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

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

ALLEGHENY DEFENSE PROJECT, *et al.*,
and
HILLTOP HOLLOW LIMITED PARTNERSHIP, *et al.*,
Petitioners,
v.
FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,
ANADARKO ENERGY SERVICES COMPANY, *et al.*,
Intervenors.

On Petition for Review of Orders of the Federal Energy Commission,
158 FERC ¶ 61,125 (Feb. 3, 2017),
161 FERC ¶ 61,250 (Dec. 6, 2017), *et al.*

PETITIONERS' OPPOSITION TO MOTION OF FEDERAL ENERGY REGULATORY COMMISSION TO STAY ISSUANCE OF MANDATE

Petitioners respectfully request that the Court deny Respondent Federal Energy Regulatory Commission's ("FERC") motion to stay issuance of the mandate for ninety days, filed on July 6, 2020. The Court ordered that the mandate be issued on July 7, 2020. *See* June 30 Order (Doc. No. 1849494).

FERC's tolling orders "do nothing more than buy itself more time to act on a rehearing application and stall judicial review . . . ." June 30 Opinion (Doc. No. 1849493) at 15. This contravenes the "plain statutory language" of the Natural Gas Act. *Id*. at 4; *see also id*. at 27 ("[T]he Commission has no authority to erase and

replace the statutorily prescribed jurisdictional consequences of its action."). FERC presents no compelling reasons for staying the issuance of the mandate, thereby creating further delay and allowing FERC to continue its unfair and unlawful practice.

This Circuit will grant a motion to stay issuance of the mandate only if "the motion sets forth facts showing good cause for the relief sought." D.C. Cir. R. 41(a)(2). Courts consider traditional stay factors when determining whether good cause for staying the mandate has been shown. *See California v. Am. Stores Co.*, 492 U.S. 1301, 1304–07 (1989) (considering whether movant for stay of mandate has made adequate showing of irreparable injury, probability of success, and balance of equities in favor of stay); *United States v. Microsoft Corp.*, No. 00-5212, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (en banc) (holding that stay motion must be denied regardless of whether Microsoft's certiorari petition would present a "'substantial question'" because Microsoft "failed to demonstrate any substantial harm" from the denial of a stay). FERC has failed to make such a showing here.

In addition, FERC has not established the elements required for a stay pending a (potential) petition for writ of certiorari. To merit a stay pending a petition for writ of certiorari, FERC "must show that the petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P.

41(d)(1). More specifically, it must demonstrate: (1) a reasonable probability that four Justices would vote to grant certiorari; (2) a significant possibility that the Court would reverse the judgment below; and (3) a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed. *Packwood v. Senate Select Comm. on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, J., in chambers); *South Park Indep. School Dist. v. United States*, 453 U.S. 1301, 1303 (1981) (Powell, J., in chambers); *see also* Robert L. Stern, *et al*., *Supreme Court Practice* § 17.19, at 689 (7th ed. 1993) (lower courts apply same factors). FERC has not made such a showing.

FERC exaggerates the consequences of issuing the mandate. Complying with the plain language of the Natural Gas Act will not preclude FERC from "manag[ing] its large case load and bring[ing] its expertise to bear on complex, technical matters before they are presented to the courts of appeals." FERC Motion at 5 (Doc. No. 1850150). As an initial matter, the Court noted that its decision "is not the same thing as saying the Commission must actually decide the rehearing application" within the Act's thirty-day window. June 30 Opinion at 29. In addition, "even after a petition for review is filed, the Commission retains the authority to 'modify or set aside, in whole or in part' the underlying order or findings." *Id.* at 30. This ensures that any "additional time for action comes with

judicial superintendence and the opportunity for the applicant to seek temporary injunctive relief if needed under the ordinary standards for a stay." *Id*. at 31.

And all of this is in addition to the ample time FERC has to apply its expertise during the original certificate proceeding. Indeed, FERC typically refuses to consider any issues on rehearing that were not raised prior to certification. *See No Gas Pipeline v. FERC*, 756 F.3d 764, 770 (D.C. Cir. 2014) (noting that FERC "regularly rejects requests for rehearing that raise issues not previously presented" unless the issue is based on newly available information); 18 C.F.R. § 385.713(c)(3). As in its briefing on the merits of its tolling order authority, FERC here fails to provide a single concrete example where the additional time it allows itself to process rehearing requests has been used to resolve or clarify issues that otherwise would be subject to judicial review.

Accordingly, FERC's argument that it needs "time to consider the implications of the Court's decision" is unavailing. FERC Motion at 6.[1] Petitioners' concerns, on the other hand, are not merely theoretical. For example, Petitioner Sierra Club filed a request for rehearing with FERC in Docket No. CP15-17-000 on May 22, 2020. *See* FERC Accession No. 20200522-5342. In

[1] The Court granted the petition for rehearing en banc regarding FERC's tolling order authority on December 5, 2019. FERC has thus been aware of the realistic prospect of that authority being overturned for more than seven months. It is disingenuous for FERC to now claim that it has been caught off guard without adequate time to consider the implications of such a decision.

response, on June 19, 2020, FERC issued a tolling order. *See* FERC Accession No. 20200619-3050. Staying issuance of the mandate would create more uncertainty, not less, in such situations. Aggrieved parties would be uncertain as to whether the absence of a mandate precludes them from seeking judicial review of the denial of their requests for rehearing (through issuance of a tolling order), or whether they must nevertheless file a petition within the time allowed by the statute. *See* 15 U.S.C. § 717r(a), (b); *see also* Environmental Amici Br. at 12-16, 25-27 (Doc. No. 1824750).

In addition to harming parties with pending rehearing requests in proceedings where FERC has already issued a tolling order (e.g., landowners who are facing condemnation proceedings and aggrieved parties in proceedings where FERC has already authorized construction to proceed), staying the mandate would harm parties whose rehearing requests may be tolled in the next ninety days. For example, FERC issued a Certificate Order for the controversial Mountain Valley Pipeline Southgate Extension on June 18, 2020. *Mountain Valley Pipeline, LLC*, 171 FERC ¶ 61,232 (June 18, 2020). Delaying issuance of the mandate would mean that FERC could issue tolling orders in response to any timely filed requests for rehearing of that Certificate Order. The pipeline company could then begin condemning private property while landowners and other aggrieved parties are kept out of court indefinitely.

FERC claims that a stay of the mandate would not impose a hardship on landowners because, *inter alia*, "nothing bars district courts from holding eminent domain actions in abeyance while agency rehearing is pending or after petitions for judicial review are filed." FERC Motion at 8 (citing Concurring Op. at 5-6). Though it is true that, as the concurring judges noted, "[n]othing in the Natural Gas Act *prevents* a district court from holding an eminent-domain action in abeyance until [FERC] completes its reconsideration of the underlying certificate order," Concurring Op. at 5 (emphasis added), there is also nothing in the Act that explicitly *requires* district courts to do so.

Moreover, in the eminent domain proceedings in this case, the United States District Court for the Eastern District of Pennsylvania ordered the condemnation of the landowners' properties and granted the pipeline company immediate possession of the properties even though the landowners' rehearing request was pending before FERC. *See Transcon. Gas Pipe Line Co. v. Permanent Easement for 2.14 Acres & Temp. Easements for 3.59 Acres in Conestoga Twp., Lancaster Cty., Pa., Tax Parcel No. 1201606900000*, Nos. 17-715, 17-720, 17-722, 17-723, 17-1725, 2017 WL 3624250, at *23 (E.D. Pa. Aug. 23, 2017). In so doing, the court expressly rejected the landowners' argument that this violated their due process rights because "[a]lthough [the landowners'] request for rehearing [was] pending in front of FERC, the [Natural Gas Act] provides that the filing of a

request for rehearing shall not, unless specifically ordered by FERC, operate as a stay of the certificate order." *Id.* at *10 (citations omitted). This precedent confirms that FERC's contention is erroneous. The fact that district courts are not precluded from staying condemnation proceedings pending a FERC rehearing or after a petition for judicial review is filed does not guarantee that district courts will actually hold eminent domain actions in abeyance in such circumstances, and the United States District Court for the Eastern District of Pennsylvania's decision in this case demonstrates that, in practice, district courts do not do so. Accordingly, a stay of the mandate would unquestionably harm landowners and other aggrieved parties.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court deny FERC's request to stay issuance of the mandate for ninety days.

Dated: July 8, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that this filing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because it contains 1,547 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I further certify that this filing 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 filing has been prepared in Times New Roman 14-point font using Microsoft Word.

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Dated: July 8, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF System and served copies of the foregoing via the Court's EM/ECF system on all ECF-registered counsel.

/s/ Siobhan K. Cole
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