ARGUED DECEMBER 7, 2018; DECIDED AUGUST 2, 2019

In the United States Court of Appeals for the District of Columbia Circuit

Nos. 17-1098, *et al.*

ALLEGHENY DEFENSE PROJECT, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

OPPOSITION TO PETITION FOR REHEARING *EN BANC* OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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Homeowners	Petitioners Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman
Petition	Petition for Rehearing *En Banc*, filed Sept. 16, 2019, by Petitioners Hilltop Hollow Limited Partnership, Hilltop Hollow Limited Partnership, LLC, and Stephen D. Hoffman
Project	Atlantic Sunrise Project
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Transco	Transcontinental Gas Pipeline Company

INTRODUCTION

The panel's August 2, 2019 decision affirmed Commission orders conditionally approving the application of Transcontinental Gas Pipeline Company (Transco) to construct and operate the Atlantic Sunrise Project (Project), an interstate pipeline designed to meet growing demand for natural gas. *Allegheny Def. Project v. FERC*, 932 F.3d 940 (D.C. Cir. 2019). In so doing, the panel found that Homeowners (Hilltop Hollow Ltd. Partnership, Hilltop Hollow Ltd. Partnership, LLC, and Stephen D. Hoffman) had been afforded a meaningful opportunity to be heard as to whether the Project would serve the public interest under section 7 of the Natural Gas Act, 15 U.S.C. § 717f, and that circuit precedent establishes that a separate public use finding under the Fifth Amendment was unnecessary. 932 F.3d at 947-48.

Homeowners' petition for rehearing focuses on a different issue. They ask the Court to overturn fifty years of precedent construing the Natural Gas Act to permit the Commission to issue "tolling orders," which signal the agency's intent to address requests for rehearing on the merits. But the panel's decision did not rest on the use of tolling orders. Irrespective of the process employed with respect to Homeowners' request for rehearing, the panel found that Homeowners were afforded a meaningful opportunity to be heard on the public use issue during the Commission's proceedings authorizing the Atlantic Sunrise Project. *Id*. at 948.

Homeowners' extended discussion of tolling orders thus fails to establish that the panel's actual decision erred in any respect.

In any event, this Court, and every other court to consider the issue, have long held that section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), permits the Commission to issue tolling orders. And just last year, the Court found that the use of tolling orders in natural gas infrastructure proceedings does not violate due process as a matter of law. *See Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018). As explained in *Riverkeeper*, to the extent the use of tolling orders raises concerns in any particular case, they may be presented in a mandamus action designed to preserve the integrity of future judicial review. *Id*. And in the specific case of the Atlantic Sunrise Project, the Court twice denied requests to stay the effectiveness of the FERC-issued certificate pending judicial review.

The Commission is nonetheless sensitive to the concerns raised by Homeowners. At its September 2019 public meeting, the Commission announced that it intends to expedite decisions on the merits of requests for rehearing of Natural Gas Act section 7 infrastructure orders implicating landowner rights. The Commission will reallocate resources to prioritize these matters with the aim of issuing orders on the merits of such requests within thirty days of their filing, thereby reducing or eliminating the need for tolling orders. The Commission's

objective is to ensure that affected landowners are provided with a judicially-reviewable order as quickly as possible.

STATEMENT OF FACTS

A. The Commission Proceedings

1. The Certificate Order

Section 7(e) of the Natural Gas Act provides that the Commission shall issue a certificate of "public convenience and necessity" if it determines that a proposed natural gas transportation project "is or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(e). In the challenged orders, the Commission found, after extensive review, that the public convenience and necessity required approval of Transco's proposed Atlantic Sunrise Project, which will connect production areas in Pennsylvania to markets in the mid-Atlantic and southeastern United States. *Transcontinental Gas Pipe Line Co., LLC*, 158 FERC ¶ 61,125, P 33 (2017) (Certificate Order). Having received a certificate of public convenience and necessity, the Natural Gas Act vested Transco with the authority to obtain needed private property by eminent domain. *See* 15 U.S.C. § 717f(h) ("When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line … it may acquire the same by exercise of the right of eminent domain ….").

2. The Tolling Order

Under section 19(a) of the Natural Gas Act, a petition for administrative rehearing is a jurisdictional prerequisite to judicial review of Commission orders. *See* 15 U.S.C. § 717r(a) ("No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon."). The Act further provides that, "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." *Id*. This Court has determined that the Commission "acts upon the application" within the thirty-day time period when it issues a tolling order granting rehearing for the limited purpose of further consideration. *See California Co. v. Fed. Power Comm'n*, 411 F.2d 720, 722 (D.C. Cir. 1969).[1]

Here, the Commission issued a tolling order within thirty days of the filing of the first of many petitions for rehearing of the Certificate Order. "In order to afford additional time for consideration of the matters raised" by the requests for rehearing, the Commission "granted" rehearing for the "limited purpose of further

[1] *See also Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018) ("the statute does not require a final decision within 30 days"); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) ("The statutory language … does not state … that FERC must 'act on the merits' within that time lest the application be denied."); *Gen Am. Oil Co. v. Fed. Power Comm'n*, 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).

consideration ….” *Transcontinental Gas Pipe Line Co., LLC*, Letter Order Granting Rehearings for Further Consideration (Mar. 13, 2017).

3. The Rehearing Order

Among the many issues addressed by the Commission on rehearing was Homeowners’ claim that the Natural Gas Act’s “public convenience and necessity” determination is distinguishable from a finding that the Project serves a “public use” sufficient to justify a taking via eminent domain. Citing this Court’s decision in *Midcoast Interstate Transmission, Inc. v. FERC*, 198 F.3d 960, 973 (D.C. Cir. 2000), the Commission found that its “public convenience and necessity finding is equivalent to a ‘public use’ determination.” *Transcontinental Gas Pipe Line Co*., 161 FERC ¶ 61,250, P 33 (2017) (Rehearing Order). Having thus “determined that the Atlantic Sunrise Project is in the public convenience and necessity,” the Commission “was not required to make a separate finding that the project serves a ‘public use’ to allow the certificate holder to exercise eminent domain.” *Id*.

Homeowners further argued that issuance of a tolling order without a corresponding stay of the Certificate Order deprived them of a meaningful opportunity for judicial review of the Commission’s public use decision. The Commission explained that the “use of tolling orders has been found to be valid by the courts” and, in this case, was necessary so the Commission could “afford[] the

multiple rehearing requests in this proceeding the careful consideration they are due." *Id*. PP 37, 39.

B. The Panel's Decision

On appeal, the panel addressed four consolidated petitions for review which argued that the Commission's orders suffered from several substantive and procedural flaws. The panel rejected these claims, finding that the Commission properly conducted its environmental assessment under the National Environmental Policy Act, appropriately found that there was a market need for the Project, as required by the Natural Gas Act, and afforded the parties due process.

With respect to this last issue, the Homeowners argued that the Commission's delay in acting on their rehearing request, while allowing construction to proceed, denied them an opportunity to be heard on whether Transco's taking of their property satisfied the public use requirement of the Fifth Amendment. *Allegheny Def. Project*, 932 F.3d at 948. The panel found that this claim was foreclosed by circuit precedent. Citing *Midcoast*, the panel explained that, so long as the Commission's determination under the Natural Gas Act that a project is required by the public convenience and necessity is not legally deficient, "it necessarily satisfies the Fifth Amendment's public-use requirement." *Id*. And the Panel noted that the Homeowners had neither "claim[ed] that they were deprived of a meaningful opportunity to be heard as part of the Commission's

proceedings leading up to its issuance of the Certificate Order," nor even acknowledged *Midcoast*, much less distinguished this controlling precedent. *Id*.

In a concurring opinion, Judge Millett took issue with the Commission's practice of issuing tolling orders to enable it to address requests for rehearing, while at the same time generally allowing construction of infrastructure projects to commence before a final ruling on the merits of those requests. Judge Millett argued that section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), should be read to impose a strict 30-day time limit for the Commission to address the merits of requests for rehearing. *See Allegheny Def. Project*, 932 F.3d at 951 ("Congress … gave the Commission 30 days to fish or cut bait"). Judge Millett acknowledged that this Court has, on multiple occasions, found that tolling orders are permissible under the Act. *Id*. (citing *Delaware Riverkeeper*, 895 F.3d at 113; *Moreau v. FERC*, 982 F.2d 556, 564 (D.C. Cir. 1993); *California Co.*, 411 F.2d at 722). She also noted that "[c]ircuit precedent has already rejected a due-process challenge to the Commission's tolling orders." *Id*. at 953 (citing *Delaware Riverkeeper*, 895 F.3d at 112-13). Judge Millett believed, however, that the potential harm to landowners stemming from delay in having their claims judicially reviewed counseled in favor of "a second look" at this precedent. *Id*. at 956.

ARGUMENT

A. The Panel's Opinion Did Not Address The Use Of Tolling Orders Under The Natural Gas Act.

Homeowners ask the Court to "reconsider and overturn *California Company* and its progeny," which found that the Commission's use of tolling orders is permissible under the Natural Gas Act. Petition for Rehearing *En Banc*, filed Sept. 16, 2019 (Petition) at 2. But in rejecting the Homeowners' due process claims, the panel did not cite – much less rely upon – *California Company* or any other case upholding the Commission's authority to issue tolling orders.

The panel had no need to address the effect of the tolling orders in this case because it found that the procedures employed by the Commission leading up to the Certificate Order afforded Homeowners a meaningful opportunity to be heard – a fact that Homeowners have never disputed. *Allegheny Def. Project*, 932 F.3d at 948 ("The Homeowners make no claim that they were deprived of a meaningful opportunity to be heard as part of the Commission's proceedings ….''). And as the panel explained, Homeowners' substantive complaint – that the Commission is required to make a separate public-use determination for Fifth Amendment purposes – is foreclosed by this Court's *Midcoast* decision, which "held that, as long as FERC's public-convenience-and-necessity determination is not legally deficient, it necessarily satisfies the Fifth Amendment's public-use requirement." *Id*. (citing *Midcoast*, 198 F.3d at 973).

Homeowners' extended critique of *California Company* and its progeny thus fails to establish that the panel erred in any respect. For this reason alone, the petition for rehearing should be denied. *See D.C. Circuit Handbook of Practice and Internal Procedures* at 57 ("The petition must state with particularity the errors that the panel is claimed to have made."); Fed. R. App. P. 40(a)(2) ("The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended"). In any event, as discussed below, there is no need to revisit the statutory basis for tolling orders.

B. Homeowners Offer No Valid Reason To Overturn *California Company* And Its Progeny.

1. The language of Natural Gas Act section 19(a) does not require a final decision on the merits within thirty days.

Under the Natural Gas Act, an application for agency rehearing is a prerequisite to judicial review. 15 U.S.C. § 717r(a). The Act specifies that, on rehearing, the Commission "shall have the power to grant or deny rehearing or to abrogate or modify its order without further hearing." *Id*. "Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." *Id*. Citing to Judge Millett's concurrence, Homeowners claim that the "most natural reading" of section 19(a) is that the Commission must grant or deny any requests for rehearing

on the merits within thirty days. Petition at 12. But every court to consider the issue has disagreed.

On its face, Natural Gas Act section 19 does not require a final rehearing decision on the merits within thirty days. *Kokajko*, 837 F.2d at 525.[2] Instead, the statute says that, unless the Commission "acts upon the application for rehearing" within thirty days, it "may be deemed to have been denied." 15 U.S.C. § 717r(a). The statute thus "require[s] FERC to take *some kind of action* within 30 days for the petition not to be deemed denied by operation of law." *Berkley*, 896 F.3d at 631. The Commission generally "acts upon" a rehearing request within thirty days by issuing a tolling order, which "grants" rehearing for further consideration on the merits. *See Gen. Am. Oil Co.*, 409 F.2d at 599 (holding that an interpretation of 15 U.S.C. § 717r(a) that permits the issuance of orders granting rehearing for further consideration is the "more reasonable construction"). Alternatively, the Commission could address the merits within thirty days, or take no action and thus invoke the statutory option to have requests for rehearing denied by operation of law. *See, e.g.*, *Algignis, Inc.*, 168 FERC ¶ 61,107 (2019) ("The Commission took

[2] *Kokajko* arises under section 313 of the Federal Power Act, 16 U.S.C. § 825*l*, also administered by the Commission, which is the same in all relevant respects as section 19 of the Natural Gas Act, 15 U.S.C. § 717r. 837 F.2d at 525 (rehearing and jurisdictional review provisions of the two statutes "are in all material respects substantially identical," and cases construing these provisions can be cited "interchangeably") (quoting *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981)).

no action on the rehearing request within 30 days of its filing. Accordingly, notice is hereby given that the request for rehearing was denied by operation of law."); *Fla. Se. Connection*, 168 FERC ¶ 61,188 (2019) (same).

That the statute does not impose a thirty-day "statutory time limit" (Petition at 12) is further illustrated by the fact that, if the Commission takes no action within that period, the rehearing request "may" – not "is," nor "must," nor "shall" – be "deemed to have been denied." 15 U.S.C. § 717r(a). Section 19 of the Natural Gas Act thus leaves the Commission with the ability to act on the merits beyond the purported "time limit," a fact this Court has long recognized. *See Texas-Ohio Gas Co. v. Fed. Power Comm'n*, 207 F.2d 615, 616-17 (D.C. Cir. 1953) ("The Commission says that it has power to take action … after the thirty-day period has passed. If that is so – and we see no reason to the contrary – the Commission could take action as much as 100 or 200 days later.").

Congress plainly knows how to expressly condition judicial review on the Commission's failure to "act on the merits of a rehearing request" when it wants to. In 2018 amendments to the Federal Power Act, Congress addressed how to obtain judicial review of tariff filings in the event the Commission is unable to act upon them due to a deadlock or lack of quorum. Congress specified that, in such circumstances, if the Commission "fails to act on the merits of the rehearing request" within thirty days of its filing, then judicial review is available. 16 U.S.C.

§ 824d(g)(2). The precise phrasing in this recent amendment is strong evidence that the broad phrase "acts upon the application" in Natural Gas Act section 19(a) should not be read to mean only "act on the merits." *See Dep't of State v. Washington Post Co*., 456 U.S. 595, 600 (1961) (specific terms are "benchmarks for measuring" the general term).

2. *California Company* correctly found that practical considerations counsel against interpreting Natural Gas Act section 19(a) as imposing a thirty-day time limit.

While Homeowners insist that Natural Gas Act section 19(a), 15 U.S.C. § 717r(a), must be read to impose a "statutory time limit" for rehearing decisions (Petition at 12), the Court has already found that there is no reason to believe that "Congress would have wished to impose such a rigid straight jacket on the Commission." *California Co*., 411 F.2d at 721. To the contrary, the rehearing rules in section 19(a) are "the product of an awareness [of] FERC's complex and multi-party proceedings." *ASARCO, Inc. v. FERC*, 777 F.2d 764, 774 (D.C. Cir. 1985) (Scalia, J.). Nowhere is this more evident than in natural gas infrastructure proceedings. In this case, the proceedings before the Commission involved more than 125 intervenors. *See* Certificate Order, 158 FERC ¶ 61,125, Appendix A, B. Eleven separate requests for agency rehearing were filed, totaling 307 pages, and raising at least 16 distinct issues. These tallies refute Homeowners' flippant suggestion that the Commission issues tolling orders simply so it can "take its

time" on rehearing. Petition at 13. *See also* Rehearing Order, 161 FERC ¶ 61,250 at P 39 (tolling order was necessary to "affor[d] the multiple rehearing requests in this proceeding the careful consideration they are due").

Interpreting Natural Gas Act section 19(a) to mandate action on the merits within thirty days would prevent the Commission "from giving careful and mature consideration to the multiple, and often clashing, arguments set out in applications for rehearing in complex cases such as this one." *California Co*., 411 F.2d at 721. This would put the Court "in the awkward position of reviewing a decision which the agency for the best of reasons may be willing to alter," or at least further expound upon for the benefit of the public and the courts. *Id*. *See also Pub. Serv. Comm'n v. Fed. Power Comm'n*, 543 F.2d 757, 774 n.116 (D.C. Cir. 1974) ("obvious purpose" of section 19(a) "is to afford the Commission the first opportunity to consider, and perhaps dissipate, issues which are headed for the courts"). These are the very "administrative and judicial problems" that supported *California Company's* conclusion that section 19(a), 15 U.S.C. § 717r(a), should not be read to require action on the merits within thirty days.

3. The Court has already rejected the contention that tolling orders are impermissible in cases involving pipeline construction.

Homeowners contend that due process concerns should preclude the use of tolling orders in cases involving pipeline construction. Petition at 13-14. But

nothing in the language of Natural Gas Act section 19(a), 15 U.S.C. 717r(a), supports such a carve out. In fact, other provisions of the Natural Gas Act make clear that Congress contemplated that pipeline construction would continue while rehearing proceeded. Section 7(h) of the Act vests pipeline companies with eminent domain authority immediately upon receipt of a certificate of public convenience and necessity. 15 U.S.C. § 717f(h). The Act further specifies 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." *Id*. § 717r(c). And this Court has already rejected the notion that the use of tolling orders violates due process in natural gas infrastructure cases as a matter of law. *Delaware Riverkeeper*, 895 F.3d at 113. *See also Berkley*, 896 F.3d at 631 (the conclusion that tolling orders are permissible under 15 U.S.C. § 717r(a) "is not changed simply because the pipeline construction may continue while a rehearing petition is pending").

As *Delaware Riverkeeper* explained, there is a remedy available should any particular tolling order raise due process concerns: "any claim of unreasonable or unconstitutional delay – or any other claim designed to preserve the integrity of future judicial review in individual certification proceedings – would lie in a mandamus action filed directly in the court of appeals." 895 F.3d at 113. In this case, petitioners opposing the Atlantic Sunrise Project twice availed themselves of

this option. Both times, petitioners argued that the use of tolling orders inflicted irreparable harm and denied them due process. *See* Emergency Motion for Stay, filed Oct. 30, 2017, at 22 (Dkt. Entry No. 170128); Motion for Stay, filed Jan. 16, 2018, at 14-16 (Dkt. Entry No. 1713155). Both times, the Court found that the petitioners' claims did not warrant a stay pending judicial review. *See* Orders Nov. 8, 2017 (Dkt. Entry No. 1703665) and Feb. 16, 2018 (Dkt. Entry No. 1718314), in D.C. Cir. Nos. 17-1098, *et al*.

C. The Panel Correctly Found That *Midcoast* Resolved Homeowners' Due Process Claim.

Homeowners briefly argue that the panel erred when it found that *Midcoast* answered their due process/public use claim. Petition at 15-16. The Court should not entertain this claim. On appeal, Homeowners made "no effort to distinguish (or to even acknowledge) [the Court's] holding in *Midcoast*." *Allegheny Def. Project*, 932 F.3d at 948. It is far too late for them to try to do so now. *See, e.g.*, *Petit v. Dep't of Educ.*, 675 F.3d 769, 779 (D.C. Cir. 2012) (failure to raise arguments in opening briefs waives those arguments).

In any event, while Homeowners claim that *Midcoast* merely addressed the scope of review to be applied to public-use determinations (Petition at15), it did more than that. *Midcoast* found that the Commission's Natural Gas Act determination that a project is required by the "public convenience and necessity" establishes that any associated taking would serve a "public use." *Midcoast*, 198

F.3d at 973 (since "in issuing the certificate to Southern, the Commission has explicitly declared that the North Alabama Pipeline will serve the public convenience and necessity, we hold that the takings complained of served a public purpose"). *See also Allegheny Def. Project*, 932 F.3d at 948 (discussing *Midcoast*).

In this case, Homeowners' "ma[d]e no claim that they were deprived of a meaningful opportunity to be heard as part of the Commission's proceedings leading up to its issuance of the Certificate Order." *Allegheny Def. Project*, 932 F.3d at 948. And *Midcoast* holds that, in the absence of any deficiency in the Commission's public interest determination under the Natural Gas Act, the Fifth Amendment's public use requirement has been satisfied. *Id*. Moreover, Homeowners' substantive gripe is that the Commission's "public convenience and necessity" determination relied on contracts with shippers as evidence of a market need for the Project. *See* Petition at 17.[3] That claim has been repeatedly rejected by this Court. *See id*. at 947 (citing *Sierra Club v. FERC*, 867 F.3d 1357, 1379 (D.C. Cir. 2017); *Myersville Citizens for a Rural Cmty., Inc. v. FERC*, 783 F.2d

[3] In fact, the Commission "did not stop there. It also relied on comments by two shippers and one end-user, as well as a study submitted by one of the Environmental Associations, all of which reinforced the demand for the natural gas shipments." *Allegheny Def. Project*, 932 F.3d at 947.

1301, 1311 (D.C. Cir. 2015); and *Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 111 n.10 (D.C. Cir. 2014)).

CONCLUSION

For the foregoing reasons, Homeowners' petition for rehearing should be denied.

Respectfully submitted,

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October 8, 2019

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the type-volume limitation of Fed. R. App. P. 35(b) and 40(b) because it contains 3,898 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in Times New Roman 14-point font using Microsoft Word 2013.

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October 8, 2019

CERTIFICATE OF SERVICE

I hereby certify that, on October 8, 2019, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert M. Kennedy
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