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FERC Adopts Regulations Delaying Construction of Federally-Regulated Natural Gas Projects Until it Rules on Requests for Rehearing

On June 9, 2020, the Federal Energy Regulatory Commission (FERC) issued a final rulemaking order amending its regulations to preclude the commencement of construction of FERC-authorized natural gas pipeline, storage and liquefied natural gas (LNG) facilities until FERC has acted on any requests for rehearing of the FERC orders authorizing them. *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 171 FERC ¶ 61,201 (2020) (Order No. 871). The new regulations affect authorizations for construction of interstate natural gas pipeline and storage facilities issued under Section 7 of the Natural Gas Act (NGA) and authorizations for construction of natural gas import/export facilities issued under NGA Section 3.

The rulemaking addresses concerns raised in an appellate proceeding, *Allegheny Defense Project v. FERC*, in which numerous groups of stakeholders objected to the FERC's practice of "tolling" for months, or even years, requests for rehearing of orders authorizing interstate natural gas pipeline construction issued under NGA Section 7. *Allegheny Def. Project v. FERC*, 932 F.3d 940 (D.C. Cir. 2019), *reh'g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019).

FERC orders authorizing construction or expansion of natural gas facilities typically include a requirement that the applicant may not commence construction before receiving written authorization from FERC's Director of the Office of Energy Projects. The purpose of this requirement is to ensure that the FERC preconstruction requirements – such as compliance with specific environmental protection conditions – have been met.

Parties dissatisfied with a FERC order have the right under the NGA to seek rehearing and must do so to preserve their right to seek judicial review of the agency's action. FERC notes that in recent years natural gas project proceedings have seen increased participation by stakeholders, such as landowners, community members, non-governmental organizations, property rights advocates, and governmental entities. Such stakeholders have filed requests for rehearing in the vast



majority of recent natural gas project proceedings involving significant new facilities.

Unless FERC acts upon a rehearing request within 30 days, under the NGA the request is deemed to have been denied. FERC often issues a “tolling order” by the 30th day following the filing of a rehearing request to allow it additional time to consider complex issues raised on rehearing. Once a tolling order is issued, there is no prescribed timeframe for FERC action on rehearing; many months can elapse before FERC issues an order on rehearing and parties interested in seeking judicial review of FERC’s action may do so. FERC’s rulemaking order is intended to address the perceived disadvantage to stakeholders caused by FERC’s longstanding practice of allowing project construction to proceed while rehearing is pending.

Order No. 871 adopts the following regulation as an addition to 18 C.F.R. Part 157:

§ 157.23 Authorizations to Proceed with Construction Activities.

With respect to orders issued pursuant to 15 U.S.C. 717b or 15 U.S.C. 717f(c) authorizing the construction of new natural gas transportation, export, or import facilities, no authorization to proceed with construction activities will be issued:

- (a) until the time for the filing of a request for rehearing under 15 U.S.C. 717r(a) has expired with no such request being filed, or
- (b) if a timely request for rehearing is filed, until the Commission has acted upon the merits of that request.

A cross-reference to this regulation will also be added to Part 153 of FERC’s regulations (which addresses Section 3 authorizations for natural gas import and export facilities, including LNG terminals).

The effective date for this rule is 30 days after publication in the Federal Register. FERC stated, however, that, as a matter of policy, it will not authorize construction of any project to commence pending rehearing during the period before the rule becomes effective.

Commissioner Glick dissented in part, sharply criticizing the other three Commissioners for not prohibiting the use of eminent domain while rehearing is pending. Commissioner Glick states that he would have done more to protect the interests of landowners, including adopting a practice of presumptively staying Section 7 certificates pending action on rehearing.

FERC’s rulemaking provides a potent means for opponents of natural gas infrastructure projects to delay natural gas project construction. Given FERC’s history of taking months in many cases to act on rehearing requests involving natural gas facility authorizations, the rulemaking order can be expected to lengthen the timelines project developers will face in developing, permitting and ultimately constructing FERC-jurisdictional natural gas infrastructure. The rulemaking’s adverse impacts may, however, be mitigated to a degree if FERC commits itself, as it has done in some recent high profile cases (such as the Jordan Cove Energy Project/Pacific Connector Gas Pipeline proceeding, Docket Nos. CP17-495 and CP17-494) to completing its processing of rehearing requests in something close to 30 days.



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