

## Update: FERC Revises “Tolling” Order Language to Address Recent Court of Appeals Decision; Seeks Legislative Fix

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As discussed previously in [Pierce Atwood's Energy Infrastructure Blog](#), on June 30, 2020, the U.S. Court of Appeals for the DC Circuit ruled that FERC lacks authority to issue tolling orders that postpone rehearing decisions on natural gas project orders solely to give the agency more time to consider rehearing requests and which delay opposing parties' efforts to file appeals court challenges. [Allegheny Defense Project v. FERC, No. 17-1098 \(D.C. Cir. June 30, 2020\)](#). On July 1, 2020, the Federal Energy Regulatory Commission (“FERC”) issued its first order since the *Allegheny Defense* decision addressing a rehearing request that it did not act on within the 30-day statutory time period under the Natural Gas Act.

Incorporating suggestions from the court's opinion, in [Midcontinent Independent System Operator, Inc., 172 FERC ¶ 61,009 \(2020\)](#), FERC issued a Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration. That notice debuted new language reflecting the *Allegheny Defense* decision.

In the absence of Commission action on the request for rehearing within 30 days from the date the request was filed, the request for rehearing (and any timely requests for rehearing filed subsequently) may be deemed denied. 16 U.S.C. §825(a) (2018); 18 C.F.R. §385.713 (2019); *Allegheny Defense Project v. FERC*, No. 17-1098 (D.C. Cir. June 30, 2020).

As provided in 16 U.S.C. §825(a) (2018), the rehearing request of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 16 U.S.C. §825(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper. As provided in 18 C.F.R. §385.713(d), no answers to the rehearing request will be entertained. (footnote omitted)

The revised “tolling” language, which has since been used in other dockets as well, reserves FERC's opportunity to address substantive rehearing arguments in a future order, but also permits the petitioners to seek judicial review of FERC's prior order because rehearing may be deemed

denied. The language is consistent with the suggestions in the *Allegheny Defense* decision and the concurring opinion.

Also, on July 2, 2020, FERC Chairman Neil Chatterjee and Commissioner Richard Glick issued a [joint statement](#) calling on the U.S. Congress “to consider providing FERC with a reasonable amount of additional time to act on rehearing requests involving orders under both the Natural Gas Act and the Federal Power Act.” The joint statement further requests that “such legislation should make clear that, while rehearing requests are pending, the Commission should be prohibited from issuing a notice to proceed with construction and no entity should be able to begin eminent domain proceedings involving the projects addressed in the orders subject to those rehearing requests.”

On July 6, 2020, FERC filed a motion requesting a stay of the court’s mandate for 90 days to allow FERC time to assess how to revise its rehearing process to implement the court’s opinion and to consider whether to pursue Supreme Court review. On July 8, 2020, the Allegheny Defense Fund requested the court deny FERC’s motion, explaining that further delay will create more uncertainty as to whether parties with pending rehearing requests that have already been tolled can seek judicial review, and harm parties whose rehearing requests may be tolled in the next 90 days.

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