***EN BANC* ORAL ARGUMENT SCHEDULED FOR MARCH 31, 2020**

No. 17-1098 (consolidated with Nos. 17-1128, 17-1263, 18-1030)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Allegheny Defense Project, *et al.*,

Petitioners,

v.

Federal Energy Regulatory Commission,

Respondent,

On Petition for Review of Orders of the Federal Energy Regulatory Commission

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BRIEF OF THE EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*:

All parties and intervenors appearing in this case are listed in Rehearing *En Banc* Brief of Respondent Federal Energy Regulatory Commission. The following have appeared as *amici curiae* in support of Petitioners:

(1) The States of Maryland, Delaware, Illinois, Minnesota, New Jersey, New York, Oregon, and Washington, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, and the People of the State of Michigan;

(2) Affected Landowners William Limpert, Carlos B. Arostegui, Richard G. Averitt III, Sandra S. Averitt, Mill Ann Averitt, Richard G. Averitt IV, Carolyn Fischer, Anne A. Norwood, Kenneth W. Norwood, Hershel Spears, Nancy Kassam-Adams, Shahir Kassam-Adams, Robert C. Day, Darlene Spears, Quinn Robinson, Delwyn A. Dyer, Clifford A. Shaffer, Maury Johnson, the New Jersey Conservation Foundation, Catherine Holleran, Alisa Acosta, Stacey McLaughlin, Craig McLaughlin, William McKinley, Pamela Ordway, Neal C. Brown LLC Family, Toni Woolsey, Ron Schaaf, Deb Evans, the Evans Schaaf Family LLC, and the City of Oberlin; and

(3) Alliance for the Shenandoah Valley, Chesapeake Bay Foundation, Inc., Citizens for Pennsylvania's Future, Cowpasture River Preservation Association, Defenders of Wildlife, Delaware Riverkeeper Network, Food & Water Watch, Friends of

Buckingham, Friends of Nelson, Highlanders for Responsible Development, Mountain Watershed Association, Natural Resources Defense Council, Public Justice, Sound Rivers, Inc., Virginia Wilderness Committee, and Winyah Rivers Alliance.

The Edison Electric Institute also anticipates that the Interstate Natural Gas Association of America will file an *amicus curiae* brief in support of Respondent.

Rulings Under Review:

References to the rulings at issue appear in the Rehearing *En Banc* Brief of Respondent Federal Energy Regulatory Commission.

Related Cases:

References to related cases appear in the Rehearing *En Banc* Brief of Respondent Federal Energy Regulatory Commission.

CERTIFICATE OF COUNSEL PURSUANT TO CIRCUIT RULE 29(d)

The Edison Electric Institute's *amicus curiae* brief is focused on the implications for the wholesale electricity markets and transmission services if the Court should hold that the Federal Energy Regulatory Commission cannot issue orders granting rehearing for further consideration under the Natural Gas Act. Notably, FERC has engaged in a similar practice under the Federal Power Act. The Edison Electric Institute is aware of one other *amicus curiae* brief to be filed in support of Respondent in this case, which will be filed by the Interstate Natural Gas Association of America. That brief will focus on different issues than those raised in this *amicus curiae* brief. In particular, the Edison Electric Institute understands that the Interstate Natural Gas Association will not address the consequences that a decision in this case may have on proceedings under the Federal Power Act. Accordingly, counsel for the Edison Electric Institute certifies, pursuant to D.C. Circuit Rule 29(d), that it is not practicable to file a joint *amicus curiae* brief with other potential *amici* in support of Respondent and that it is therefore necessary to file a separate brief.

/s/ Scott A. Keller
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, the Edison Electric Institute states that it is a national association of investor-owned electric companies. The Edison Electric Institute has no outstanding publicly-held shares or debt securities, and no publicly-owned company has a 10% or greater ownership interest in the Edison Electric Institute.

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INTEREST OF *AMICUS CURIAE*

This brief is filed by the Edison Electric Institute ("EEI") as *amicus curiae* in support of Respondent Federal Energy Regulatory Commission ("FERC").[1] EEI is the association that represents all U.S. investor-owned electric companies, international affiliates, and industry associates worldwide. EEI members provide electricity for approximately 220 million Americans and operate in all 50 States and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States. EEI members own about 75% of transmission system facilities in the country. EEI members include vertically integrated utilities, competitive transmission developers, and power producers that participate in wholesale power markets.

EEI's members make considerable investments in energy infrastructure—investments FERC and Congress have recognized are critical to ensure a reliable, cost-effective, and modern bulk power system. EEI's members and the facilities they own and operate, including electric generation and transmission assets located across the United States, are extensively regulated by FERC pursuant to its broad

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), the Edison Electric Institute affirms that no party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. And no person, other than the Edison Electric Institute, its members, and its counsel, contributed money that was intended to fund the preparation or submission of this brief.

jurisdiction under the Federal Power Act. The national electric grid includes nearly a quarter-million miles of high-voltage lines, most of which are subject to FERC's jurisdiction, as well as generation capable of producing over 400 million megawatt hours of electricity per month. EEI and its members are thus regularly parties to complex proceedings before FERC. These proceedings often involve dozens of parties, facilities in multiple States, and thousands of pages of filings addressing nuanced technical issues.

While this case involves FERC's authority under the Natural Gas Act, the Federal Power Act's provisions regarding rehearing parallel the language of the Natural Gas Act in all material respects. *Compare* 15 U.S.C. § 717r(a), *with* 16 U.S.C. § 825*l*(a). Accordingly, the Court's decision on whether FERC may grant rehearing for further consideration—and ensure itself sufficient time to engage in reasoned decisionmaking that addresses concerns raised by parties on rehearing—has significant implications for proceedings arising under the Federal Power Act. EEI is well-positioned to explain the harms that will result if the Court holds that FERC lacks authority to issue orders granting rehearing for further consideration.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2) and Circuit Rule 29(b), all parties consented to the filing of this *amicus curiae* brief.

STATUTES AND REGULATIONS

Except for the following, which is contained in the Addendum to this brief, all applicable statutes and regulations are contained in the Addendum to the Rehearing *En Banc* Brief of Respondent Federal Energy Regulatory Commission: 47 U.S.C. § 405(b)(1).

SUMMARY OF ARGUMENT

This Court should reaffirm that FERC has statutory authority to grant rehearing and engage in further consideration of its orders. Nothing in the Natural Gas Act or Federal Power Act prohibits FERC from issuing orders granting rehearing for further consideration. This Court has recognized for decades that FERC has this authority and nothing has changed to warrant an overhaul of that longstanding precedent. *See Cal. Co. v. Fed. Power Comm'n*, 411 F.2d 720, 722 (D.C. Cir. 1969).

FERC rehearing and additional consideration results in responsible agency decisionmaking. This is particularly crucial here, where complicated laws govern FERC's authority over the natural gas, power, hydropower, and oil industries. As this Court has long recognized, these FERC proceedings are often complex, require significant technical expertise, and address sophisticated arguments made by parties whose entire businesses focus on these different markets. Proceedings under the

Natural Gas Act and Federal Power Act, therefore, often involve dozens of parties, facilities spanning multiple States, and an extensive administrative record.

When parties file applications for rehearing of FERC orders, the agency must first determine whether to even respond. If FERC chooses to respond, it then has a duty to "respond meaningfully" to a party's objection. *See, e.g.*, *PPL Wallingford Energy LLC v. FERC*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (stating that FERC's "'failure to respond meaningfully' to objections raised by a party renders its decision arbitrary and capricious") (quoting *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001)); *Canadian Ass'n*, 254 F.3d at 299 ("Unless [FERC] answers objections that on their face seem legitimate, its decision can hardly be classified as reasoned.").

FERC's interest in responding meaningfully to all arguments and issues raised in rehearing applications under the Federal Power Act and Natural Gas Act is not altruistic, but rather mandated by the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A) (requiring courts to set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law). To survive judicial review under the Administrative Procedure Act, FERC must demonstrate that its decisions are reasoned and supported by the record. And the record that FERC itself develops is what the

reviewing court examines when determining whether the requirements of the Administrative Procedure Act have been satisfied.

Yet, responding meaningfully to the arguments raised in many rehearing applications takes time. In a proceeding involving tens of rehearing requests, it may take FERC easily more than 30 days to analyze the hundreds or thousands of pages submitted by the parties. FERC thus faces a tension that this Court undoubtedly appreciates all too well: FERC wants to ensure that parties receive full consideration of their arguments, but this proper consideration may delay final decisions. FERC's practice of issuing orders granting rehearing for further consideration thus guarantees that FERC has the time necessary to adequately respond to all arguments raised on rehearing. This allows FERC to satisfy its obligations under the Federal Power Act, Natural Gas Act, and Administrative Procedure Act, giving full consideration to the record in a proceeding as expeditiously as possible, even if takes more than 30 days.

Accordingly, a broad finding that FERC cannot grant rehearing for further consideration would have an adverse impact on litigation in federal courts in cases where FERC needs additional time to consider complex issues. Without the ability to grant rehearing for further consideration, it would be very difficult, if not impossible, for FERC to engage substantively with the various arguments raised on rehearing in all of its cases in a mere 30 days. Because it would require significant

resources for FERC to give full consideration to all the rehearing requests on the myriad of complicated proceedings pending before it at any given time, FERC would undoubtedly deny many more requests for rehearing—with deficient rehearing orders that fall short of Administrative Procedure Act standards. Alternatively, FERC might let those rehearing requests be deemed denied by operation of law. Either way, litigation would ensue, and federal appellate courts would be in the unenviable position of having to sort out many technical issues that could have been resolved by FERC if it had more time. The federal courts' experience with recent FERC rulemakings confirms the benefit of allowing FERC sufficient time to refine its policies on rehearing.

In sum, if FERC is denied sufficient time to address arguments raised in rehearing applications, then parties will receive less consideration before FERC, more litigation in federal courts will ensue, and courts will review and remand scores of deficient rehearing orders that will not reflect reasoned decisionmaking. Because there is no statutory deadline to act on remand, only then will FERC have sufficient time to prepare orders that fully address the arguments raised earlier on rehearing. In all likelihood, those remand orders and subsequent rehearing orders will issue much later than a rehearing order under the status quo interpretation of the Federal Power Act and Natural Gas Act. All of this would be bad for FERC, litigating parties, and the courts. This Court should therefore reaffirm that FERC has authority to grant

rehearing for further consideration under both the Natural Gas Act and the Federal Power Act.

ARGUMENT

I. FIFTY YEARS OF PRECEDENT AND PRACTICE SUPPORTS FERC'S STATUTORY AUTHORITY TO GRANT REHEARING FOR FURTHER CONSIDERATION.

The Natural Gas Act and Federal Power Act provide FERC the statutory authority to grant rehearing, and this includes granting rehearing for purposes of further consideration. This authority is supported by 50 years of precedent and practice. There has been no intervening change in law or practice that warrants this Court's departure from established precedent—particularly this Court's *California Company* precedent that has existed for a half-century. *See Cal. Co.*, 411 F.2d at 722. Congress also has amended Section 19 of the Natural Gas Act since the issuance of this Court's *California Company* decision, yet Congress has never questioned FERC's ability to grant rehearing for further consideration. In light of this congressional attention to Section 19 of the Natural Gas Act, the Court should be "especially reluctant to reject" the "presumption of continued validity that adheres in the judicial interpretation of a statute." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986).

Section 19(a) of the Natural Gas Act provides that if a party files for rehearing, FERC "shall have power to grant or deny rehearing or to abrogate or modify its order

without further hearing." 15 U.S.C. § 717r(a). "Unless [FERC] acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." *Id.*

As this Court and several others have recognized, this statutory language requiring FERC to "act upon" the rehearing application within 30 days after filing does not compel FERC to "act on the merits" within that time.[2] *See Cal. Co.*, 411 F.2d at 722; *Gen. Am. Oil Co. of Tex. v. Fed. Power Comm'n*, 409 F.2d 597, 599 (5th Cir. 1969); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018), *cert. denied*, 139 S. Ct. 941 (2019); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) (addressing the identical rehearing provision of the Federal Power Act, 16 U.S.C. § 825*l*(a)). Thus, FERC "has 'acted' for purposes of [Section] 19(a) by granting the rehearing."[3] *Gen. Am. Oil Co.*, 409 F.2d at 599.

The rehearing provisions of the Natural Gas Act and Federal Power Act starkly contrast with other statutory regimes that require a federal regulator to grant

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[2] Indeed, Congress can and has distinguished FERC "acting upon" a filing from "acting on the merits" of a filing. In 2018, Congress amended the Federal Power Act by adding Section 205(g)(2), which provides that a request for rehearing is deemed denied if FERC has not "acted on the merits" within 30 days because FERC lacks a quorum, the Commissioners are deadlocked, or as a result of vacancy, incapacity, or recusal. *See* 16 U.S.C. § 824d(g)(2).

[3] There is no legislative history addressing the 30-day rehearing timeline. *See Cal. Co.*, 411 F.2d at 721 ("None of the parties has cited relevant statutory history, and we have found none.").

or deny a request for rehearing within certain timeframes. For example, the Federal Communications Commission Act states that "[w]ithin 90 days after receiving a petition for reconsideration of an order . . . the [Federal Communications] Commission *shall* issue an order granting or denying such petition." 47 U.S.C. § 405(b)(1) (emphasis added). In contrast to the Natural Gas Act, the Federal Communications Commission is required ("shall") to either grant or deny a petition within the relevant time frame. Of note, because definitive action is required under the Federal Communications Commission Act—in contrast to the less prescriptive regimes applied to FERC under the Natural Gas Act and Federal Power Act—the Federal Communications Commission has substantially more time to act.[4]

FERC's practice of granting rehearing for further consideration has existed for 50 years. Congress has acquiesced in this practice by amending Section 19 of the Natural Gas Act—without altering FERC's established authority to grant rehearing

[4] Petitioners posit that "[t]he plainest reading of [Section 19(a)] is that FERC must take one of the three enumerated actions—grant rehearing, deny rehearing, or abrogate or modify its order—within thirty days or else the rehearing request will be deemed to be denied." Petitioners' Joint Brief on Rehearing *En Banc* at 13. Of course, while FERC's "tolling" orders are given that label as a shorthand reference, these orders are in fact granting rehearing. For example, the order in this case expressly stated that it was an "Order Granting Rehearings for Further Consideration." *See Order Granting Rehearings for Further Consideration*, Docket No. CP15-138-001 (Mar. 13, 2017). So even under petitioners' reading of Section 19(a), FERC's orders granting rehearing for further consideration take sufficient action within 30 days so that these rehearing applications cannot be deemed denied.

for further consideration. Multiple circuits have recognized and upheld FERC's longstanding practice of granting rehearing for further consideration. *See Cal. Co.*, 411 F.2d at 722; *Gen. Am. Oil Co.*, 409 F.2d at 599; *Berkley*, 896 F.3d at 631; *Kokajko*, 837 F.2d at 525. Against that backdrop, in 2005, Congress amended Section 19 of the Natural Gas Act; Congress added a new subsection granting parties the right to seek immediate judicial review if a federal agency *other than FERC* fails to take action on a required pipeline-construction permit in accordance with FERC's permitting schedule. *See* 15 U.S.C. § 717r(d)(2) (as enacted by Energy Policy Act of 2005, Pub. L. No. 109-58, § 313, 119 Stat. 594 (2005)).[5] Similarly, Congress has amended the Federal Power Act's specific section dealing with FERC's general rehearing timeline. *See* America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3006, Oct. 23, 2018, 132 Stat. 3868 (amending Section 313 of the Federal Power Act to add a new subsection providing a right to judicial review if FERC fails to act on a rehearing request because it is deadlocked or lacks a quorum).

Yet Congress has never amended the Natural Gas Act or Federal Power Act to eliminate *FERC's* authority to issue orders granting rehearing for further consideration or otherwise constrain FERC's rehearing timeline. This strongly suggests that Congress has ratified the circuits' existing, uniform statutory

[5] The only exception to this broad grant of judicial jurisdiction is for permits required under the Coastal Zone Management Act of 1972. *See* 15 U.S.C. § 717r(d)(2).

interpretation allowing FERC to grant rehearing for further consideration. *See, e.g.*, *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Proj., Inc.*, 135 S. Ct. 2507, 2520 (2015) ("'If a word or phrase has been . . . given a uniform interpretation by inferior courts . . . , a later version of that act perpetuating the wording is presumed to carry forward that interpretation.'") (quoting A. Scalia & B. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322 (2012)); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009) ("'Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'") (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

Congress' acquiescence is unsurprising given the dramatic increase in the complexity of the natural gas and power markets—plus their regulatory regimes—since the inception of the Natural Gas Act and Federal Power Act in 1938 and 1935, respectively. From a regulatory perspective, FERC has fundamentally reshaped both industries. FERC's Order No. 888, for example, required that the wholesale transmission function be unbundled from the sale of electric power—and required electric utilities to provide nondiscriminatory, open access to their transmission lines. *See New York v. FERC*, 535 U.S. 1, 10-13 (2002). In Order No. 636, FERC mandated that pipelines "unbundle" their sales and transportation services, effectively deregulating the sales market while preserving cost-based regulation of

pipelines' transportation services. *See United Distrib. Cos. v. FERC*, 88 F.3d 1105, 1126 (D.C. Cir. 1996). These orders, while uniquely transformative, represent only a small fraction of the dozens of major rulemakings FERC has undertaken in recent decades. In fact, since 2016, FERC has issued 30 rulemaking orders that the agency describes as "major" with respect to the electric industry alone. FERC, *Major Orders & Regulations* (Nov. 21, 2019), https://www.ferc.gov/legal/maj-ord-reg.asp.

In addition to this increased complexity, the unbundling of services and functions, inception of organized markets, and increase in non-traditional generation facilities all have led to an exponential increase in the number of stakeholders involved in Natural Gas Act and Federal Power Act proceedings. Multiple statutes have been enacted that require FERC to engage in extensive environmental, historical, and cultural reviews of the projects it authorizes. *See, e.g.*, National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. § 4321, *et seq.*; Endangered Species Act of 1973, 87 Stat. 892, 16 U.S.C. § 1531, *et seq*. Each of those statutes, too, provide additional opportunities and grounds for public participation not contemplated when the Natural Gas Act and Federal Power Act were enacted.

Citing the move to market-based rates and increasing complexity in power markets, some *amici* argue that "FERC's regulatory responsibilities have shifted such that tolling orders result in irreparable harm not contemplated in *California*

Company." *En Banc* Brief of Alliance for the Shenandoah Valley, *et al*., at 22. The changes to the power and gas markets do not warrant a departure from decades of precedent under both the Natural Gas Act and Federal Power Act. If anything, the increased complexity in power markets favors giving FERC additional time to consider its orders.

In addition, this argument fundamentally misconceives "the deference this Court must accord to longstanding and well-entrenched decisions, especially those interpreting statutes that underlie complex regulatory regimes." *California v. FERC*, 495 U.S. 490, 499 (1990). "Stare decisis is usually the wise policy because in most matters, it is more important that the applicable rule of law be settled than that it be settled right . . . This is commonly true, even where the error is a matter of serious concern, provided correction can be had by legislation." *Square D Co.*, 476 U.S. at 424. The Court's guidance is particularly salient given that Congress has amended both the Natural Gas Act and Federal Power Act, including the specific sections of those acts establishing FERC's general rehearing timeline obligations, and has chosen to leave FERC's authority to grant rehearing for further consideration unaltered.

II. LITIGANTS AND COURTS WOULD BE HARMED IF FERC LACKS AUTHORITY TO GRANT REHEARING FOR FURTHER CONSIDERATION.

Proceedings before FERC are often extraordinarily complicated—especially those arising under the Federal Power Act. They frequently involve dozens of parties, thousands of pages of documents, and facilities spanning multiple States. It may be incredibly difficult or impossible for FERC—within 30 days—to engage in "reasoned decisionmaking" that adequately grapples with the various arguments raised in rehearing applications. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 764-65 (2016) (holding that court must ensure that FERC "engaged in reasoned decisionmaking—that it weighed competing views, selected [an outcome] with adequate support in the record, and intelligibly explained the reasons for making that decision").

This duty to respond meaningfully to all arguments and issues raised in rehearing applications arises from the Administrative Procedure Act. *See* 5 U.S.C. § 706(2)(A) (requiring that courts set aside agency actions, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law). To survive judicial review, FERC's decisions on rehearing must be reasoned and supported by the record. In fact, this Court regularly takes FERC to task for failing to satisfy this obligation and remands decisions to FERC for further proceedings. *See, e.g.*, *Petro Star Inc. v. FERC*, 835 F.3d 97, 99

(D.C. Cir. 2016) (remanding because FERC "failed to respond meaningfully to evidence presented . . . rendering its decision arbitrary and capricious"); *W. Deptford Energy, LLC v. FERC*, 766 F.3d 10, 12 (D.C. Cir. 2014) (vacating FERC orders in part and remanding because FERC "provided no reasoned explanation for how its decision comports with statutory direction, prior agency practice, or the purposes of the filed rate doctrine").

Therefore, FERC's practice of issuing orders granting rehearing for further consideration, when appropriate to do so, ensures that FERC has adequate time to satisfactorily engage arguments raised in rehearing applications, as required by the Administrative Procedure Act. On rehearing, FERC often is able to resolve some—if not all—of the issues raised by parties. FERC's practice of issuing orders granting rehearing for further consideration thus guarantees that parties receive more process before an agency that has technical expertise. *See, e.g.*, *Nw. Pipeline Corp. v. FERC*, 863 F.2d 73, 78 (D.C. Cir. 1988) (rehearing requirement of the Natural Gas Act allows FERC "to bring its knowledge and expertise to bear on an issue before it is presented to a generalist court"); *Save Our Sebasticook v. FERC*, 431 F.3d 379, 382 (D.C. Cir. 2005) ("Even if it were very likely that [FERC] would deny the rehearing petition, a reviewing court would at least have the benefit of the agency's expert view of why it thought the petitioner's arguments failed.").

Where rehearing is requested and FERC grants rehearing for further consideration, this does not always result in an extended additional review period. As shown by Exhibit D of the *En Banc* Brief of Alliance for the Shenandoah Valley, *et al.*, FERC regularly resolves rehearing applications following tolling periods of 90 days or less (20% of the rehearing requests listed in Exhibit D and not noted as pending were tolled for 90 days or less and 5% were tolled for 30 days or less). More than half of the rehearing applications listed in this Exhibit D and not noted as pending were tolled for less than 180 days.[6]

Rehearing also reduces the number of petitions for review filed with the courts, and it ensures that the record is more fully developed before litigation commences. If the Court were to hold that FERC cannot take time necessary to consider issues raised on rehearing, then there are many proceedings in which FERC may have significant difficulty substantively engaging with the arguments raised in rehearing applications. Without sufficient time, FERC would likely broadly deny rehearing requests, even where it would have granted rehearing given adequate time

[6] To be sure, FERC should continue to minimize the use and length of tolling periods where they do not undermine the agency's ability to adequately review rehearing requests. FERC has recognized this and is making proactive efforts to fast-track rehearing review in certain cases. *See* Rehearing *En Banc* Brief of Respondent Federal Energy Regulatory Commission at 51-52 (discussing FERC's efforts to expedite decisions on the merits of requests for rehearing of natural gas infrastructure orders that implicate landowner rights, including by formally reorganizing the Office of General Counsel).

to consider the arguments on rehearing. FERC would know many of these orders would be remanded by the courts for failure to satisfy Administrative Procedure Act requirements and that it would have the time on remand it was denied on rehearing. Alternatively, FERC would fail to act, which would in turn be deemed a denial. In the absence of a rehearing order, the courts would struggle to reach an outcome on judicial review. Given the deficiency of most rehearing orders under this alternate framework, litigants in those proceedings would be more disposed to file suit in federal court, which would then be required to process additional petitions for review of FERC orders. This litigation would raise issues that could have been resolved on rehearing if FERC had sufficient time to consider the issues and would require federal courts to act without the benefit of FERC's additional expert guidance.

As this Court's history with FERC cases demonstrates, proceedings initiated by market participants are often complicated and hotly contested. *See, e.g.*, *Emera Maine v. FERC*, 854 F.3d 9, 16 (D.C. Cir. 2017) (complaint initiated by State of Massachusetts and customers challenging rates resulting in petitions for review filed by both customers and utilities challenging FERC orders). FERC has no control over whether and when parties initiate such proceedings, and it has even less time to develop its position as to underlying policy issues internally before proceeding to decisionmaking.

This dilemma might be best understood by examining this Court's recent experience with FERC Order No. 1000—FERC's most recent major reform of electric transmission planning and cost allocation under the Federal Power Act.[7] When FERC issued Order No. 1000, parties filed 58 timely applications for rehearing. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 139 FERC ¶ 61,132, Order No. 1000-A, at Appendix A, 77 Fed. Reg. 32,184 (2012). About 10 months later, FERC issued its order on rehearing: Order No. 1000-A. *Id.* Parties filed only five timely rehearing applications from Order No. 1000-A. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 141 FERC ¶ 61,044, Order No. 1000-B, at Appendix A, 77 Fed. Reg. 64,890 (2012). About five months later, FERC issued Order No. 1000-B, its order on rehearing of Order No. 1000-A. *Id*. Parties filed fifteen petitions for review in this Court of Orders No. 1000, 1000-A, and 1000-B. In Orders No. 1000-A and 1000-B, FERC "rejected requests to eliminate or substantially modify Order No. 1000" but "provided clarifications relating to scope, terminology, and underlying reasons for certain reforms." *S.C. Pub. Serv. Auth.*, 762 F.3d at 53. As a result, by the time this Court ultimately

[7] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132 (2012), *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

considered Order No. 1000, this rule was far more refined and many issues originally raised on rehearing had been resolved or clarified.

The Second Circuit's experience reviewing FERC's Order No. 773 parallels this Court's experience with Order No. 1000. In Order No. 773, FERC adopted standards and procedures for determining which power distribution facilities are subject to FERC's jurisdiction.[8] Parties filed thirteen rehearing requests regarding Order No. 773. 143 FERC ¶ 61,053, at P 10. About four months later, FERC issued a rehearing order—Order No. 773-A. *Id.* In contrast to the volume of rehearing applications from the original order, only two parties sought rehearing of Order No. 773-A. Another four months later, FERC issued an order articulating its rationale for denying rehearing. Two parties ultimately filed petitions for review of Order Nos. 773 and 773-A. By the time the Second Circuit considered the final rule, many issues originally raised on rehearing had already been resolved or clarified by FERC—leaving only two claims before the court. *New York*, 783 F.3d at 953. Further, FERC's rehearing orders allowed the court to consider a fully developed record that included "an extensive array of factual material, as well as scores of comments submitted by interested parties in response to the agency's published preliminary

[8] *Revisions to Electric Reliability Organization Definition of Bulk Electric System*, Order No. 773, 141 FERC ¶ 61,236 (2012), *clarified and reh'g denied*, Order No. 773–A, 143 FERC ¶ 61,053 (2013), *aff'd*, *New York v. FERC*, 783 F.3d 946 (2d Cir. 2015).

proposals" and "reasoned explanations [provided by FERC], spanning hundreds of pages, for adopting the standards and procedures here at issue in lieu of its former rule." *Id.* at 959.

This dynamic is not limited to FERC's industry-wide rulemakings. Contested applications by regulated entities to charge new rates or supply new services, administrative litigation initiated by both FERC and stakeholders, and many other proceedings before FERC all benefit from the sharpened analysis that careful rehearing allows. For example, in a recent FERC proceeding to establish a new capacity product in just one of the regional markets FERC regulates, entities filed 27 rehearing requests from FERC's initial order.[9] After FERC's extensive order resolving the rehearing applications, only "[n]ine organizations petitioned [this Court] for review," raising only "eight challenges." *Advanced Energy Mgmt. All.*, 860 F.3d at 660. These examples, of course, fail to capture the many petitions for review that were avoided entirely because FERC adequately addressed parties' concerns on rehearing.

If FERC had been limited to 30 days to review the rehearing applications in the proceedings just discussed, it would have been very difficult for FERC to substantively engage with all the parties' arguments. Perhaps FERC would have

[9] *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 (2015), *reh'g denied*, 155 FERC ¶ 61,157 (2016), at Appendix A, *aff'd, Advanced Energy Mgmt. All. v. FERC*, 860 F.3d 656 (D.C. Cir. 2017).

reviewed and issued orders on some of the rehearing applications within 30 days. Or perhaps instead FERC would have simply denied the applications or waited for them to be deemed denied after 30 days. In any event, the federal courts would have been faced with the unenviable task of having to sort through many highly technical, nuanced arguments that FERC ultimately could have resolved or clarified on rehearing. Not only would there have been more litigation in court, but those petitions for review also would have had less well-developed administrative records. The courts would in turn be forced to remand many more proceedings to FERC for further development.

Thus, courts, FERC, regulated entities, and stakeholders would find themselves in a contorted regime if FERC could not grant rehearing for further consideration. If FERC is compelled to act on all rehearing applications in a mere 30 days, FERC would fully expect that its decisions would be remanded. There is no statutory deadline to act on remand, so only on remand would FERC have sufficient time to address the arguments originally raised on rehearing (and remanded by the court)—and at a level that would satisfy FERC's obligations under the Administrative Procedure Act. The original order denying rehearing would thus become the functional equivalent of a tolling order, and the inevitable order on remand would take the place of a proper, well-prepared rehearing order. Once FERC finally issued the order on remand, there would be another round of rehearing

applications in response to the remand order, followed by another round of judicial review on rehearing of the remand order. All of this would not only be extraordinarily inefficient, but also it would impose heavy burdens on the courts, FERC, regulated entities, and stakeholders. It also likely would significantly delay relief for aggrieved parties.

This confirms that the Court, years ago, was rightfully "reluctant to impute to Congress a purpose to limit [FERC] to 30 days' consideration of applications for rehearing, irrespective of the complexity of the issues involved, with jurisdiction then passing to the courts to review a decision which at that moment would profitably remain under active reconsideration by the agency." *Cal. Co.*, 411 F.2d at 722. This problem is compounded by the increased complexity of the regulatory framework FERC now oversees and develops—particularly compared to the world that existed when the Natural Gas Act and Federal Power Act were enacted about three generations ago. If FERC lacks authority to grant rehearing and take additional time to consider the parties' arguments, that will have an adverse impact on the litigating parties and the courts. No matter how compelling the immediate case may appear, a broad holding that FERC lacks authority to issue such orders would have far-reaching consequences for cases under both the Natural Gas Act and Federal Power Act—including the majority of cases FERC must decide in which landowners and condemnation are not an issue.

CONCLUSION

EEI respectfully requests that the Court uphold FERC's practice of issuing orders granting rehearing for further consideration.

Dated: February 18, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,298 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(e)(1).

2. 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 a proportionally spaced typeface using the Microsoft Office Word word-processing software in 14-point Times New Roman type style.

Dated: February 18, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d) and D.C. Circuit Rule 25(c), I hereby certify that on this 18th day of February, 2020, I have served the foregoing *Amicus Curiae* Brief upon all counsel registered to receive service through the Court's CM/ECF system via electronic filing.

Dated: February 18, 2020

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ADDENDUM

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22, 1913 (38 Stat. 219)'', and ''such Title 28'' in lieu of ''that Act''.

1937—Subsec. (a). Act May 20, 1937, § 11, inserted '', or suspending a radio operator's license'' after ''or for modifications of an existing radio station license''.

Subsec. (b)(3). Act May 20, 1937, § 12, added par. (3) relating to appeal from decisions in case of any radio operator whose license has been suspended by the Commission.

Subsec. (c). Act May 20, 1937, § 13, inserted in last sentence ''or order'' after ''upon the application''.

CHANGE OF NAME

Act June 7, 1934, ch. 426, 48 Stat. 926, changed name of ''Court of Appeals of the District of Columbia'' to ''United States Court of Appeals for the District of Columbia''.

EFFECTIVE DATE OF 1984 AMENDMENT

Amendment by Pub. L. 98–620 not applicable to cases pending on Nov. 8, 1984, see section 403 of Pub. L. 98–620, set out as a note under section 1657 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF 1952 AMENDMENT

Section 19(2) of act July 16, 1952, provided that: ''The amendments made by this Act to section 402 of the Communications Act of 1934 [this section] (relating to judicial review of orders and decisions of the Commission) shall not apply with respect to any action or appeal which is pending before any court on the date of enactment of this Act [July 16, 1952].''

ADMINISTRATIVE ORDERS REVIEW ACT

Court of appeals exclusive jurisdiction respecting final orders of Federal Communications Commission made reviewable by subsec. (a) of this section, see section 2342 of Title 28, Judiciary and Judicial Procedure.

§ 403. Inquiry by Commission on its own motion

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

(June 19, 1934, ch. 652, title IV, § 403, 48 Stat. 1094.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

§ 404. Reports of investigations

Whenever an investigation shall be made by the Commission it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

(June 19, 1934, ch. 652, title IV, § 404, 48 Stat. 1094.)

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon

which the Commission gives public notice of the order, decision, report, or action complained of.

(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

(June 19, 1934, ch. 652, title IV, § 405, 48 Stat. 1095; July 16, 1952, ch. 879, § 15, 66 Stat. 720; Pub. L. 86–752, § 4(c), Sept. 13, 1960, 74 Stat. 892; Pub. L. 87–192, § 3, Aug. 31, 1961, 75 Stat. 421; Pub. L. 97–259, title I, §§ 122, 127(c), Sept. 13, 1982, 96 Stat. 1097, 1099; Pub. L. 100–594, § 8(d), Nov. 3, 1988, 102 Stat. 3023.)

CODIFICATION

''Reconsiderations'' substituted in text for ''Rehearings'' as the probable intent of Congress, in view of amendment by section 127(c)(1) of Pub. L. 97–259, which substituted ''reconsideration'' for ''rehearing'' wherever appearing in this section.

AMENDMENTS

1988—Pub. L. 100–594 designated existing provisions as subsec. (a), substituted ''section 155(c)(1)'' for ''section 155(d)(1)'' in two places, and added subsec. (b).

1982—Pub. L. 97–259 substituted ''reconsideration'' for ''rehearing'' wherever appearing and ''the Commission gives public notice of the order, decision, report, or action complained of'' for ''public notice is given of orders disposing of all petitions for rehearing filed with the Commission in such proceeding or case, but any order, decision, report, or action made or taken after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order''.

1961—Pub. L. 87–192 provided for petition for rehearing to the authority making or taking the order, decision, report, or action, substituted references to report and action for requirement, wherever else appearing, and inserted references to proceeding by any designated authority within the Commission, wherever appearing.

1960—Pub. L. 86–752 substituted ''any party'' for ''and party'' in first sentence, and inserted sentence dealing with disposition of petitions for rehearing.

1952—Act July 16, 1952, provided for taking of newly discovered evidence and evidence which should have been taken in original hearing.

EFFECTIVE DATE OF 1960 AMENDMENT

Pub. L. 86–752, § 4(d)(4), Sept. 13, 1960, 74 Stat. 892, provided that: ''The amendment made by paragraph (2) of subsection (c) of this section [amending this section] shall only apply to petitions for rehearing filed on or after the date of the enactment of this Act [Sept. 13, 1960].''

§ 406. Compelling furnishing of facilities; mandamus; jurisdiction

The district courts of the United States shall have jurisdiction upon the relation of any person alleging any violation, by a carrier subject to this chapter, of any of the provisions of this chapter which prevent the relator from receiving service in interstate or foreign communication by wire or radio, or in interstate or foreign transmission of energy by radio, from said carrier at the same charges, or upon terms or conditions as favorable as those given by said carrier for like communication or transmission under similar conditions to any other person, to issue a writ or writs of mandamus against said carrier commanding such carrier to furnish facilities for such communication or transmission to the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper pending the determination of the question of fact: *Provided further*, That the remedy given by writ of mandamus shall be cumulative and shall not be held to exclude or interfere with other remedies provided by this chapter.

(June 19, 1934, ch. 652, title IV, § 406, 48 Stat. 1095.)

REFERENCES IN TEXT

This chapter, referred to in text, was in the original ''this Act'', meaning act June 19, 1934, ch. 652, 48 Stat. 1064, known as the Communications Act of 1934, which is classified principally to this chapter. For complete classification of this Act to the Code, see section 609 of this title and Tables.

§ 407. Order for payment of money; petition for enforcement; procedure; order of Commission as prima facie evidence; costs; attorneys' fees

If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the line of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suits the findings and order of the Commission shall be prima facie evidence of the facts therein stated, except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

(June 19, 1934, ch. 652, title IV, § 407, 48 Stat. 1095.)

§ 408. Order not for payment of money; when effective

Except as otherwise provided in this chapter, all orders of the Commission, other than orders for the payment of money, shall take effect thirty calendar days from the date upon which public notice of the order is given, unless the Commission designates a different effective date. All