by DRN were not been accounted for in the Certificate Order or any of the other supporting documents. As such, the Commission's approval of the Project and issuance of the Certification

is arbitrary, capricious, or otherwise not in accordance with the law. Specifically, the Commission's environmental review fails to meet the requirements of NEPA, 42 U.S.C. § 4321 *et seq.* (2006), and its implementing regulations, 40 C.F.R. Pts. 1500-08. The EIS cannot serve as the basis for an adequate hard look at the Project's environmental impacts or need for the PennEast Project. Based on this flawed environmental review, the Commission cannot determine that the public benefits of the proposed Project outweigh its adverse impacts, thus violating the NGA, 15 U.S.C. §§ 717f (2006) and its implementing regulations, 18 C.F.R. Part 157 (2011).

DRN submitted a Rehearing Request on January 24, 2018 seeking final agency action so DRN can ultimately file a Petition for Review in the appropriate Circuit Court. However, on February 22, 2018 the Commission issued its Tolling Order granting review only for the purposes of further consideration. Thus DRN, nor its members, can challenge the legal sufficiency of the Certificate.

II. BASIS FOR REHEARING

The Commission's use of tolling orders deprives DRN of constitutionally guaranteed due process rights by preventing timely and effective judicial review of contested agency action.

Concise Statement of the Alleged Errors in the Order

- 1.) *The Commission Erred because the Commission's use of tolling orders deprives DRN of constitutionally guaranteed due process rights by*

preventing timely and effective judicial review of contested agency action.

Statement of Issues

The subsection below corresponds to the numbered paragraphs in Part II. above, and set forth DRN's position with respect to the identified issues.

ARGUMENT

1. The Tolling Order Violates DRN's Due Process Rights

The Commission's use of tolling orders deprives DRN of constitutionally guaranteed due process rights by preventing timely and effective judicial review of contested agency action.

In the Natural Gas Act, Congress plainly sought to balance the laudatory goal of allowing the Commission a reasonable opportunity to correct erroneous orders prior to judicial review, against the competing goal of allowing aggrieved parties to obtain timely judicial review of such orders. The balance that Congress struck was to prohibit judicial review of a Commission order unless a party first seeks rehearing of such order within thirty days, 15 U.S.C. § 717r(a), while also prohibiting the Commission from taking more than thirty days "to grant or deny rehearing or to abrogate or modify its order." 15 U.S.C. § 717r(a). The Commission has routinely failed to comply with section 717r(a) because the Commission regularly fails to take meaningful action on rehearing requests, and instead simply grants itself more time,

which is plainly not one of the “acts” Congress authorized the Commission to take in section 717r(a). *See Fed. Hous. Fin. Agency v. UBS Ams. Inc.*, 712 F.3d 136, 141 (2d Cir. 2013) (“In construing a statute, we begin with the plain language, giving all undefined terms their ordinary meaning”). As such, the Commission simply does not have any statutory basis for issuing the tolling orders.

The Commission’s issuance of tolling orders has clearly thwarted Congress’ goal of allowing for timely judicial review of Commission orders within thirty days of the issuance of a certificate. To find otherwise and allow the Commission to extend the thirty-day statutory timeframe for an **indefinite** and **unlimited** period would render Congress’ drafting a complete nullity. *See Clark v. Rameker*, 134 S. Ct. 2242, 2248 (2014) (“It therefore flouts the rule that ‘a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous’”) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

The Commission’s use and abuse of its tolling order powers have never been reviewed or ruled upon by any court in the context of tolling orders issued specifically pursuant to natural gas pipeline projects under Section 7 of the Natural Gas Act, and thus present a factual and legal question of first impression. While several circuits have upheld the issuance of tolling orders in other contexts, *see, e.g.*, *Kokajko v. FERC*, 837 F.2d 524 (1st Cir. 1988); *Gen. Am. Oil Co. of Texas v. Fed. Power Comm’n*, 409 F.2d 597, 599 (5th Cir. 1969), none of these cases involve a

situation where a pipeline company is issued a Certificate thereby automatically conferring power to take landowners' property via eminent domain, and also allowing construction activity to begin prior to an aggrieved party having the opportunity to challenge the legal sufficiency of the Certificate in court.

DRN predicted in March of 2016 that the Commission would inevitably approve the Penneast Pipeline Project, which would be consistent with the agency's 100 percent approval rate for natural gas pipeline projects that have come before the Commission for a vote, and that the Commission would issue a tolling order to any subsequent challenges of the Certificate. On January 19, 2018, the Commission approved the Project, and provided Penneast with a Certificate of Public Convenience and Necessity.

Penneast promptly initiated condemnation proceedings against over a hundred landowners who oppose the project now that it has received the Certificate. One of DRN's members received a notice on February 13, 2018, stating that a complaint was filed "for the taking under the federal power of eminent domain pursuant to the Natural Gas Act" of her property.

DRN submitted its Rehearing Request to the Commission on January 24, 2018, challenging the legal sufficiency of the Certificate. While DRN anticipated that this Rehearing Request, and all other such requests, would be "tolled" by the Commission through the issuance an order indefinitely extending the time by which

the Commission would have to issue final agency action, DRN hoped that the Commission would act promptly. It has not. Instead, the Commission issued such an order on February 22, 2018, thereby preventing DRN, and any other party, from filing a legal challenge regarding the validity of the Certificate.

Therefore, because of the Commission's routine practice of "tolling" rehearing requests, landowners such as DRN's member cannot challenge the Certificate that courts hearing the condemnation proceedings necessarily rely upon for issuing judgments against landowners. This is precisely the unjust scenario DRN itself has been subjected to with regard to past pipeline projects, and anticipated would occur here.

By way of further example, the Delaware Riverkeeper Network submitted a rehearing request to the Commission in January of 2015 citing several ways in which the Commission violated the Clean Water Act when it issued a Certificate for Transcontinental Pipeline Company's Leidy Southeast Expansion Project in Pennsylvania. The Commission sat on the rehearing request for over a year, and during that time issued at least twenty different Letter Orders allowing the pipeline company to proceed with all forms of construction activity. Because the Commission did not act on DRN's rehearing request, the Commission effectively blocked any effective judicial review of the Certificate. DRN's members' property, environmental, aesthetic and recreational interests were harmed by the construction

activities, which included tree-felling, grading, trenching, wetland conversions, and blasting activities prior to DRN being able to challenge the Certificate in court.

DRN is again in the same situation. DRN submitted a rehearing request to the Commission on February 14, 2017 with regard to Tennessee Gas Pipeline Company's Orion pipeline project. On March 13, 2017 the Commission "granted" the rehearing request "for the limited purpose of further consideration." Over the last six months the Commission has issued numerous letter orders authorizing all construction activities. Indeed, "final grade" and "restoration activities" are currently underway. Despite the fact that DRN contests that the legal sufficiency of the Certificate, DRN simply has no way of obtaining effective judicial review of the prior to this construction taking place, and will not likely have the case briefed until the entire project is completed.

The Commission's use of tolling orders is especially egregious in this context considering the limitations on what the Commission must consider. Unlike other rehearing requests, nothing new is, or can be, considered by the Commission in a rehearing request for a Section 7 natural gas pipeline project. *See NO Gas Pipeline*, 756 F.3d at 770 (noting that the Commission "rejects requests for rehearing that raise issues not previously presented unless parties show that the request is 'based on matters not available for consideration . . . at the time of the . . . final decision.' 18 C.F.R. § 385.713(c)(3)"). The scope and depth of the Commission's inquiry is

therefore extremely narrow, as the Commission has already considered and responded to all of the issues presented in the rehearing request. The thirty days afforded to the Commission to make decision was never contemplated to be exclusively used by the Commission to craft comprehensive decisional documents to better position the Commission to fend-off potential appeals.

III. COMMUNICATIONS

Communications and correspondence regarding this proceeding should be served upon the following individuals:

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IV. CONCLUSION

For the foregoing reasons, DRN respectfully requests that the Commission grant this request for rehearing and rescission of the Tolling Order.

Respectfully submitted this 15th day of March, 2018.

s/ Aaron Stemplewicz

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