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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 153 and 157

[Docket No. RM20-15-001; Order No. 871-A]

Limiting Authorizations to Proceed with Construction Activities Pending Rehearing

AGENCY: Federal Energy Regulatory Commission.

ACTION: Order addressing arguments raised on rehearing and clarification, and providing for additional briefing.

SUMMARY: On rehearing, the Federal Energy Regulatory Commission (Commission) modifies Order No. 871, which amended its regulations to preclude the issuance of authorizations to proceed with construction activities with respect to natural gas facilities authorized by order issued pursuant to section 3 or section 7 of the Natural Gas Act until either the time for filing a request for rehearing of such order has passed with no rehearing request being filed or the Commission has acted on the merits of any rehearing request. The Commission provides for further briefing on the issues raised in the rehearing requests.

DATES: The effective date of the document published on July 6, 2020 (85 FR 40113) is confirmed: August 5, 2020.

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SUPPLEMENTARY INFORMATION:

1. On June 9, 2020, the Federal Energy Regulatory Commission (Commission) issued Order No. 871, which is a final rule that precludes the issuance of authorizations to proceed with construction activities with respect to a Natural Gas Act (NGA) section 3 authorization or section 7(c) certificate order until the Commission acts on the merits of any timely-filed request for rehearing or the time for filing such a request has passed.¹

On July 9, 2020, the Interstate Natural Gas Association of America (INGAA) requested clarification or, in the alternative, rehearing, and Kinder Morgan, Inc. Natural Gas Entities² (Kinder Morgan) and TC Energy Corporation (TC Energy) requested rehearing of Order No. 871.

2. Pursuant to *Allegheny Defense Project v. FERC*,³ the rehearing requests filed in this proceeding may be deemed denied by operation of law. However, as permitted by

¹ *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 85 FR 40113 (July 6, 2020), 171 FERC ¶ 61,201 (2020).

² The Kinder Morgan Gas Entities include: Natural Gas Pipeline Company of America LLC; Tennessee Gas Pipeline Company, L.L.C.; Southern Natural Gas Company, L.L.C.; Colorado Interstate Gas Company, L.L.C.; Wyoming Interstate Company, L.L.C.; El Paso Natural Gas Company, L.L.C.; Mojave Pipeline Company, L.L.C.; Bear Creek Storage Company, L.L.C.; Cheyenne Plains Gas Pipeline Company, LLC; Elba Express Company, L.L.C.; Kinder Morgan Louisiana Pipeline LLC; Southern LNG Company, L.L.C.; and TransColorado Gas Transmission Company LLC.

³ 964 F.3d 1 (D.C. Cir. 2020) (en banc) (*Allegheny*).

section 19(a) of the NGA,⁴ we are modifying the discussion in Order No. 871 and providing for additional briefing, as discussed below.⁵

I. Background

3. In Order No. 871, the Commission explained that historically, due to the complex nature of the matters raised on rehearing of orders granting authorizations under NGA sections 3 and 7, the Commission had often issued an order (known as a tolling order) by the thirtieth day following the filing of a rehearing request, allowing itself additional time to provide thoughtful, well-considered attention to the issues raised on rehearing.

4. In order to balance its commitment to expeditiously responding to parties' concerns in comprehensive orders on rehearing and the serious concerns posed by the possibility of construction proceeding prior to the completion of agency review, the Commission, in Order No. 871, exercised its discretion by amending its regulations to add new § 157.23, which precludes the issuance of authorizations to proceed with construction of projects authorized under NGA sections 3 and 7 during the period for filing request for rehearing of the initial orders or while rehearing is pending.⁶

5. Three weeks after the Commission issued Order No. 871, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) issued an en banc decision in

⁴ 15 U.S.C. 717r(a) (“Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.”).

⁵ *Allegheny*, 964 F.3d at 16-17.

⁶ Order No. 871 also revised § 153.4 of the Commission’s regulations to incorporate a cross-reference to new § 157.23.

Allegheny.⁷ The court held that the Commission's use of tolling orders solely to allow itself additional time to consider an application for rehearing does not preclude operation of the NGA's deemed denial provision,⁸ which enables a rehearing applicant to obtain judicial review after thirty days of agency inaction.⁹ The court explained that, to prevent a rehearing from being deemed denied, the Commission must act on an application for rehearing within thirty days of its filing by taking one of the four NGA-enumerated actions: grant rehearing, deny rehearing, or abrogate or modify its order without further hearing.¹⁰

6. On July 9, 2020, INGAA filed a request for clarification or, in the alternative, rehearing of Order No. 871. On the same day, Kinder Morgan and TC Energy also filed requests for rehearing.

II. Discussion

7. We believe that the issues raised regarding this rulemaking merit further consideration by the Commission. Accordingly, to facilitate our reconsideration of the rulemaking and ensure a complete record for further Commission action, we provide all interested parties an opportunity to comment on the arguments in the rehearing requests, including, but not limited to, the issues enumerated below.

- a. Should the Commission withhold authorizations to commence construction during the pendency of all rehearing requests? Alternatively, should the

⁷ 964 F.3d 1.

⁸ 15 U.S.C. 717r(a).

⁹ *Allegheny*, 964 F.3d at 18-19.

¹⁰ *See id.* at 13 (quoting 15 U.S.C. 717r(a)).

Commission withhold authorizations to commence construction only during the pendency of rehearing requests that raise certain issues or arguments? If the Commission were to limit such a rule to only certain issues or arguments, which issues or arguments should trigger that rule?

- b. If the Commission were to adopt a rule of withholding authorizations to commence construction while rehearing is pending, should that rule apply to all orders pertaining to an NGA section 3 authorization or section 7 certificate or only a subset thereof?
- c. In its rehearing request, INGAA poses a number of hypotheticals regarding circumstances that may unfold following *Allegheny*.¹¹ Please comment on how a rule withholding authorizations to commence construction during rehearing, if appropriate, should apply to those circumstances.
- d. Should the Commission modify its practices or procedures to address concerns regarding the exercise of eminent domain while rehearing requests are pending before the Commission? If so, how?
- e. If the Commission retains the rule withholding authorizations to commence construction while rehearing is pending, at what point in time should projects be permitted, upon receipt of an appropriate authorization, to commence construction? For example, should the Commission set a specific time, such as 90 days after the filing for a request for rehearing, for the Commission to issue an authorization to proceed?

¹¹ INGAA Rehearing at 21-24.

8. Briefs shall be due within 21 days (February 16, 2021). Reply briefs shall be due 15 days thereafter (March 3, 2021). Barring exceptional circumstances, the Commission will issue an order addressing the issues raised on rehearing and in the briefs within 60 days of receipt of the reply briefs.

III. Filing Procedures

9. Submissions must refer to Docket No. RM20-15-001, and must include the filer's name, the organization they represent, if applicable, and their address. The Commission encourages electronic filing via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats. Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format. If filing electronically, you do not need to make a paper filing.

10. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number RM20-15-001.

11. All submissions will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below.

IV. Document Availability

12. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the

contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

13. From the Commission's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits in the docket number field.

14. User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at (202) 502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

V. Effective Date

15. The effective date of the document published on July 6, 2020 (85 FR 40113) is confirmed: August 5, 2020.

By the Commission. Commissioner Danly is dissenting with a separate statement attached.

ISSUED: January 26, 2021.

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Limiting Authorizations to Proceed with Construction
Activities Pending Rehearing

Docket No. RM20-15-001

DANLY, Commissioner, *dissenting*:

1. On June 9, 2020, the Commission issued a final rule providing that an authorization to proceed with construction activities for a Natural Gas Act (NGA) section 3¹ authorization or section 7(c)² certificate authorization will not be issued until the Commission acts on the merits of any timely-filed request for rehearing or the time for filing such a request has passed.³ On July 9, 2020, the Interstate Natural Gas Association of America requested clarification or, in the alternative, rehearing, and Kinder Morgan, Inc. Natural Gas Entities and TC Energy Corporation requested rehearing of Order No. 871. Today's order does not address any of these requests for rehearing, but instead establishes a briefing schedule for addressing several questions which touch on some, but not all, of the issues raised on rehearing, and additionally requests briefing on issues not raised on rehearing.

2. I dissent from today's order because it: (1) falls short of the Commission's obligation under the Administrative Procedure Act (APA) to address the arguments raised in requests for rehearing; and (2) will delay a ruling on the merits of the rehearing requests until approximately ten months after they were submitted, an action that surely is in tension with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *Allegheny Defense Project v. FERC (Allegheny)*⁴ which prohibits the Commission from employing procedural means to delay judicial review of its orders.

3. Whether the Commission retains the regulation as it is currently written, modifies it, or vacates it, the Commission is required under the APA to explain its reasoning. In doing so, it must respond to arguments raised by litigants. This requirement is fundamental to administrative decision making.⁵ The requests for rehearing assert that

¹ 15 U.S.C. 717b (2018).

² 15 U.S.C. 717f(c).

³ See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871, 85 Fed. Reg. 40,113 (July 6, 2020), 171 FERC ¶ 61,201 (2020) (Order No. 871).

⁴ 964 F.3d 1 (D.C. Cir. 2020) (en banc).

⁵ See *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, *entirely failed to consider an important aspect of the problem*, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it

the adoption of the regulation was arbitrary and capricious due to a number of infirmities. Among them are:

- a claim that the regulation could be read to prohibit issuing an authorization to proceed with construction where a request for rehearing is filed by a party in support of the project (including by the project proponent itself);
- an argument that the rule would not allow an authorization to proceed with construction where the party requesting rehearing is not an affected landowner;
- a claim that the regulation, as drafted, might not allow the issuance of an authorization to proceed with construction when a rehearing request has been denied by operation of law due to Commission inaction;
- an argument that the rule, strictly construed, might not permit the issuance of an authorization to proceed with construction when the rehearing request concerns an amendment to an existing authorization or subjects unrelated to landowner concerns, such as rates; and
- potential indefinite delay in the issuance of an authorization to proceed with construction.

These are legitimate arguments. They deserve a response by the Commission. The Commission is obligated to provide those responses, but all are sidestepped in today's order.

4. An inattentive reader who does no more than glance at the title of today's order might well be lulled into believing that it accomplishes more than it really does. This order is styled "Order Addressing Arguments Raised on Rehearing and Clarification, and Providing for Additional Briefing." Despite the title, the Commission neither addresses the arguments raised on rehearing nor provides any clarification. Instead, with no explanation other than a bald declaration that "[w]e believe that the issues raised regarding this rulemaking merit further consideration,"⁶ today's order lists a number of questions for further briefing. Although the enumerated questions may be relevant to some points raised in the requests for rehearing, the Commission fails to explain why it

could not be ascribed to a difference in view or the product of agency expertise.") (emphasis added); *New England Power Generators Ass'n, Inc. v. FERC*, 881 F.3d 202, 211 (D.C. Cir. 2018) (finding "that FERC did not engage in the reasoned decisionmaking required by the Administrative Procedure Act" because it "failed to respond to the substantial arguments put forward by Petitioners and failed to square its decision with its past precedent").

⁶ *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, Order No. 871-A, 174 FERC 61,050, at P 7 (2021).

agrees or disagrees with those arguments or why it believes the record insufficient for the Commission to rule on those arguments.

5. To the extent that the Commission suggests a more complete record is needed to consider the requests for rehearing, I disagree. The Commission received three requests for rehearing that detail arguments the Commission had not considered in issuing the final rule. These arguments are straightforward—implicating neither complex facts nor difficult legal principles. Although I acknowledge that the Commission may well have needed more than thirty days in which to address those arguments, the six months that have elapsed surely were more than adequate, and I see no reason why the Commission needs the additional ninety-six days afforded by today’s order. Regardless, even if there were good reasons for needing more time, the Commission necessarily fails in its duties by offering no justification for further delay.

6. Moreover, the questions set forth for briefing are not confined to the issues properly raised on rehearing. One question asks whether the Commission should modify its practices or procedures to address concerns regarding the exercise of eminent domain while rehearing requests are pending before the Commission. No rehearing request suggests the Commission take this step. One wonders why this is the appropriate vehicle for such an inquiry, but it is not the proper vehicle to respond to arguments raised in the normal course of litigation.

7. The inquiry regarding eminent domain appears at odds with the Commission’s well-developed body of law declaring that it lacks the authority to restrict a certificate holder’s use of eminent domain once the certificate of public convenience and necessity is received.⁷ I am not convinced that an automatic stay of the exercise of eminent domain pending Commission action on the merits of a rehearing request, which today’s order suggests the Commission will consider, can be reconciled with NGA section 19(c).⁸ That section provides that “[t]he filing of an application for rehearing . . . shall not, unless *specifically* ordered by the Commission, operate as a stay of the Commission’s order.”⁹ As such, the idea that the Commission may adopt practices or procedures (presumably) to automatically stay an authorization to restrict a certificate holder’s use of eminent domain would appear, at least on initial inquiry, to conflict with NGA section 19(c). At a minimum, if the Commission wants parties to address the question of whether the exercise of eminent domain should be stayed automatically during the pendency of rehearing requests, it should also have directed the parties to address the foundational question of the Commission’s legal authority to issue a rule mandating such a stay. I *strongly encourage* parties to address this question in their briefs, even though it was not specifically mentioned in the majority’s order.

⁷ See, e.g., *PennEast Pipeline Co., LLC*, 174 FERC ¶ 61,056, at P 10 & n.17 (2021) (collecting cases).

⁸ See 15 U.S.C. 717r(c).

⁹ *Id.* (emphasis added).

8. The Commission's failure to address the substance of the rehearing requests might be understandable if the order directing briefing had been issued earlier. Indeed, the Court in *Allegheny* suggested that it might be permissible for the Commission to provide for such supplemental briefing.¹⁰ However, that suggestion was offered in the context of the Court's discussion of a potential Commission order issued in connection with a timely ruling on rehearing within thirty days after a rehearing request.¹¹ Here, we are simply failing to perform our duties.

9. Finally, lest any reader of today's order overlook it, let's pause for a moment to consider the irony of what the Commission contemplates here. In the very same proceeding in which the Commission promulgated a rule specifically aimed at alleviating concerns that its tolling orders served only to "buy [the Commission] more time to act on a rehearing application and stall judicial review,"¹² the Commission attempts to buy more time by ordering further procedure after the statutory deadline to act on rehearing has passed and as judicial review is imminent, absent any modification in the meantime of the rule under review. I for one will be interested to see whether the D.C. Circuit countenances this action any more than it accepted the Commission's use of tolling orders for the very same purpose. Time will tell.

For these reasons, I respectfully dissent.

James P. Danly
Commissioner

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¹⁰ *See Allegheny*, 964 F.3d at 16.

¹¹ *See id.*

¹² *Id.* at 9.