

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Limiting Authorizations to Proceed with)
Construction Activities Pending Rehearing) Docket No. RM20-15-001

**BRIEF OF THE STATES OF MARYLAND, MASSACHUSETTS, NEW JERSEY,
OREGON, AND RHODE ISLAND, AND THE DISTRICT OF COLUMBIA,
PURSUANT TO ORDER 871-A ADDRESSING
ARGUMENTS RAISED ON REHEARING AND
CLARIFICATION, AND PROVIDING FOR
ADDITIONAL BRIEFING CONCERNING ORDER 871**

The States of Maryland, Massachusetts, New Jersey, Oregon, and Rhode Island, and the District of Columbia, (States) respectfully submit this brief addressing several of the questions on which the Commission has sought input in Order 871-A in this proceeding, and, relatedly, responding to arguments made by parties requesting rehearing on Order 871.

BACKGROUND

On June 9, 2020, the Federal Energy Regulatory Commission (Commission or FERC) issued Order No. 871, which precludes the issuance of authorizations to proceed with construction activities with respect to a Natural Gas Act (NGA) section 3 authorization or a section 7(c) certificate order until either the Commission acts on the merits of any timely-filed request for rehearing or the time for filing such a request has passed.¹ Subsequently, several parties filed requests for rehearing of Order 871. On June

¹ *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 171 FERC ¶ 61,201 (2020) (Order 871).

30, 2020, three weeks after Order 871 was issued, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit), sitting *en banc* in *Allegheny Defense Project v. FERC*,² held that the Commission could not toll the statutorily prescribed 30-day period for acting on a rehearing requests by granting the request for the limited purpose of allowing itself additional time to consider the request.

Under *Allegheny Defense*, the rehearing requests filed in this proceeding were deemed denied by operation of law because the Commission did not act on the requests within 30 days.³ However, because the record in a pending challenge to Order 871 in the D.C. Circuit has not yet been filed, the Commission (as permitted by the NGA) issued Order 871-A to modify Order 871 and provide for additional briefing.⁴

ARGUMENT

1. Order 871 properly withholds authorization of construction activities for section 3 authorizations and section 7 certificates filed by parties other than landowners.

In Order 871-A, the Commission seeks input on whether it should “withhold authorizations to commence construction during the pendency of all rehearing requests” or only when certain issues or arguments are raised. The Interstate Natural Gas Association of America (INGAA), in its motion to intervene and request for clarification or, in the

² 964 F.3d 1 (D.C. Cir. 2020) (*en banc*).

³ See *Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 174 FERC ¶ 61,050 at P 1-2 (2021) (Order 871-A).

⁴ *Id.* at P. 2.

alternative, for rehearing of Order No. 871 (INGAA Rehearing Request), argues that the Commission should not withhold authorizations for construction activities “in cases where a rehearing request does not implicate affected landowners, including (but not limited to) cases where no affected landowner has sought rehearing or cases under Section 7 of the NGA that do not involve the use of eminent domain.”⁵ But narrowing the application of Order 871 as INGAA requests would run afoul of the same principles of administrative fairness that motivated the D.C. Circuit’s opinion in *Allegheny Defense*.

Although much of the discussion in *Allegheny Defense* related to the unlawfulness and procedural unfairness to landowners of denying judicial review to parties requesting rehearing while eminent domain proceedings and construction moved forward, the same underlying procedural fairness concerns before construction commences justify Order 871’s protections for all parties filing rehearing requests. Indeed, the petitioners in *Allegheny Defense* included not only landowners, but also environmental associations, and the unlawfulness of the Commission’s use of tolling orders to stave off judicial review applied with equal force to those petitioners.⁶

Landowner concerns and property rights are not the only relevant concerns and interests at stake in these proceedings. As noted in Order 871, “[i]n recent years, the Commission’s NGA sections 3 and 7 proceedings have seen increased interest and

⁵ INGAA Rehearing Request at 3.

⁶ 964 F.3d 1, 19 (“Because the Commission's Tolling Order could not prevent the Homeowners and Environmental Associations from seeking judicial review, the initial petitions for review that they filed . . . are properly before this court for review, and the motions to dismiss those petitions for lack of jurisdiction are denied”)

participation by stakeholders, such as landowners, community members, non-governmental organizations, property rights advocates, and governmental entities, who have raised concerns about proposed projects.”⁷ These interested parties hold concrete stakes in the projects authorized under sections 3 and 7 of the NGA and would be unfairly prejudiced by allowing construction to proceed while the Commission weighs their rehearing requests.

For example, governmental bodies, including states, local governments, and tribes, may oppose projects on grounds such as the public need for a project, a project’s contribution to climate change, harm to the environment from the construction and operation of pipeline projects, noise and traffic impacts, effects on historical resources, and other concerns. Such objections, as well as others touching on the police power and sovereign interests of governmental bodies, concern the interests of all the polity’s residents and members. Environmental and community groups likewise may assert interests that would be directly impaired by the commencement of construction while a rehearing request is pending and that may be distinct from those affecting landowners, but no less prejudiced by authorizing construction during the pendency of a rehearing request.⁸

⁷ Order 871 at P. 7.

⁸ More broadly, with respect to the Commission’s question in Paragraph 7.a. of Order 871-A whether “the Commission withhold authorizations to commence construction only during the pendency of rehearing requests that raise certain issues or arguments,” the Commission should not limit the scope of Order 871. What may appear to be a minor issue or argument based on historical section 3 and 7 applications may not be so in a future application. The Commission should not attempt to guess at the importance of certain issues and arguments, but instead withhold authorizations to commence construction during the pendency of all rehearing requests.

The State of Oregon's experience in connection with the Jordan Cove LNG terminal demonstrates how limiting the scope of Order 871 solely to circumstances where landowners have filed rehearing requests would fail to account for the scope of a project's potential impacts. The significant adverse impacts that the Commission identified in its Environmental Impact Statement (EIS) for that project are not borne primarily (or at all) by landowners. Indeed, such impacts can infringe on the sovereign interests of states in their *parens patriae* capacities. For example, the EIS acknowledged that the LNG terminal would have significant impacts on scenic resources. The identified resources, such as the Oregon Coast Trail and Coos Bay water trails, are enjoyed by the public engaged in recreation, not private landowners. The EIS also concluded that the LNG terminal would result in significant adverse impacts to the affordability of rental housing units for low-income residents and that construction noise would have significant adverse impacts on wildlife.

The Commission also underestimated or ignored the significance of numerous other impacts, both in its EIS and in its balancing, under sections 3 and 7 of the Natural Gas Act, of the benefits and impacts of both the Pacific Connector Pipeline and the LNG terminal. Most of these impacts would be borne by the public at large, through injury to natural resources, rather than specific private landowners. This is not to diminish the direct impacts borne by landowners along the pipeline route, but rather to emphasize the scale of impacts to both public and private resources as a whole. These include impacts to fish and wildlife (including a number of threatened and endangered species), climate, air quality, water quality, and wetlands. Federally recognized tribes have interests in cultural

resources, distinct from their status as landowners, that would be adversely impacted by the pipeline and terminal.

Authorizing construction while *any* interested party awaits the Commission's decision on a petition for rehearing would place those parties in the same state of administrative limbo described by the court in *Allegheny Defense*. There, the D.C. Circuit recognized that treating an order from the Commission with an outstanding request for rehearing as final for purposes of proceeding with on-the-ground efforts to seize land and commence construction, but non-final for the purposes of seeking judicial review, was patently unfair.⁹ The same holds true where a request for rehearing raises concerns about project construction impacts on the environment, local communities, or other matters of public interest. Treating an underlying order as final for the purpose of authorizing construction while it is still non-final for the purposes of seeking judicial review continues, wrongly, to “split the atom of finality.”¹⁰ Authorizing construction before ruling on a project opponent's rehearing request remains pending would in fact continue the same Kafkaesque regime that doomed the Commission's previous tolling order practice.¹¹

⁹ 964 F.3d 1, 10 (referring to the Commission's treatment of orders pending rehearing as “Schrodinger's cat: both final and not final at the same time.”). Notably, in cases subject only to the Administrative Procedures Act, courts have been clear that exhaustion of administrative remedies is required only when the administrative review is required by statute and rule, and the decision is “inoperative pending that review.” *Darby v. Cisneros*, 509 U.S. 137, 154 (1993); *see also Marine Mammal Conservancy, Inc. v. Department of Agric.*, 134 F.3d 409, 411 (D.C. Cir. 1998) (same).

¹⁰ *Id.*

¹¹ *See Allegheny Defense*, 964 F.3d at 20, 21 (Griffith, J., concurring) (discussing “uninterrupted construction” pending judicial review as a harm independent from the

2. The Commission should further modify its procedures to protect landowners from the exercise of eminent domain during the pendency of a rehearing request.

The Commission also sought input on whether it should “modify its practices or procedures to address concerns regarding the exercise of eminent domain while rehearing requests are pending before” it, and if so, how.¹² As explained below, the States submit that the Commission should indeed modify its practices or procedures to address problems arising from the exercise of eminent domain before action on the merits of a pending rehearing request.

By withholding notices to proceed with construction before it acts on the merits of rehearing requests, the Commission has taken an important step towards remedying the unfairness that resulted from its past practices in reviewing proposed pipeline projects. However, because Order 871 does nothing to halt a certificate holder’s efforts to move forward with acquiring private property through eminent domain proceedings during the pendency of rehearing requests, it does not go far enough.¹³

In his partial dissent from Order 871, then-Commissioner (now Chairman) Glick suggests that the Commission should presumptively stay Section 7 certificates pending

deferral of judicial review and noting that “[a]pproving irreversible construction in the midst of a properly substantive rehearing might qualify as arbitrary and capricious.”)

¹² Order 871-A at P. 7.d.

¹³ See *Allegheny Defense*, 964 F.3d at 10 n.2; see also *id.* at 22 (Griffith, J., concurring).

action on the merits of a request for rehearing, thereby “delaying the issuance of the condition precedent for a condemnation action pursuant to the NGA.”¹⁴ This approach accords with principles of fairness, makes good sense, and would provide critical protections for affected landowners. The States urge the Commission to codify such a presumptive stay of section 7 certificates.

Alternatively, the States suggest that the Commission adopt a rule of procedure under which it must act within 30 days on any request for a stay filed in connection with a rehearing request. Under this approach, the applicant for the stay would still be required to meet the statutory standard for obtaining a stay, but would be ensured a prompt ruling from the Commission without the burden of seeking a stay from a court. A procedural rule requiring action on a stay request within 30 days would be well within the Commission’s authority to adopt.¹⁵

3. Order 871-A is a rule of agency procedure, not a stay of a Commission order.

In its Request for Rehearing, Kinder Morgan, Inc., Natural Gas Entities (KMI) argues that Order 871 constitutes a stay of construction and violates the NGA because it

¹⁴ Order 871 (Glick, Commissioner, concurring in part and dissenting in part) at P. 5.

¹⁵A third option would be to treat certificate orders as nonfinal while rehearing requests are pending, an approach that builds on a suggestion in Judge Griffith’s concurrence in *Allegheny Defense*. See 964 F.3d at 22. Thus, a certificate holder could not condemn property until any issues with the certificate have been resolved by the Commission.

does not meet the requirements for a stay.¹⁶ This argument is misplaced because Order 871 is well within the Commission’s discretion under the NGA and does not purport to stay any already-authorized construction activity.

Section 19(c) of the NGA provides that “[t]he filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order.”¹⁷ The Commission will grant a stay when “justice so requires,” and in making that determination, will consider “(1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.”¹⁸

The issuance of a certificate, however, does not in and of itself authorize the commencement of construction activities. Rather, the certificate holder must separately seek and obtain a notice to proceed with construction.¹⁹ As KMI itself recognizes, “issuance of a notice to proceed is a necessary step prior to initiating construction.”²⁰ Order

¹⁶ *Request for Rehearing of Kinder Morgan, Inc. Natural Gas Entities (KMI Rehearing at 13-15).*

¹⁷ 15 U.S.C. § 717r(c).

¹⁸ *Columbia Gas Transmission, LLC Columbia Gulf Transmission, LLC*, 162 FERC ¶ 61,260 at P. 4 (2018).

¹⁹ *Algonquin Gas Transmission, LLC Maritimes & Ne. Pipeline, L.L.C.*, 161 FERC ¶ 61287 at P. 18 (2017) (review of a request for notice to proceed is necessary “to ensure that the Commission’s conditions [in a certificate order] have been met before authorizing construction activities.”)

²⁰ KMI Rehearing at 8.

871 does not purport to stay a preexisting notice to proceed; it merely establishes a rule that the Commission will withhold such notices to proceed until the Commission acts on the merits of a pending rehearing request.

KMI objects that “[t]he Commission routinely grants notices to proceed with construction while rehearing requests are pending — a step that occurs after the project has undergone the thorough and detailed review and the Commission has determined that the project is in the public interest.”²¹ But this description of the past practice of routine grants of notices to proceed only underscores the point that, *until granted*, there is no imminent action to be stayed. In short, Order 871 does not stay any previously granted authorization. Rather, it serves to withhold the issuance of a separate and distinct notice to proceed with construction and therefore does not implicate Section 19(c) of the NGA.

It is inconsequential to this analysis that a notice to proceed may be a “ministerial action taken by an agency staff member, who ensures compliance with the conditions on the certificate order.”²² The fact that the action may be ministerial does not mean that a notice to proceed has already been granted and therefore would only be withheld by meeting the factors required for issuing a stay. Rather, the “ministerial” nature of the action, if it is indeed properly so characterized, suggests that the Commission has greater freedom to adopt a procedural rule withholding the issuance of such a notice until the merits of an underlying certificate or authorization are fully determined.

²¹ *Id.* at 14.

²² *Id.*

The ministerial nature of this step further supports the Commission's position that Order 871 is a procedural rule that is not subject to the Administrative Procedures Act's notice-and-comment requirements. Order 871 does not itself have any substantive effect. It merely establishes a procedural rule that notices to proceed with construction should not be issued on the basis of a certificate or authorization that is subject to a rehearing request. By deferring the authorization of construction activity through this procedural rule, the Commission has not stayed an imminent action, and has not violated the APA's procedural requirements.

4. The Commission should withhold authorization for construction activities until the filing of the record in the court of appeals in any case challenging a rehearing request.

In Order 871-A, the Commission sought input on whether there should be a specific point in time following the filing of a rehearing request when it should consider authorizing the commencement of construction. As long as it has jurisdiction to modify an order, the Commission should be able to do so in the exercise of its discretion to ensure that all issues related to a rehearing request are resolved before judicial review. Under 15 U.S.C. § 717r(a), “[u]ntil the record in a proceeding shall have been filed in a court of appeals, . . . the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.” The time for modifications of orders runs until the record is filed in a court of appeals, and the Commission should withhold construction authorizations until then.

CONCLUSION

For the foregoing reasons, the States submit that the Commission should uphold Order 871 and further modify its procedures as set forth above.

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