ALLEGHENY DEF. PROJECT V. FERC: THE JENGA BLOCK PULL FORETELLING A FATAL CRASH OF FERC'S TOLLING ORDER FAÇADE

I. INTRODUCTION

In *Allegheny Defense Project v. FERC,*[1] (*Allegheny*) the D.C. Circuit Court of Appeals (DC Circuit), acting on rehearing en banc, departed from a fifty-year-old precedent by holding that the Federal Energy Regulatory Commission (FERC) does not "act upon" an application for rehearing within the meaning of section 717(r) of the Natural Gas Act (NGA) by issuing a tolling order that simply precludes an application from being deemed denied and thus denies an applicant their statutory right to seek judicial review.[2] In its holding, the D.C. Circuit amplified

1. Allegheny Def. Project v. FERC, 964 F.3d 1 (D.C. Cir. 2020).
2. *Id.* at 19.

that the court, not administrative agencies, retain the power to interpret jurisdictional statutory provisions.[3] The decision carries major weight for the businesses regulated under the NGA, the Federal Power Act (FPA), as well as the customers, landowners and other interested parties involved in FERC regulated industries.[4]

Part II of this note examines the historical and legal context of the D.C. Circuit's Decision in *Allegheny* as well as the procedural and factual background of *Allegheny*. In Part III, this note summarizes the rationale of the D.C. Circuit's ruling. Part IV, explores both the subsequent history and the future implications of that ruling to both FERC regulated industries and others.

II. BACKGROUND

A. Interpretation of the Federal Energy Regulatory Commission's Use of Tolling Orders

FERC has a commonly issued tolling orders, which in FERC's view are equivalent to a grant of rehearing, in order to afford the agency additional time to consider the issues raised in an aggrieved parties application.[5] These FERC tolling orders operate "for an open-ended period of time" during which the tolled application cannot be deemed denied.[6] The consequence of such tolling orders is therefore that judicial review of the aggrieved parties' applications in federal court is delayed until FERC lifts the tolling order and rules on the rehearing.[7] In administrative law the court "generally grant[s] deference to an agency's reasonable interpretation of ambiguity in a statue it administers applying the framework of *Chevron*."[8] Tolling orders have been held permissible by the D.C. Circuit under the NGA since its 1969 decision in *California Co. v. FPC*.[9] In *California Co.*, several energy companies petitioned for review of the Federal Power Commission's (FPC)[10] Area Rate Proceedings, but no ruling on the merits of the energy companies' applications for rehearing had been issued.[11] Rather, the FPC issued a grant of rehearing on all applications, but "was careful to note that it's action 'shall not be deemed a grant or denial of the application on their merits in whole in or part.'"[12]

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3. *Id.* at 11-12.
4. *Id.* at 5, 23.
5. *Allegheny*, 964 F.3d at 5, 23.
6. *Id.* at 6.
7. *Id.*
8. *Id.* at 11 (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).
9. *Allegheny*, 964 F.3d at 17 (citing California Co. v. FPC, 411 F.2d 720 (D.C. Cir. 1969)) (holding that the agency's interpretation of the congressional intent of section 717r(a) as a presumption of agency silence was valid).
10. *California Co*., 411 F.2d at 720. FERC is the successor agency to the FPC. Congress transferred this authority in the Department of Energy Organization Act of 1977. *See* Department of Energy Organization Act, 91 Stat. 565 (1977) (codified as amended at 42 U.S.C. § 7101 (2014).
11. *California Co.*, 411 F.2d at 720.
12. *Id.*

Notably, the FPC issued the grants of rehearing for the purpose of avoiding the statutory requirement that unless the FPC acts upon the application within 30 days, the application is deemed denied.[13] The energy companies argued that the language of section 717r(a) required the FPC to act on the merits of the rehearing application, within thirty days, and the FPC's failure to act allowed their case to be ripe for judicial review.[14] However, a "two-judge panel" of the D.C. Circuit gave deference to the FPC interpretation of section 717r(a), holding that such a "time honored interpretation of the section involved is worthy of judicial deference."[15]

Thus, the court was "reluctant to impute to Congress a purpose to limit the Commission 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 . . . the agency."[16] Since then, courts have long treated FPC's and now FERC's interpretation of section 717r(a) as settled law and significantly, the "public, government, . . . circuits, and the Bar have long relied" on tolling orders as a permissible use of acting upon a rehearing request within 30 days.[17]

B. Factual and Procedural History

In 2015, the Transcontinental Gas Pipeline Co. (Transco) applied for a certificate of public convenience and necessity from FERC in order to develop its Atlantic Sunrise Project (ASP), a $3 billion dollar expansion of the existing Transco natural gas pipeline system to connect abundant Marcellus gas supplies with markets in the Mid-Atlantic and Southeastern United States.[18] Central to Transco's application was the construction of 200 miles of pipeline through Southeastern Pennsylvania.[19] The petitioners, the Erb and Hoffman families (Homeowners), owned properties directly in the path of the ASP.[20] The Homeowners opposed FERC granting Transco's certificate for a variety of reasons, including concerns about the decimation of ecosystems, endangering of stream beds, and that the pipeline would negatively impact sites deserving of historical protection.[21]

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13. *Id.*

14. *Id*. at 721.

15. *California Co.*, 411 F.2d at 721 (one of the judges assigned to the panel did not participate in the decision and the ruling was *per curiam*).

16. *Id*. at 722.

17. *Allegheny*, 964 F.3d at 23; Delaware Riverkeeper Network v. FERC, 895 F.3d 102, 113 (D.C. Cir. 2018).

18. *Allegheny*, 964 F.3d at 5; see also WILLIAMS, *About the Project*, http://atlanticsunriseexpansion.com/about-the-project/overview.

19. *Allegheny*, 964 F.3d at 5.

20. *Id*.

21. *Id*. at 6.

Additionally, the Environmental Association Petitioners (EAP) opposed the project for similar reasons.[22]

On February 3, 2017, FERC granted Transco a certificate of public convenience and necessity for the ASP project.[23] Both the Homeowners and the EAP moved to stay the Certificate Order pending FERC's rehearing decision and filed applications for rehearing before FERC.[24] The EAP's application was filed February 10 and 24, 2017, while the Homeowners' was filed on March 6, 2017.[25] On March 13, 2017, the first business day after the thirty (30) day statutory time period for the Commission to act on the EAP's first application, FERC's Secretary issued a tolling order that applied to all three rehearing applications.[26] In particular, the order "granted [rehearing] for the limited purpose of further consideration" for an open-ended period of time and by virtue of its issuance, the applications for rehearing would not be deemed denied.[27] Following the issuance of the tolling order, the Homeowners and EAP petitioned for review of both the Certificate and the Tolling Order in the D.C. Circuit.[28] In response, Transco and FERC "moved to dismiss the petitions for lack of jurisdiction, contending that the petitions were 'incurably premature' because . . . [FERC] had not taken final agency action" on the rehearing requests pursuant to section 717r of the Natural Gas Act.[29]

As the Homeowners and EAP waited for FERC "to resolve their rehearing applications, Transco pressed forward with its condemnation action against the Homeowners in the United States District Court for the Eastern District of Pennsylvania."[30] In August 2017, the district court ruled on Transco's eminent domain case granting partial summary judgement and a preliminary injunction to Transco.[31] In doing so, the district court provided Transco the immediate possession of the right of way to build its pipeline over the Homeowners' land.[32] The following week, seven months after a motion to stay was filed, FERC denied it.[33]

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22. *Id*.; The EAP consisted of Allegheny Defense Project, Clean Air Council, Concerned Citizens of Lebanon County, Heartwood, Lancaster Against Pipelines, Lebanon Pipeline Awareness, and Sierra Club (Allegheny), who filed for rehearing on February 10, 2017. The EAP further consisted of the Accokeek, Mattawoman, and Piscataway Creeks Communities Council Inc. (Accokeek), who filed for rehearing on February 24, 2017. *See Transcon. Gas Pipe Line Co., LLC*, 161 FERC ¶ 61,250 at P 2 (2017) [hereinafter *Transco I*].

23. *Allegheny*, 964 F.3d at 6.

24. *Id.*

25. *Id*. Two different EAP members filed for rehearing separately in what was later a consolidated action. On February 10, 2017 Allegheny filed a request for rehearing and a motion for stay pending resolution of its rehearing request and any further judicial review of FERC's February 3, 2017 order granting Transco a certificate of public convenience and necessity. Accokeek followed suit on February 24, 2017 resting upon the same arguments set forth in Allegheny's February 10, 2017 pleading. *See Transco I*, *supra* note 22, at P 2.

26. *Allegheny*, 964 F.3d at 6.

27. *Id.* at 7.

28. *Id.*

29. *Id.*

30. *Allegheny*, 964 F.3d at 7.

31. *Id.* at 8.

32. *Id.*

33. *Id.* (citing *Transcon. Gas Pipe Line Co.*, 160 FERC ¶ 61,042 (2017)) [hereinafter *Transco II*].

In doing so, FERC found the environmental harm and air pollution concerns as insufficient to justify a stay.[34]

On September 5, 2017, Transco requested from FERC an order to allow it to begin construction.[35] Ten days later, the Construction Order was granted while the Homeowners' and EAP's rehearing applications remained pending.[36] As the thirty day statutory mark approached, the EAP immediately sought rehearing and rescission of the Construction Order which led FERC to issue another tolling order.[37] Finally, nine months after the Homeowners' first application for rehearing, FERC denied the rehearing but by that time Transco had already started construction on the Homeowners' property.[38] Following the denial, the Homeowners and EAP filed a second petition with the D.C. Circuit, and argued that FERC "failed to support its determination that the Project served a market need as required by the Natural Gas Act, and denied them due process by allowing construction to begin before any court could review the Certificate Order."[39] Additionally, three months after the denial of the rehearing for the certificate order, FERC denied the rehearing of the Construction Order.[40] Notably, "by the time . . . [the court] heard oral arguments . . . on the merits of the Homeowners' and [EAP's] petitions for review, the pipeline had been built and operational for two months.[41]

The D.C. Circuit Panel held that the "motions to dismiss the first round of petitions [were] moot, reasoning that the second round gave the D.C. Circuit jurisdiction to review the Certificate Rehearing Order."[42] The panel rejected the Homeowners' and EAP's arguments and denied the petition for review.[43] In response, the Homeowners sought, and The United States Court of Appeals for the District of Columbia Circuit granted, "rehearing *en banc* and vacated the panel's judgement."[44]

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34. *Allegheny*, 964 F.3d at 8 (citing *Transco II*, *supra* note 33, at P 8).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Allegheny*, 964 F.3d at 8.

39. *Id.* at 9.

40. *Id.* (citing *Transcon. Gas Pipeline Co.*, 162 FERC ¶ 61,192 (2018)).

41. *Id.*

42. *Allegheny*, 964 F.3d at 9.

43. *Id.*; *See* Allegheny Def. Project v. FERC, 932 F.3D 940, 945-48 & n.1 (D.C. Cir. 2019) (discussing that the Homeowners and EAP argued FERC: "[(1)] improperly conducted its environmental assessment under NEPA [(2)] failed to substantiate market need for the Project as required by the Natural Gas Act, and [(3)] denied them due process by authorizing construction to commence before the issuance of the Certificate Order could be judicially reviewed." The court found none of the arguments successful).

44. Allegheny Def. Project v. FERC, 964 F.3d 1, 7 (D.C. Cir. 2020). Rehearing *en banc* is the only way a circuit court can reverse its own precedent. *See* United States v. Doe, 730 F.2d 1529, n. 2 (D.C. Cir. 1984) (stating "[The D.C. Circuit] cannot overrule the decisions of another panel of this court; a panel's decision may only be rejected by a court *en banc*")). Typically, courts disfavor a rehearing *en banc* and usually they will not be ordered unless: "(1) *en banc* consideration is necessary to maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35. Thus, it is important to note that the panel that ruled against the Homeowners could not reverse its own precedent, even if the panel thought the Homeowners were right. *See Doe*, 730 F.3d at n.2; *see also* Phillip M. Kannan, *The Precedential Force of Panel Law*, 76 MARQ. L. REV. 755 (1993).

C. Interpretation of Section 717r(a) of the NGA falls Directly to the Court and Not to FERC

In examining the question whether the statutory text of the NGA permits FERC's use of tolling orders to delay judicial review, the D.C. Circuit first addressed who retained the power to interpret the ambiguities of section 717r(a) of the NGA.[45] The D.C. Circuit noted that in administrative law, deference is generally granted "to an agency's reasonable interpretation of ambiguity in a statute it administers, applying the framework of *Chevron*."[46] Under the *Chevron* framework, FERC asked the D.C. Circuit to defer to their reasonable interpretation of the ambiguity in section 717r(a).[47]

However, the Court held that it was unnecessary to employ *Chevron* deference, because FERC was not "[interpreting an] ambiguity in a statute it administer[ed]."[48] The rationale underlying the court's decision, was that "[f]ederal agencies do not administer and [possess] no relevant expertise in enforcing the boundaries of the court's jurisdiction."[49] Notably, the court held that section 717r(a) spoke "directly to federal court jurisdiction to review Commission order."[50] According to the Court, the jurisdictional provisions of section 717r(a) were not administered by FERC and thus *Chevron* deference could not be afforded to FERC in this case.[51] Therefore, the D.C. Circuit held that interpretation of section 717r(a) of the NGA fell directly to the court and not to FERC.[52]

D. Section 717r(a) of the NGA Lays out Unambiguous Requirements

The question of whether FERC possessed "the authority [under section 717r(a)] to issue the Tolling Order that served solely to override the deemed denied provision and thereby prevent . . . judicial review until whenever [FERC] acted" remained before the court.[53] Before turning to this issue, the D.C. Circuit noted that while a tolling order delays judicial review, it does not delay a natural gas company's ability to judicially take possession of the aggrieved parties' land through the use of eminent domain and then begin construction and operation of the pipelines.[54] Despite placing aggrieved landowners at a decided disadvantage

45. *Allegheny*, 964 F.3d at 9, 11.

46. *Id.* at 11 (referencing the Chevron Two-Step Test laid out by Justice Stevens in *Chevron*, *U.S.A., Inc.*, 467 U.S. at 837).

47. *Id.*

48. *Id.* at 11.

49. *Allegheny*, 964 F.3d at 11.

50. *Id.* at 12.

51. *Id.*

52. *Id.*

53. *Allegheny*, 964 F.3d at 12.

54. *Id.* at 10-11. FERC Commissioner Glick stated that FERC can and should do better, as it has created a regulatory construct that "allows a pipeline developer to build its entire project while simultaneously preventing opponents of that pipeline from having their day in court, [which] ensures that irreparable harm will occur before any party has access to judicial relief." *Id.* (quoting *Spire STL Pipeline LLC*, 169 FERC ¶ 61,134 at P 33 (2019) (Glick, Comm'r, dissenting).

in adjudicating their rights, the process of issuing tolling orders, and thus delaying judicial review until FERC acts has become "virtually automatic."[55]

As the D.C. Circuit notes in *Allegheny*, the ubiquity of FERC's use of tolling orders is illustrated by FERC's issuance of them in "all thirty-nine cases [over the past twelve years], in which landowners sought rehearing in a proceeding involving natural gas pipeline construction."[56] FERC uses its "tolling orders to split the atom of finality . . . [or] in other words, render [FERC] decisions akin to Schrodinger's cat: both final and not final at the same time."[57] Furthermore, this "asymmetrical finality timetable has become common place" as seen through FERC authorizing "construction to begin before resolving the rehearing requests on the merits in 64%" of its 114 natural gas pipeline cases from October, 2008 to February, 2019.[58]

In interpreting section 717r(a) the D.C. Circuit's analysis "[began] with the statutory text, and [ended] there as well."[59] The D.C. Circuit noted that section 717r(a)'s requirement for the "filing of an application for rehearing as precondition to judicial review" of Commission action was uncontested.[60] However, according to the Court, once an application is filed, section 717r(a) is explicit in its specifications of what FERC's next steps are.[61] Specifically FERC can, "(i) grant rehearing, (ii) deny rehearing, (iii) abrogate its order without further hearing, and (iv) modify its order without further hearing."[62] The D.C. Circuit further noted that section 717r(a) is unambiguous in the ramifications of FERC's failure to act upon the application in the prescribed time, the application may be deemed denied.[63]

The D.C. Circuit held that by referencing in the deemed-denied provision "what [FERC] has—or has not—done 'upon the application,' Congress signaled that the kinds of actions that prevent deemed denial are the four dispositions just listed."[64] Thus, section 717r(a) is unambiguous in establishing that if FERC fails

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55. *Id.* at 9.

56. *Allegheny*, 964 F.3d at 9.

57. *Id.* at 10 (discussing that tolling orders are final enough for pipeline companies to take property by eminent domain and final enough for construction to be greenlight construction and operation, but they are not final enough for aggrieved parties to seek judicial review).

58. *Id.*; *See* May Van Rossum, *People's Dossier of FERC Abuses: Stripping People's Rights*, DELAWARE RIVER KEEPER NETWORK, https://www.delawareriverkeeper.org (Discussing the harms inflicted by FERC's delays in responding to rehearing request which include projects being fully constructed and operational, subjecting properties to deforestation, inflicting irreparable harm on forested wetlands, destroying maple enterprise operations, right of-way clearing, trenching, and deployment of pipe all before the aggrieved landowner's get their day in court).

59. *Allegheny*, 964 F.3d at 12 (quoting Nat'l Ass'n of Mfrs. v. Dep't of Defense, 138 S. Ct. 617, 631 (2008)).

60. *Id.*

61. *Id.* at 13.

62. *Id.* (quoting 15 U.S.C. § 717r(a) (2005) (breaking down the language of section 717r(a) which states: Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing).

63. *Allegheny*, 964 F.3d at 13.

64. *Id.*

to take one of the enumerated actions within the statutorily prescribed thirty day window, the application may be deemed denied and the applicant can seek judicial review of "the now-final agency action."[65]

III. ANALYSIS

A. FERC Failed to Act Upon a Request Within the Meaning of 717r(a) and its Inaction Triggered Judicial Review.

FERC believed that the use of its tolling orders amounted to an action upon the application because it "included language stating that 'rehearing is hereby granted.'"[66] However, the D.C. Circuit held that section 717r(a) "is not such an empty vessel [and] [t]he question is not one of labels but of signification."[67] Therefore, the D.C. Circuit noted that the question before them was whether the tolling order "amount[ed] to a 'grant' of rehearing within the meaning of a statute, or instead amount only to inaction on the application, . . . [thereby triggering] judicial review as a deemed denial."[68]

First, in addressing this question, the D.C. Circuit noted that "a 'grant' of rehearing, as opposed to inaction on an application for rehearing requires some substantive engagement with the application."[69] Notably a 'grant' of rehearing must do more than grant additional time.[70] According to the court, FERC was emphatically "doing one thing, and one thing only: [i]t [was] preventing 'timely-filed rehearing request' from being 'deemed denied' by operation of law.'"[71] The text of the NGA lends no justification for FERC to "have it both ways, claiming to have granted rehearing in one breath, while promising in the next breath that it will decide in some future order whether to grant rehearing or not."[72] When issuing tolling orders the court held that FERC is merely "kicking the can down the road."[73]

Second, the D.C. Circuit held that the tolling order only stalled for time to allow FERC the opportunity act because the Secretary was forbidden from acting on the application.[74] The court noted that the Secretary had "not been delegated any authority to 'act on' the rehearing application, . . . [but had only been delegated authority to] 'toll the time for action on requests for rehearing'"[75]

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65. *Id.*
66. *Id.*
67. *Allegheny*, 964 F.3d at 13.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Allegheny*, 964 F.3d at 13.
72. *Id.* at 14.
73. *Id.* at 13-14.
74. *Id.*
75. *Allegheny*, 964 F.3d at 13-14.

Third, in answering whether or not the tolling order 'granted' rehearing, the D.C. Circuit held that the tolling order created an "unbounded amount of additional time, within which rehearing could never be deemed denied."[76] In the present case, FERC took nine months compared to their typical seven month average "from tolling order to actual rehearing decision on landowner's decisions in pipeline cases."[77] The D.C. Circuit held that FERC, by issuance of its tolling orders, attempted to delete the statutorily prescribed time limit and the deemed denied provision.[78] In other words, the court explained, FERC had attempted to rewrite section 717r(a) "to say that its failure to act within thirty days means nothing."[79] But, the court concluded, neither FERC nor a court possesses the authority to rewrite legislation and "render statutory language a nullity."[80]

Fourth, the D.C. Circuit referenced that Congress only permits agencies to "modify the consequences of their inaction" when Congress" says so explicitly."[81] As an example, it notes that Congress kept FERC "on a tight leash" when it amended the NGA's close relative the FPA to limit the time FERC could take to act on certain applications.[82] Furthermore, section 717r(a) is silent on any authority to toll, and thus according to the court the "textual omission pulls the rug out from under [FERC's] claim of the unwritten and unilateral power to indefinitely evade a deemed denial."[83]

Fifth, the only question the court decided was that FERC is unable to issue a tolling order for the purpose of modifying "the statutorily prescribed jurisdictional consequences of its inaction."[84] However, the court noted that FERC need not make a decision upon the application within the statutorily prescribed timeframe of thirty days.[85] Thus, even if FERC fails to act upon the application during thirty-day timeframe, section 717r(a) provides FERC additional time to render a decision by stating: "[u]ntil the record in a proceeding shall have been filed in a court of appeals," [FERC] "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 the NGA."[86] The section 717r(a) approach, "unlike [FERC's], ensures that [FERC's] additional time for action comes with judicial superintendence and the opportunity for the applicant to seek

76. *Id*. at 14 (citation omitted).

77. *Id.* at 15.

78. *Id*.

79. *Allegheny*, 964 F.3d at 15.

80. *Id*.

81. *Id.* (noting that Congress has been explicit in limiting the leeway an agency has when modifying the consequences of its inaction as seen in 15 U.S.C. § 78s(b)(2)(A), (C) in which the Securities and Exchange Commission fails to act, the Commission may extend its initial period to act only under limited, specific circumstances).

82. *Id*. (citing 16 U.S.C. § 824b(a)(5) (2015)).

83. *Allegheny*, 964 F.3d at 16.

84. *Id.*

85. *Id.*

86. *Id*. at 16-17 (quoting 15. U.S.C. § 717r(a)).

temporary injunctive relief if needed"[87] Thus, the D.C. Circuit concluded that the tolling order was not an act upon the Homeowner's and EAP's applications within the meaning of section 717r(a).[88]

B. Subject Matter Jurisdiction Attaches: Granting of Certificate of Convenience Upheld

As a result of FERC's tolling orders being unable to fend off the Homeowner's and EAPs ability to seek judicial review, their initial petitions for review "were properly before [the] court for review."[89] Federal subject matter jurisdiction attached to the Homeowner's and EAP's initial petitions for review as the result of FERC's failure to act upon their rehearing requests within thirty days of the filing of their rehearing applications.[90] The initial petitions challenged FERC's findings that Transco had met its burden of showing market need for "its proposed transportation of natural gas."[91] FERC found Transco satisfied the market need requirement through Transco's reliance on precedent agreements, "comments by two-shippers and one end-user, [as] well as a study . . . all of which reinforced the [domestic] demand for natural gas shipments."[92] As a result the court held that the Homeowner's and EAP's petitions fell short and denied all four petitions for review, as well as the motions to dismiss these petitions.[93]

C. Judger Henderson's Allegheny Partial Dissent and the Fight for a Fifty-Year-Old Precedent

In writing her partial dissent, Circuit Judge Henderson voiced a similar concern as that discussed in the majority opinion, namely that FERC, by issuing tolling orders for the purpose of avoiding the deemed denied provision, creates an inherent dilemma for the Homeowners.[94] However, she believed that the majority opinion disregarded stare decisis and reached a "conclusion without proper regard for the 'extent' to which tolling orders [had] been upheld."[95] Since 1969, the courts have consistently interpreted that FERC's use of tolling orders are a functional equivalent to an 'act' upon applications under section 717r(a).[96] Overturning such precedent is not like rewriting section 717r(a) on a blank piece of paper, but rather is "constricted by the 'special force' of *stare decisis*, which bars overruling precedent without 'special justification.'"[97]

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87. *Allegheny*, 964 F.3d at 17.
88. *Id*.
89. *Id.* at 19.
90. *Id.*
91. *Allegheny*, 964 F.3d at 19.
92. *Id.*
93. *Id.*
94. *Id.* at 25 (Henderson, J., dissenting).
95. *Allegheny*, 964 F.3d at 23 (Henderson, J., dissenting).
96. *Id.* (citing Cal. Co. v. Fed. Power Comm'n, 441 F.2d 720, 722 (D.C. Cir. 1969)).
97. *Allegheny*, 964 F.3d at 23 (Henderson, J., dissenting) (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (emphasis in original); Allen v. Copper, 140 S. Ct. 994 (2020).

According to the dissent, there are several conditions under which a circuit court may reevaluate its own statutory interpretation.[98] First, a circuit court may reevaluate its own statutory interpretation when other circuits establish a distinguishable, but persuasive construction of the statute.[99] Second, a circuit court may reevaluate its own statutory interpretation if the "*en banc* court 'decides that [a] panel's holding on an important question of law was fundamentally flawed.'"[100] However, the dissent reasoned that none of these factors are present in *Allegheny* to support a reversal of *California Co.*[101] Furthermore, the dissent reasoned that the majority opinion overturned precedent to which the political branches theoretically acquiesced, and could have written out of the statute if they opposed.[102] Thus by overturning *California Co*., the majority "[drew] the judiciary into a policy making role" and overruled precedent on which the "public, government, . . . circuits, and the Bar have long relied."[103]

D. Stare Decisis is not the Berlin Wall, it is Permeable

Thus, the dissent (and previously FERC) argued that stare decisis precludes the D.C. Circuit from overruling *California Co. v. Federal Power Commission*,[104] in which the D.C. Circuit first upheld the use of the tolling order, "without the benefit of oral argument."[105] However, in the majority opinion the Court noted that in reaching that decision, no one, including the panel, could have "foreseen [FERC's] routinization of the [unbounded length] of tolling orders."[106] Further emphasizing this point, the Court noted the landowner's detriment created by this tolling order practice could not have been foreseen because *California Co.* involved rate setting rather than pipeline construction.[107] Furthermore, the D.C. Circuit held that "*stare decisis* principles do not require us to continue down the wrong path."[108] The Court recognized, in agreement with the dissent, that *stare decisis* differs in application to circuit precedent from its application to Supreme Court precedent.[109]

In reviewing circuit precedent, a court can reevaluate its own statutory interpretation if the *en banc* court "decides that [a] panel's holding on an important question of law was fundamentally flawed."[110] However, the majority diverged

98. *Allegheny*, 964 F.3d at 23 (Henderson, J., dissenting)

99. *Id*. at 24 (quoting *Patterson*, 491 U.S. at 173).

100. *Id*.

101. *Id.* at 24.

102. *Allegheny*, 964 F.3d at 24-25 (Henderson, J., dissenting).

103. *Id.* at 23, 25.

104. 411 F.2d 720 (D.C. Cir. 1969).

105. *Allegheny*, 964 F.3d at 17.

106. *Id*. (noting that panels followed *California Co.*'s precedent without further analysis).

107. *Id.* at 17-18.

108. *Id.* (emphasis in original).

109. *Allegheny*, 964 F.3d at 18.

110. *Id.* Generally, cases that come before a United States courts of appeals are heard in front of a three-judge panel. *See* Fed. R. App. P. 35; 28 U.S.C. § 46 (1970). This three-judge appellate court "makes the decision of a division, the decision of the court, unless rehearing [e]n banc is ordered." Reviser's Note to 28 U.S.C. §

from the dissent, in holding that the Court may also set aside circuit precedent "when intervening developments in the law . . . have removed or weakened the conceptual underpinnings from the prior decisions."[111] In light of these principles and in contrast to the dissent, the court held that the panel's acceptance of tolling orders in *California Co.* "is both 'fundamentally flawed' and irreconcilable with intervening Supreme Court decisions in two respects."[112] First, intervening precedent makes clear that the court "must enforce plain and unambiguous statutory language," and "the statute that Congress enacted."[113]

Second, intervening Supreme Court and circuit precedent indicates that *Chevron* deference to an agency's interpretation of a statutory provision is inapplicable when the statutory provisions involve "the boundaries of the courts' jurisdiction," a matter over which federal agencies "have no relevant expertise."[114] Thus, the D.C. Circuit held that panel's approach to statutory construction in *California Co*. was "fundamentally flawed and grounded in a mode of statutory construction that has been foreclosed by the Supreme Court."[115] *Stare decisis* in this regard, was not a wall standing in the way of the D.C. Circuit, it was permeable.[116] Thus, the Court's holding that FERC's tolling orders were not grants of rehearing because they failed to act upon the rehearing application by taking one of the unambiguous actions spelled out in section 717r(a), is permissible.

E. The Court Dismantled Only One Web Ensnaring Landowners: Circuit Judge Griffith's Concurring Opinion

The D.C. Circuit's decision was based in part on finding the appropriate weight and deference to give precedent.[117] Circuit Judge Griffith in his concurring opinion warned that delayed judicial review was only a singular strand in a "web that can ensnare landowners in pipeline cases," and that it "is not the primary

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46(c) (1970). A court can sit en banc during a rehearing of a panel decision or even on the initial hearing of a case. 28 U.S.C. § 46(c) (1970). When the court sits en banc, it consists of "all circuit judges in regular active service." *Id.* En banc decisions carry great weight and "because en banc courts 'are convened only when extraordinary circumstances exist,' they make 'for more effective judicial administration' where '[c]onflicts within a circuit will be avoided' and '[f]inality of decision in the circuit courts of appeal will be promoted.'" Alexandra Sadinsky, *Redefining En Banc Review in the Federal Courts of Appeals*, 82 FORDHAM L. REV. 200, 2011 (2014) (quoting United States v. Am.-Foreign S.S. Corp., 363 U.S. 685 (1960). Further, courts of appeals are often the court of last resort due to the discretionary nature of grants of Certiorari by the Supreme Court. *Id.* at 2004. Thus, en banc review allows every judge on the appellate court to weigh in on the case and controversy or overturn a decision reached by the original three-judge panel and often determine the "major doctrinal trends of the future for their court." *Id.* at 2030.

111. *Allegheny*, 964 F.3d at 18 (quoting United States v. Burwell, 690 F.3d 500, 504 (D.C. Cir. 2012).

112. *Id.* (citing Critical Mass Energy Project v. NRC, 975 F.2d 871, 876 (D.C. Cir. 1992); *Burwell*, 690 F.3d at 504).

113. *Id.* (citing and quoting Obduskey v. McCarthy & Holthus LLP, 139 S. Ct. 1029, 1040 (2019).

114. *Id*. at 12; *see, supra*, notes 45-52 (discussing the inapplicability of *Chevron* deference to statutory provisions the agency is not "charged with administering").

115. *Allegheny*, 964 F.3d at 18.

116. *Id.*

117. *Id.* at 12.

driver of unfairness" to landowners.[118] Further, the concurrence recognized that "one cannot review the procedural history of this case, and others like it, without concluding that something is amiss."[119] Property is routinely handed over to pipeline companies only to be "irreparably transformed, all without judicial consideration of the crucial question: Should the pipeline exist?"[120] This injustice results from the unintentional comingling of three factors: "delayed judicial review, uninterrupted construction, and district courts' swift transfer of property."[121] The concurring opinion discusses each of these factors in detail, as discussed below.

1. Delayed Judicial Review

According to the *Allegheny* concurrence, the NGA explicitly provides federal courts jurisdiction to hear reviews of FERC's certificate orders in two possible scenarios.[122] The first scenario in which federals courts receive jurisdiction occurs when FERC fails to "act upon" the application for rehearing within the statutorily prescribed timeline in section 717r(a) of the NGA.[123] This scenario was the subject of the *Allegheny m*ajority's opinion in holding that the tolling order did not "act upon" the application for rehearing.[124] The second scenario occurs once "FERC rules on the *merits* of a granting petition for rehearing."[125] The *Allegheny* concurrence notes however, this "caveat is important because [FERC] can grant rehearing *without* making a merits decision."[126] This conclusion stems from there being no indication that section 717r(a)'s use of "grant . . . rehearing" was equivalent to ensuring FERC made a decision on the merits.[127] Additionally, the majority afforded no guidance on the determination of what qualifies as a "grant" of rehearing.[128] As a result, FERC is free to grant rehearing "by agreeing to consider the applicant's arguments," or in the words of the *Allegheny* concurrence "deciding to decide," which might still leave open the possibility for undue delay.[129]

2. Uninterrupted Construction

Additionally, the *Allegheny* concurrence emphasizes that delayed or deferred judicial review is *not* one of the major contributors of unfairness to landowners in pipeline cases.[130] The harms caused to the landowners are created by and stem from the steps FERC takes in the interim between granting a certificate and acting

118. *Allegheny*, 964 F.3d at 20 (Griffith, J., concurring).
119. *Id*.
120. *Id*.
121. *Id.*
122. *Allegheny*, 964 F.3d at 20 (Griffith, J., concurring).
123. *Id.*
124. *Id.*
125. *Id*. (emphasis in original).
126. *Allegheny*, 964 F.3d at 20 (Griffith, J., concurring) (emphasis in original).
127. *Id.*
128. *Id*. at 21.
129. *Id.*
130. *Allegheny*, 964 F.3d at 21 (Griffith, J., concurring).

upon a rehearing application, such as granting construction orders.[131] The *Allegheny* concurrence, referencing the majority's opinion, noted that FERC has begun to change course by "amend[ing] its rehearing regulations to 'preclude [ ] the issuance' of a construction order 'while rehearing of the initial order is pending.'"[132] If FERC continued with this practice it would significantly limit the impact of the issue the D.C. Circuit addressed in *Allegheny.* A challenge under the Administrative Procedure Act might be ripe, the concurrence stated, if FERC reverts back to issuing the construction orders while a case is pending rehearing.[133]

3. District Court's Swift Transfer of Property

The *Allegheny* concurrence also notes, however, that even if FERC keeps its new policy of not authorizing construction orders in place, landowners are still at risk. If the certificate order has issues and has not been stayed, the new rule still "does not . . . prevent eminent domain proceedings from going forward based on the underlying certificate order."[134] Eminent domain proceedings are the final strand of the web that can ensnare landowners.[135] Notably, the NGA is silent when it comes to "prevent[ing] a district court from holding an eminent-domain action in abeyance until [FERC] completes its reconsideration of the underlying certificate order."[136] The *Allegheny* concurrence further suggests that a grant of rehearing for a certificate order should be deemed as non-final, thus rendering it as "an invalid basis for transferring property by eminent domain."[137] Thus, the *Allegheny* concurrence concludes that while eliminating FERC's use of tolling orders as a stalling tactic was necessary, even after the decision FERC still retains vast power to postpone review by granting rehearing.[138] However, the court retains an arsenal to mitigate future potential abuse of this power.[139]

IV. SUBSEQUENT HISTORY AND FUTURE IMPLICATIONS

In its majority decision in *Allegheny*, the D.C. Circuit "breaks new ground as the first court of appeals to disapprove FERC's use of tolling orders since the Natural Gas Act became law in 1938."[140] The rationale and approach taken by the D.C. Circuit is likely to be replicated by sister circuits and will likely play a sub-

131. *Id.* at 1, 21 (Griffith, J., concurring).

132. *Id.*

133. *Id.* at 22; *See also* Recent Changes in Commission Rehearing Practice: Item A-3 (Sept. 17, 2020) (transcript available https://www.ferc.gov/news-events/news/recent-changes-commission-rehearing-practice-item-3) (discussing an overview of changes in the FERC's practices concerning requests for rehearing following the in *Allegheny).*

134. *Allegheny*, 964 F.3d at 22 (Griffith, J., concurring).

135. *Id*.

136. *Id*.

137. *Id*.

138. *Allegheny*, 964 F.3d at 22. (Griffith, J., concurring).

139. *Id*.

140. *Id.* (Henderson, J., dissenting) (referencing holdings of the Fifth, Fourth, and First Circuits opposing the D.C. Circuit's position and upholding the use of tolling orders).

stantial role in guaranteeing fair proceedings for both landowners, pipeline companies and others.[141] As a result of the D.C. Circuit's holding FERC can no longer use tolling orders as a means to indefinitely postpone ruling on the merits of a request for rehearing of a FERC order.[142] Notably, under this ruling FERC is not required to decide rehearing requests within the thirty-day statutorily prescribed window.[143]

However, following the *en banc* decision in *Allegheny*, FERC made it explicitly clear that FERC is halting its use of tolling orders in proceedings arising under the NGA and FPA.[144] Rather than issuing tolling orders, FERC is issuing "one of two types of notices no earlier than the 31st day after rehearing is received: a Notice of Denial of Rehearing by Operation of Law, or a Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration."[145] The Notice of Denial of Rehearing by Operation of Law indicates to the applicants for rehearing and the public that FERC intends to not issue a merits order response to the request for rehearing.[146] The Notice of a Denial of Rehearing by Operation of Law and Providing for Further Consideration, goes further in stating FERC's "intention to issue a further order addressing issues raised on rehearing.[147]

While FERC has taken some steps towards remedying the issue of tolling orders, there still remains a gap in which Pipeline companies can still resort to eminent domain proceedings while an appeal is pending.[148] However, nothing in the NGA prevents a landowner from seeking a stay or a district court from holding an eminent domain action in abeyance until FERC grants rehearing.[149]

V. CONCLUSION

Although the D.C. Circuit was very narrow in the question it addressed, it provided an accommodation for the interested parties involved. FERC cannot use a tolling order as the sole means of postponing judicial review on the merits of an appeal of FERC's orders.[150] While beneficial to the landowners, this decision does not negate the possibility of pipeline companies resorting to eminent domain pro-

141. *Id.* at 22 (Griffith, J., concurring).

142. *Allegheny*, 964 F.3d at 19.

143. *Id.* at 16.

144. *Recent* Changes in Commission Rehearing Practice: Item A-3 (Sept. 17, 2020) (transcript available https://www.ferc.gov/news-events/news/recent-changes-commission-rehearing-practice-item-3).

145. *Id.* FERC states that these Notices have important features in common "they both acknowledge that, because the 30-day deadline in the [NGA] or the [FPA] has passed, rehearing may be deemed denied by operation of law." Additionally, these Notices make public the status of the rehearing request but neither Notice rules on the rehearing request. *See Id.*

146. *Id.*

147. *Id.*; *see Allegheny*, 964 F.3d at 16-17 (quoting 15. U.S.C. § 717r(a)) (discussing FERC's authority to "modify order set aside" the underlying orders until the record is filed with the reviewing court).

148. *Allegheny*, 964 F.3d at 1, 10 n.2.

149. *Id*. at 22 (Griffith, J., concurring).

150. *See id.* at 19.

ceedings while an appeal is pending in order to push forward the pipeline construction process.[151] Conversely, eminent domain can be held in abeyance if landowners show on the merits that they have a likelihood of prevailing in their appeals.[152] There are many avenues for the court to further guarantee fair proceedings for both landowners and pipeline companies and the D.C. Circuit took a major step in that direction.[153] The D.C. Circuit decision was the pull of a block on a Jenga tower that toppled FERC's stalling tactic of issuing tolling orders and a move to develop more fair proceedings for customers, landowners and other interested parties involved in FERC regulated industries.[154]

Michael D. Campbell[*]

151. *See Allegheny*, 964 F.3d at n.2.

152. *See id.* at 22 (Griffith, J., concurring).

153. *Id*.

154. *Id.*

* Michael Campbell is a third-year law student at the University Of Tulsa College Of Law. Campbell will be moving to Dallas upon graduation and begin working for Underwood Perkins P.C., in their transactional group. The author would like to thank Professor Robert Butkin, Mr. Harvey Reiter, Mr. Alex Goldberg, Mr. Joseph R. Hicks, and the *Energy Law Journal* student editors for all their help throughout the publication process. Campbell would also like to thank his family, friends, his daughter Adalyn, and his wife Gracie Campbell for all their support.