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FERC Updates Tolling Order Practice in Wake of D.C. Circuit Opinion

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On June 30, 2020, in *Allegheny Defense Project v. FERC* ("*Allegheny*"),¹ the D.C. Circuit overruled its prior precedents and invalidated the Federal Energy Regulatory Commission's ("FERC") longstanding practice of issuing tolling orders to extend the statutory period within which to act on requests for rehearing of its orders. The court held that, if FERC does not address the substance of a request for rehearing or establish additional processes within 30 days after the request for rehearing is filed, the request may be deemed denied and the requester may seek appellate review of the Commission order.²

In place of the tolling orders rejected in *Allegheny*, the FERC Secretary has begun issuing notices styled "Notice of Denial of Rehearing By Operation of Law and Providing for Further Consideration" 30 days after requests for rehearing are filed. In accordance with *Allegheny* and either the Federal Power Act (the "FPA")³ or the Natural Gas Act (the "NGA"),⁴ the notices state that, "[i]n the absence of Commission action on the request for rehearing within 30 days from the date the request was filed, the request for rehearing (and any timely requests for rehearing filed subsequently) may be deemed denied."⁵

Misleadingly, however, the notices further explain that, "[a]s provided in 16 U.S.C. § 825l(a) (2018), rehearing request of the above-cited order filed in this proceeding will be addressed in a future order to be issued consistent with the requirements of such section. As also provided in 16 U.S.C. § 825l(a), the Commission may modify or set aside its above-cited order, in whole or in part, in such manner as it shall deem proper."⁶

While both the FPA and NGA permit FERC to "modify or set aside, in whole or in part," any order or finding, FERC may only do so until the record in the proceeding has been filed in a court of appeals.⁷ FERC typically must file the record in a proceeding around 40 days after a petition for review is filed. Once the record is filed, jurisdiction over the matter becomes exclusive to the court of appeals in which the petition for review and record is filed.⁸

FERC's now-standard notice neglects to mention this limitation on its ability to modify or set aside orders, which could cause unnecessary confusion to parties who file a request for rehearing. Parties that do so should be aware that they may file a petition for review in the appropriate court of appeals within 60 days of the date their request is deemed denied, and FERC can only modify its order up until the record is filed in the court of appeals. The D.C. Circuit's opinion in *Allegheny* provided FERC the opportunity to establish further processes within 30 days of receiving a request for rehearing, such as a briefing schedule, which would extend FERC's time to entertain the request. As of this time, FERC has

not done so. Parties should be cognizant that FERC's new notices do not establish additional processes and in no way hinder parties' right to seek appeal.

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Washington, D.C. lawyers:

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¹ *Allegheny Def. Project, et al. v. Fed. Energy Regulatory Comm'n*, No. 17-1098, 2020 WL 3525547 (D.C. Cir. 2020).

² *Id.*

³ 16 U.S.C. § 825(a).

⁴ 15 U.S.C. § 717r(a).

⁵ *See, e.g., Midcontinent Indep. Sys. Operator, Inc.*, Notice of Denial of Rehearing By Operation of Law and Providing for Further Consideration, Docket No. ER20-1078-001 (July 1, 2020).

⁶ *Id.*

⁷ 16 U.S.C. § 825(a).

⁸ 16 U.S.C. § 825(b) ("Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.").

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