

**UNITED STATES JUDICIAL PANEL
on
MULTIDISTRICT LITIGATION**

**IN RE: FEDERAL ENERGY REGULATORY COMMISSION,
GAS TRANSMISSION NORTHWEST LLC, 185 FERC 61,035,
ISSUED ON OCTOBER 23, 2023, AND 185 FERC 62,169, ORDER
ISSUED ON DECEMBER 26, 2023**

MCP No. 175

**ORDER STRIKING NOTICE OF MULTICIRCUIT PETITIONS FOR REVIEW AND
VACATING CONSOLIDATION ORDER**

Before the Panel:* Petitioner Gas Transmission Northwest, LLC (GTN), moves for reconsideration of the Panel’s January 22, 2024, consolidation order under 28 U.S.C. § 2112(a)(3). GTN argues that one of the petitions for review listed in the Federal Energy Regulatory Commission’s (FERC’s) notice of multicircuit petitions for review did not satisfy the statutory requirements for inclusion in the notice set forth in Section 2112. The notice included two petitions for review, one filed in the United States Court of Appeals for the Fifth Circuit and one in the United States Court of Appeals for the District of Columbia Circuit. Petitioners Columbia Riverkeeper and Rogue Climate (collectively, Riverkeeper) oppose the motion for reconsideration. FERC takes no position on venue but clarifies certain statements in its notice and GTN’s motion for reconsideration regarding the thirty-day rehearing period established by the Natural Gas Act, 15 U.S.C. §717r(a).

Section 2112 establishes rules to consolidate proceedings challenging an agency action in a single court. If, within ten days of issuing an order, the agency “receives, from the persons instituting the proceedings,” 28 U.S.C. § 2112(a)(1), a single petition for review that has been “stamped by the court with the date of filing,” *id.* § 2112(a)(2), then the agency must file the record in that court of appeals notwithstanding any other proceedings that have been instituted for review of that order, *id.* § 2112(a)(1). If the agency receives, within the ten-day period, two or more date-stamped petitions for review filed in different courts of appeals, then the Panel “shall, by means of random selection,” designate the court in which the agency shall file the record. *Id.* § 2112(a)(3). All other courts of appeals must then transfer any related petitions for review to the court in which the agency files the record. *Id.* § 2112(a)(5).

In October 2021, GTN filed an application with FERC for authorization to install, construct, modify, and operate certain natural gas compression facilities in Idaho, Oregon, and Washington (the GTN Xpress Project). Riverkeeper opposed the project due to its alleged adverse environmental impacts. On October 23, 2023, FERC issued a certificate of convenience and public

* Judge Nathaniel M. Gorton did not participate in the decision of this matter.

- 2 -

necessity for the GTN Xpress Project, which granted authorization for the project subject to certain conditions. See Order Issuing Certificate, *Gas Transmission Northwest, LLC*, 185 FERC ¶ 61,035 (Oct. 23, 2023).

To appeal an order under the Natural Gas Act, a party must first seek rehearing from the agency. See 15 U.S.C. § 717r(a); *Williston Basin Interstate Pipeline Co. v. FERC*, 475 F.3d 330, 334 (D.C. Cir. 2006) (“If a party does not seek rehearing, no judicial review is available.”). The statute further provides that if the Commission does not act upon an application for rehearing within thirty days, the application is deemed denied as a matter of law, at which point the party may seek appellate review. 15 U.S.C. § 717r(a). Both Riverkeeper and GTN filed applications for rehearing with FERC on November 22, 2023. The Commission did not act on any of the rehearing applications by Friday, December 22, 2023, the thirtieth day after they were filed. The next business day—Tuesday, December 26, 2023—FERC’s Deputy Secretary issued a “Notice of Denial of Rehearing by Operation of Law and Providing for Further Consideration.” *Gas Transmission Northwest, LLC*, 185 FERC ¶ 62,169 (Dec. 26, 2023).

GTN and Riverkeeper both filed petitions for review of FERC’s certificate order in the appellate courts. GTN, which challenges FERC’s denial of its request for a “predetermination” that costs associated with the GTN Xpress Project would be rolled into GTN’s system rates at its next rate-setting case, filed its petition for review in the Fifth Circuit on January 2, 2024, and delivered a date-stamped copy of the petition to FERC that same day. There is no dispute that GTN’s petition meets the requirements of Section 2112.¹

Riverkeeper filed its petition for review in the D.C. Circuit on January 4, 2024. The following day, Riverkeeper delivered to FERC a copy of its petition for review, but this copy did not include a date stamp from the court. Riverkeeper did, however, provide the case number assigned by the D.C. Circuit and explained that it could not obtain a date-stamped copy because of an “administrative backlog” at the court. On January 10, 2024, Riverkeeper served a date-stamped copy of its D.C. Circuit petition on FERC, which reflected the filing date of January 4, 2024.

FERC subsequently filed its notice of multicircuit petitions for review with the Panel. Seemingly presented with two petitions for review that satisfied the statutory criteria, the Panel Clerk conducted a random selection and issued a consolidation order, designating the D.C. Circuit

¹ Riverkeeper argues that GTN’s petition should be disregarded because the petition is not ripe and GTN lacks standing to petition for review of FERC’s order. The Panel, though, does not engage with the merits of the petitions. See *In re Nat’l Labor Relations Bd.; Station GVR Acquisition, LLC d/b/a Green Valley Ranch Resort Spa Casino & Int’l Union of Operating Eng’rs Local 501, AFL-CIO*; 366 NLRB No. 175, Issued on Aug. 27, 2018, 338 F. Supp. 3d 1343, 1345 (J.P.M.L. 2018) (quoting 16 Charles Alan Wright & Arthur R. Miller, *Fed. Practice & Procedure* § 3944 (3d ed. Sept. 2018 Update), for the proposition that Section 2112 “does not make the Panel responsible for determining whether any of the review petitions were properly filed”). These issues are properly decided by the appellate court, not the Panel.

- 3 -

as the forum in which the petitions would be consolidated. GTN's motion for reconsideration followed, and the Panel Clerk stayed the consolidation order until the reconsideration motion is resolved.

Petitions for review "must meet strict statutory requirements" to be included on a notice seeking to trigger the random selection procedures under Section 2112(a)(3). *In re FERC, Order Denying Rehearing, The Yakama Nation v. Pub. Util. Dist. No. 2 of Grant County, Wash., 103 FERC 61,073, Issued on Apr. 16, 2003 (Yakama Nation)*, 278 F. Supp. 2d 1379, 1380 (J.P.M.L. 2003). GTN argues (1) that the petition Riverkeeper delivered to FERC did not meet Section 2112's date-stamp requirement and (2) that the petition was not filed with the D.C. Circuit within the ten-day statutory period set forth in the statute.

Whether Riverkeeper's petition satisfies Section 2112(a)'s date-stamp requirement presents a somewhat close question. The Panel has consistently stated that the date-stamp requirement is not a mere formality. *See, e.g., In re FERC, Atl. Coast Pipeline, LLC, 164 FERC 61,100, Issued on Aug. 10, 2018*, 341 F. Supp. 3d 1378, 1380 (J.P.M.L. 2018) (striking notice because petition was not date-stamped); *Yakama Nation*, 278 F. Supp. 2d at 1380 (same). The petition for review that Riverkeeper served on FERC did not have a date stamp. Instead, Riverkeeper provided the D.C. Circuit case number and attributed the lack of a date stamp to an administrative backlog at the court. Arguably, the case number would have allowed FERC to verify whether the petition had been filed. *Cf. Local Union 36 v. Nat'l Labor Relations Bd.*, 631 F.3d 23, 26–27 (2d Cir. 2010) (holding that date-stamped email transmitting petition for review to Second Circuit was sufficient because that court did not permit hard copy filing). On the other hand, the D.C. Circuit rules permit in-person filing of petitions for review. *See* D.C. Cir. R. 25(c)(3) ("Case-initiating documents, including . . . petitions for review or notices of appeal from agency action . . . may be filed either electronically or in paper form."). Thus, regardless of any backlog with respect to electronic filing, it appears that Riverkeeper could have presented its petition in paper form and obtained a date-stamped copy.

We need not resolve this issue, however, because Riverkeeper's petition was not filed within Section 2112(a)'s ten-day window. Riverkeeper argues that the triggering act for Section 2112's ten-day filing period was the issuance of the Notice of Denial on December 26. But this is inconsistent with the Natural Gas Act, which states that "[u]nless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied." 15 U.S.C. § 717r(a). The Notice of Denial merely informed the parties that the thirty-day period provided by the statute had passed. It was the passing of the thirty days with no agency action that triggered the ability to appeal under the statute, not the issuance of the Notice of Denial.² Moreover, FERC could not issue the Notice of Denial until *after* the thirty-day period

² Riverkeeper suggests that some order must "issue" for the ten-day period in Section 2112(a) to be triggered but overlooks that the order being appealed is not the denial by operation of law of the rehearing applications, but FERC's initial order issuing a certificate of convenience for the GTN Xpress Project. The thirty-day rehearing window set forth in 15 U.S.C. § 717r(a) merely establishes when a petition for review of that order may be filed in the appellate court.

- 4 -

had expired. *Cf. Allegheny Defense Project v. FERC*, 964 F.3d 1, 12–19 (D.C. Cir. 2020) (en banc) (holding that FERC could not issue an order “tolling” the thirty-day period set forth in 15 U.S.C. § 717r(a) to prevent a deemed denial or alter the jurisdictional consequences of agency inaction). Accordingly, Section 2112(a)’s ten-day countdown began when, by operation of law, the thirty-day period expired, not when FERC subsequently notified the parties of this event.

With the trigger established, the timing is straightforward. When FERC failed to act on the rehearing applications by the end of December 22, the applications were deemed denied by operation of law. Federal Rule of Appellate Procedure 26(a) states that, when calculating a time period for filing, every day is counted, including intermediate weekends and legal holidays, except that if the last day of the period is a weekend or legal holiday, the period continues to run until the next business day. Ten days from December 22, 2023, was January 1, 2024, which was a federal holiday. Therefore, the ten-day period under Section 2112(a) expired the following day, January 2, 2024. GTN’s petition was filed and delivered to FERC within this period. Riverkeeper’s petition was not filed until January 4 and was not delivered to FERC until January 5—after Section 2112(a)’s filing window had closed.

Riverkeeper argues that the December 22 should be considered a federal holiday because FERC employees were given a three-hour early dismissal that day. This argument is not persuasive. Setting aside the fact that December 22 was not designated as a federal holiday, either by statute or executive order, the three-hour early dismissal apparently was not even publicized—Riverkeeper learned of it through a Freedom of Information Act request. *See Resp. in Opp.*, Hasselman Decl. ¶ 2, MCP No. 175 (J.P.M.L. filed Feb. 12, 2024), ECF No. 11-1 (stating that early dismissal announcement “was obtained by my client pursuant to a Freedom of Information Act request”). Moreover, FERC remained open, and employees were directed to check with their supervisor before leaving “to avoid interference with Commission operations.” *See id.* at 4.

Riverkeeper also argues that the Panel Clerk has issued consolidation orders in other dockets in which FERC’s notice of multicircuit petitions for review was based on the date the Notice of Denial by Operation of Law issued. No party challenged those consolidation orders, however, so there was no reason for the Panel Clerk to look beyond FERC’s averments in its notice of multicircuit petitions for review. When presented with a notice that seemingly satisfies the statutory criteria, the Panel Clerk must conduct the random selection. *See Panel Rule 25.5(a)* (“Upon filing a notice of multicircuit petitions for review, the Clerk of the Panel *shall* randomly select a circuit court of appeals”) (emphasis added). Those prior MCP dockets thus offer no guidance or precedent with respect to the application of the statutory ten-day window in this matter.

Riverkeeper’s petition was filed too late to trigger the random selection process under Section 2112(a)(3). Instead, the procedure under Section 2112(a)(1)—when the agency receives only one petition for review within the ten-day period—applies. Specifically, the agency “shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order.” 28 U.S.C. § 2112(a)(1). If later filed petitions are filed (such as Riverkeeper’s petition here), the courts are required to transfer those proceedings to the

- 5 -

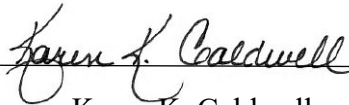
first court. *See id.* § 2112(a)(5). Accordingly, we will strike FERC's notice and vacate the consolidation order.

IT IS THEREFORE ORDERED that motion for reconsideration is granted;

IT IS FURTHER ORDERED that the notice of multicircuit petitions for review is stricken; and

IT IS FURTHER ORDERED that the consolidation order in this docket is vacated.

PANEL ON MULTIDISTRICT LITIGATION

A handwritten signature in cursive script, reading "Karen K. Caldwell", is positioned above a horizontal line.

Karen K. Caldwell
Chair

Matthew F. Kennelly
Roger T. Benitez
Madeline Cox Arleo

David C. Norton
Dale A. Kimball

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SCHEDULE A

District of Columbia Circuit

COLUMBIA RIVERKEEPER, ET AL. v. FEDERAL ENERGY REGULATORY
COMMISSION, No. 24-01002

Fifth Circuit

GAS TRANSMISSION NORTHWEST, LLC v. FEDERAL ENERGY REGULATORY
COMMISSION, No. 24-60002