

171 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

18 CFR Parts 153 and 157

[Docket No. RM20-15-000; Order No. 871]

Limiting Authorizations to Proceed with Construction Activities Pending Rehearing

(Issued June 9, 2020)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) issues this final rule to amend its regulations to preclude the issuance of authorizations to proceed with construction activities with respect to natural gas facilities authorized by order issued pursuant to section 3 or section 7 of the Natural Gas Act until either the time for filing a request for rehearing of such order has passed with no rehearing request being filed or the Commission has acted on the merits of any rehearing request.

DATES: This rule will become effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

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SUPPLEMENTARY INFORMATION:

171 FERC ¶ 61,201
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Limiting Authorizations to Proceed with Construction Docket No. RM20-15-000
Activities Pending Rehearing

ORDER NO. 871

FINAL RULE

(Issued June 9, 2020)

I. Introduction

1. By this final rule, the Federal Energy Regulatory Commission (Commission or agency) is revising its regulations to preclude the issuance of authorizations to proceed with construction activities with respect to a Natural Gas Act (NGA) section 3 authorization or section 7(c) certificate order until the Commission acts on the merits of any timely-filed request for rehearing or the time for filing such a request has passed. This rule ensures that construction of an approved natural gas project will not commence until the Commission has acted upon the merits of any request for rehearing. The rule imposes no new obligations on the public.

II. Background

2. The NGA vests the Commission with jurisdiction over the transportation and wholesale sale of natural gas in interstate commerce.¹ To meet these aims, the NGA declares that “the business of transporting and selling natural gas for ultimate distribution to the public is affected with [the] public interest.”²

3. Before a company can construct a natural gas pipeline, it must obtain approval from the Commission under NGA section 7(e), which provides that the Commission “shall” issue a certificate if it determines that a proposed pipeline “is or will be required by the present or future public convenience and necessity.”³

4. If the Commission grants a certificate of public convenience and necessity, the NGA authorizes the certificate holder to exercise eminent domain authority if it “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 or pipe lines for the transportation of natural gas[.]”⁴

5. Separately, NGA section 3 prohibits the import or export of natural gas between the United States and a foreign nation without “first having secured an order of the

¹ 15 U.S.C. 717(a).

² *Id.*

³ *Id.* 717f(e).

⁴ *Id.* 717f(h). The NGA specifies that any such condemnation proceedings shall take place in the federal court for the district in which the property is located or in the relevant state court.

Commission authorizing it to do so.”⁵ NGA section 3 authority is divided between the Department of Energy, which oversees the import or export of the natural gas commodity,⁶ and the Commission, which oversees the siting, construction, and operation of import or export facilities.⁷ The Commission “shall” authorize proposed import or export facilities unless it finds that construction and operation of the proposed facilities “will not be consistent with the public interest.”⁸ Unlike section 7, section 3 does not provide for the acquisition of lands through eminent domain.

6. Pursuant to the NGA, the Commission can approve a proposed project subject to “such reasonable terms and conditions as the public convenience and necessity may require.”⁹ The certificate orders typically include conditions a company must meet before construction or operation of the project may begin, and typically provide that a company must receive written authorization from the Director of the Office of Energy

⁵ 15 U.S.C. 717b.

⁶ *Id.* 717b(a)-(c). In 1977, Congress transferred the regulatory functions of NGA section 3 from the Federal Power Commission to the Department of Energy. 42 U.S.C. 7151(b) (Department of Energy Organization Act). The Department of Energy delegated back to the newly created Federal Energy Regulatory Commission the limited authority under NGA section 3(e) to approve the physical facilities. 15 U.S.C. 717b(e).

⁷ 15 U.S.C. 717b(e). *See* DOE Delegation Order No. 00-004.00A (effective May 16, 2006) (renewing delegation to the Commission authority over the construction and operation of LNG facilities); *see also* 43 FR 47,769, 47,772 (Oct. 17, 1978) (1978 delegation); 42 U.S.C. 7172(e) (Commission authority includes any matter assigned by the Department).

⁸ 15 U.S.C. 717b(a).

⁹ *Id.* 717f(e).

Projects (or the Director’s designee) before commencing construction of any project facilities.¹⁰ The purpose of requiring a written request for authorization to commence with construction activities (often referred to as a notice to proceed) is not to reexamine the underlying Commission order; rather, it is to ensure that the Commission’s preconstruction requirements have been met.

III. Discussion

7. In recent years, the Commission’s NGA sections 3 and 7 proceedings have seen increased interest and participation by stakeholders, such as landowners, community members, non-governmental organizations, property rights advocates, and governmental entities, who have raised concerns about proposed projects. The Commission’s order granting an authorization under section 3 and/or section 7 fully considers all stakeholder concerns raised during the proceeding.

8. If a party is dissatisfied with the Commission’s NGA section 3 authorization or section 7 certificate determination, it may apply for rehearing.¹¹ The application must “set forth specifically” the grounds for rehearing.¹² On rehearing, the Commission is

¹⁰ See, e.g., *Florida Gas Transmission Co., LLC*, 170 FERC ¶ 61,200, 62,335 (2020) (Environmental Condition 9 requires Florida Gas to “receive written authorization from the Director of OEP before commencing construction of any project facilities. To obtain such authorization, Florida Gas must file with the Secretary documentation that it has received all applicable authorizations required under federal law (or evidence of waiver thereof)”; *Gulf South Pipeline Co., LP*, 170 FERC ¶ 61,201, 62,348 (2020) (same).

¹¹ 15 U.S.C. 717r(a).

¹² *Id.*

authorized to “grant or deny” the request, “or to abrogate or modify its order[.]”¹³

“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.”¹⁴ Often, because of the complex nature of the matters raised, the Commission issues an order (known as a tolling order) by the thirtieth day following the filing of a rehearing request, in order to allow additional time for the Commission to provide thoughtful, well-considered attention to the issues raised on rehearing.¹⁵

9. The rehearing process serves as a mechanism for the Commission to carefully consider the arguments presented, in order to resolve disputes or bring its expertise to bear on complex, technical matters before they are potentially presented to the courts. The Commission balances the interests of numerous stakeholders and renders decisions that address challenging technical, economic, and environmental matters, as well as

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See, e.g., *Cal. Co. v. FPC*, 411 F.2d 720, 721 (D.C. Cir. 1969); *Kokajko v. FERC*, 837 F.2d 524, 525 (1st Cir. 1988) (“The statutory language, . . . although requiring FERC to ‘act’ upon the application for rehearing within thirty days after filing, lest the application is deemed denied, does not state . . . that FERC must ‘act on the merits’ within that time lest the application is deemed denied.”); *Gen. Am. Oil Co. of Tex. v. FPC*, 409 F.2d 597, 599 (5th Cir. 1969); *Berkley v. Mountain Valley Pipeline, LLC*, 896 F.3d 624, 631 (4th Cir. 2018); see also *Del. Riverkeeper Network v. FERC*, 895 F.3d 102, 113 (D.C. Cir. 2018) (rejecting a due process challenge to Commission tolling orders).

complex legal issues. This takes time. Only after resolving these “difficult problems”¹⁶ does the Commission issue an order on the merits of a rehearing request.

10. Once the Commission issues an order on the merits of a rehearing request, a party may seek judicial review of the Commission’s order. An application for agency rehearing is a prerequisite to judicial review, and only those objections raised on rehearing may be presented to the court of appeals.¹⁷ Congress specified that an application for rehearing “shall not, unless specifically ordered by the Commission, operate as a stay of the Commission’s order.”¹⁸ Thus, following issuance of an NGA section 7 certificate or section 3 authorization, a project sponsor may request that the Commission authorize construction while rehearing is pending.

11. In order to balance our commitment to expeditiously respond to parties’ concerns in comprehensive orders on rehearing and the serious concerns posed by the possibility of construction proceeding prior to the completion of Commission review, we are exercising our discretion to adopt a new regulation that precludes the issuance of authorizations to proceed with construction of projects authorized under NGA sections 3 and 7 while rehearing of the initial orders is pending. This rule ensures that construction of an approved natural gas project will not commence until the Commission has acted upon the merits of any request for rehearing, regardless of land ownership.

¹⁶ *FPC v. Colo. Interstate Gas Co.*, 348 U.S. 492, 501 (1955).

¹⁷ 15 U.S.C. 717r(b).

¹⁸ *Id.* 717r(c).

12. This final rule adds to our regulations new § 157.23, which provides that:
- With respect to orders issued pursuant to 15 U.S.C. 717b or 15 U.S.C. 717f(c) authorizing the construction of new natural gas transportation, export, or import facilities, no authorization to proceed with construction activities will be issued:
- (a) until the time for the filing of a request for rehearing under 15 U.S.C. 717r(a) has expired with no such request being filed, or
- (b) if a timely request for rehearing is filed, until the Commission has acted upon the merits of that request.
13. In addition, we are revising § 153.4 of our regulations to incorporate a cross-reference to new § 157.23.

IV. Information Collection Statement

14. The Paperwork Reduction Act¹⁹ requires each federal agency to seek and obtain the Office of Management and Budget's (OMB) approval before undertaking a collection of information (i.e., reporting, recordkeeping, or public disclosure requirements) directed to ten or more persons or contained in a rule of general applicability. OMB regulations require approval of certain information collection requirements contained in final rules published in the *Federal Register*.²⁰ This final rule does not contain any information collection requirements. The Commission is therefore not required to submit this rule to OMB for review.

¹⁹ 44 U.S.C. 3501-3521.

²⁰ See 5 CFR 1320.12.

V. Environmental Analysis

15. The Commission is required to prepare an Environmental Assessment or an Environmental Impact Statement for any action that may have a significant effect on the human environment.²¹ The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment, including the promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or the regulations being amended.²² This final rule disallows the issuance of authorizations to proceed with construction activities until the Commission acts on the merits of any request for rehearing of an NGA section 3 authorization or section 7(c) certificate order. Because this final rule is procedural in nature, preparation of an Environmental Assessment or an Environmental Impact Statement is not required.

VI. Regulatory Flexibility Act

16. The Regulatory Flexibility Act of 1980 (RFA)²³ generally requires a description and analysis of final rules that will have significant economic impact on a substantial number of small entities. However, final rules promulgated without the publication of a general notice of proposed rulemaking under section 553 of the Administrative Procedure

²¹ *Regulations Implementing the National Environmental Policy Act of 1969*, Order No. 486, 41 FERC ¶ 61,284 (1987).

²² 18 CFR 380.4(a)(2)(ii).

²³ 5 U.S.C. 601-612.

Act (APA) are exempt from the RFA's requirements.²⁴ Pursuant to section 553(b)(3)(A) of the APA, "rules of agency organization, procedure, or practice" may be published without general notice of proposed rulemaking.²⁵ Because this rule concerns only matters of agency procedure – specifically, the Commission's internal processes and procedure for issuing authorizations to proceed with construction activities under an NGA section 3 authorization or an NGA section 7(c) certificate order, the APA's public notice and comment procedures do not apply. Accordingly, this final rule is exempt from the requirements of the RFA.

VII. Document Availability

17. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the Internet through FERC's Home Page (<http://www.ferc.gov>). At this time, the Commission has suspended access to the Commission's Public Reference Room due to the President's March 13, 2020 proclamation declaring a National Emergency concerning the Novel Coronavirus Disease (COVID-19).

18. From FERC's Home Page on the Internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in

²⁴ *Id.* 604(a).

²⁵ *Id.* 553(b)(3)(A).

eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

19. User assistance is available for eLibrary and the FERC's website during normal business hours from FERC Online Support at 202-502-6652 (toll free at 1-866-208-3676) or email at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

VIII. Effective Date

20. The Commission is issuing this rule as a final rule without a period for public comment. Public notice and comment, otherwise required by 5 U.S.C. 553, do not apply to "rules of agency organization, procedure, or practice."²⁶ This rule concerns only matters of agency procedure, and will not significantly affect regulated entities or the general public.

21. This rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. As a matter of policy, however, the Commission will not authorize construction to proceed pending rehearing during the period before this rule becomes effective.

List of subjects

18 CFR Part 153

Exports, Natural gas, Reporting and recordkeeping requirements

²⁶ 5 U.S.C. 553(b)(3)(A).

18 CFR Part 157

Administrative practice and procedure, Natural gas, Reporting and recordkeeping requirements

By the Commission. Commissioner Glick is concurring in part and dissenting in part with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

In consideration of the foregoing, the Commission is amending Parts 153 and 157, Chapter I, Title 18, *Code of Federal Regulations*, as follows:

PART 153—APPLICATIONS FOR AUTHORIZATION TO CONSTRUCT, OPERATE, OR MODIFY FACILITIES USED FOR THE EXPORT OR IMPORT OF NATURAL GAS

1. The authority citation for Part 153 continues to read as follows:

Authority: 15 U.S.C. 717b, 717o; E.O. 10485; 3 CFR, 1949–1953 Comp., p. 970, as amended by E.O. 12038, 3 CFR, 1978 Comp., p. 136, DOE Delegation Order No. 0204–112, 49 FR 6684 (February 22, 1984).

2. Revise § 153.4 to read as follows:

§ 153.4 General requirements.

The procedures in §§ 157.5, 157.6, 157.8, 157.9, 157.10, 157.11, 157.12, and 157.23 of this chapter are applicable to the applications described in this subpart.

PART 157—APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND FOR ORDERS PERMITTING AND APPROVING ABANDONMENT UNDER SECTION 7 OF THE NATURAL GAS ACT

3. The authority citation for Part 157 continues to read as follows:

Authority: 15 U.S.C. 717-717w, 3301-3432; 42 U.S.C. 7101-7352.

4. Add § 157.23 to subpart A to read as follows:

§ 157.23 Authorizations to Proceed with Construction Activities.

With respect to orders issued pursuant to 15 U.S.C. 717b or 15 U.S.C. 717f(c) authorizing the construction of new natural gas transportation, export, or import facilities, no authorization to proceed with construction activities will be issued:

(a) until the time for the filing of a request for rehearing under 15 U.S.C. 717r(a) has expired with no such request being filed, or

(b) if a timely request for rehearing is filed, until the Commission has acted upon the merits of that request.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Limiting Authorizations to Proceed with Construction Docket No. RM20-15-000
Activities Pending Rehearing

(Issued June 9, 2020)

GLICK, Commissioner, *concurring in part and dissenting in part*:

1. It is readily apparent that today’s final rule attempts to address *some* of the concerns raised in the *Allegheny Defense Project v. FERC* proceeding before the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). In that proceeding, numerous groups have objected to the Commission’s practice of “tolling” for months, or even years, requests for rehearing of certificates issued pursuant to § 7 of the Natural Gas Act,¹ thereby preventing landowners from seeking judicial review, even while pipeline developers are permitted to condemn their land and start constructing a pipeline. In her concurring opinion in *Allegheny Defense Project*, Judge Millett correctly characterized the Commission’s practice as a “Kafkaesque regime”—one that allows “the Commission [to] keep homeowners in seemingly endless administrative limbo while energy companies plow ahead seizing land and constructing the very pipeline that the procedurally handcuffed homeowners seek to stop.”² Now that the *en banc* D.C. Circuit has heard oral argument on the legality of this Kafkaesque regime, the Commission is finally deciding to stop allowing developers to begin constructing a pipeline before the Commission’s rehearing process is complete. That is a step in the right direction.

2. Nevertheless, I dissent in part from this final rule because it does nothing to address the concern, articulated clearly in Judge Millett’s concurrence, that a pipeline developer should not be able to begin the process of condemning private land before the owners of that land can go to court to challenge the certificate. Eminent domain is among the most significant actions that a government may take with regard to an individual’s private property.³ And the harm to an individual from having his or her land

¹ 15 U.S.C. § 717f(c).

² *Allegheny Def. Project v. FERC*, 932 F.3d 940, 948 (D.C. Cir.) (Millett, J., concurring), *reh’g en banc granted, judgment vacated*, 943 F.3d 496 (D.C. Cir. 2019).

³ *Cf. Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (observing that government action that provides for “public access [to private property] would deprive [the owner] of the right to exclude others, ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’”) (quoting *Kaiser Aetna v. United*

condemned is one that may never be fully remedied, even in the event they receive their constitutionally required compensation.⁴ Bearing those basic facts in mind, there is something fundamentally unfair about a regulatory regime that allows a private entity to start the process of condemning an individual's land before the landowner can go to court to contest the basis for that condemnation action.

3. That concern was central to Judge Millett's concurrence in *Allegheny Defense Project*. Throughout her opinion, she touched on the profound inequity of allowing a developer to condemn land and construct a pipeline while the opponents of that pipeline are stuck in "administrative limbo" before the Commission.⁵ I see nothing in her opinion that suggests that the problem created by the Commission's abuse of tolling orders is limited to the actual construction of a pipeline. To the contrary, Judge Millett pointed repeatedly to the exercise of eminent domain prior to rehearing as an example of how the Commission's use of tolling orders "runs roughshod over basic principles of fair process."⁶

4. And yet this final rule deals only with construction without making any effort to address the exercise of eminent domain during that period when the courthouse doors are closed to landowners seeking to challenge the certificate. That is a shame. And the

States, 444 U.S. 164, 176 (1979)); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("[W]e have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause."); *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to *exclude* strangers, or for that matter friends, but especially the Government." (emphasis in the original)).

⁴ See *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949) ("The value of property springs from subjective needs and attitudes; its value to the owner may therefore differ widely from its value to the taker."); *United Church of the Med. Ctr. v. Med. Ctr. Comm'n*, 689 F.2d 693, 701 (7th Cir. 1982) ("It is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury."); accord *Richardson v. City & Cty. of Honolulu*, 124 F.3d 1150, 1168 (9th Cir. 1997) (O'Scannlain, J., concurring in part and dissenting in part) ("Whether because of a sentimental attachment to his property or a conviction that the property is actually worth more than what the market will currently bear, a landlord might choose not to sell, even at the 'fair market value.'").

⁵ *Allegheny Def. Project*, 932 F.3d at 948, 950, 952-53, 956 (Millett, J., concurring).

⁶ *Id.* at 950 (Millett, J., concurring).

failure to do anything in that regard is a striking contrast to the Commission's supposed concern for landowners. Rather than remaining silent on this situation, we ought to do everything in our power to address it and ensure that certificate holders are not permitted to go to court before landowners.

5. To that end, I believe that we should adopt a practice of presumptively staying § 7 certificates⁷ pending Commission action on the merits of any timely filed requests for rehearing.⁸ A practice along those lines would help protect landowners from an action seeking to condemn their property by delaying the issuance of the condition precedent for a condemnation action pursuant to the NGA.⁹ Only then will we have addressed the most glaring due process shortcomings associated with the Commission's use of tolling orders in NGA certificate proceedings.

6. During my time at the Commission, I have had the opportunity to meet with many landowners who lost their property rights through eminent domain proceedings authorized by the NGA. It is heartbreaking to hear their stories of watching their land be

⁷ Unlike § 7 of the NGA, § 3 does not convey eminent domain authority. *See Limiting Authorizations to Proceed with Construction Activities Pending Rehearing*, 171 FERC ¶ 61,201, P 5 (2020). Accordingly, I do not believe it is necessary to presumptively stay the Commission's § 3 determinations. I do, however, agree with my colleagues that it is appropriate to refrain from issuing any notices to proceed with construction under *both* § 3 and § 7 given the potential for irreparable harm due to construction pursuant to either provision of the NGA. *See id.* P 11.

⁸ Under such an approach, the Commission could, in its discretion, lift the stay in response to a showing from the pipeline developer that it is necessary or appropriate to commence condemnation proceedings prior to the Commission acting on rehearing.

⁹ Multiple courts have contemplated a stay having an effect along those lines. *See, e.g., Mountain Valley Pipeline, LLC v. An Easement to Construct, Operate & Maintain a 42-inch Gas Transmission Line*, No. 2:17-CV-04214, 2018 WL 1004745, at *5 (S.D.W. Va. Feb. 21, 2018) ("The landowners insist that the various challenges that Mountain Valley faces before FERC and the courts of appeals counsel against the granting of partial summary judgment. As explained earlier, a FERC order remains in effect unless FERC or a court of appeals issues a stay and no such stay has been issued here." (internal citations omitted)); *In re Algonquin Nat. Gas Pipeline Eminent Domain Cases*, No. 15-CV-5076, 2015 WL 10793423, at *7 (S.D.N.Y. Sept. 18, 2015) ("Here, various interested parties have filed Requests for Rehearing with FERC but, absent a stay by FERC, those Requests for Rehearing neither prohibit these proceedings from going forward nor affect Algonquin's substantive right to condemn or the need for immediate possession."); *Tenn. Gas Pipeline Co. v. 104 Acres of Land More or Less, in Providence Cty. of State of R.I.*, 749 F. Supp. 427, 431 (D.R.I. 1990) ("Because in this case the Commission's order has not been stayed, condemnation pursuant to that order may proceed.").

condemned while the Commission sat on rehearing requests, leaving them helpless to challenge the certificate, even as it was used to seize their land. We should be doing everything in our power to prevent such a patently unfair result.

For these reasons, I respectfully concur in part and dissent in part.

Richard Glick
Commissioner