

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

ILLINOIS COMMERCE)	
COMMISSION,)	
)	No. 20-1645
Petitioner,)	
)	Consolidated with Nos.
v.)	20-1759, 20-1760,
)	20-1761, 20-1762,
FEDERAL ENERGY)	20-1819, 20-1849,
REGULATORY COMMISSION,)	20-2010, 20-2016
)	
Respondent.)	
)	

**INTERVENOR ELECTRIC POWER SUPPLY ASSOCIATION’S
MOTION TO TRANSFER**

Pursuant to Federal Rule of Appellate Procedure 27 and 28 U.S.C. § 2112(a)(5), Intervenor Electric Power Supply Association (“EPSA”) respectfully requests that this Court transfer these consolidated petitions to the United States Court of Appeals for the District of Columbia Circuit.

LEGAL BACKGROUND

1. 16 U.S.C. § 825*l* governs judicial review of orders issued by the Federal Energy Regulatory Commission (“FERC” or the “Commission”) under the Federal Power Act (“FPA”). Prior to seeking judicial review of an order, an aggrieved party must, within 30 days, first request rehearing at FERC. *Id.* § 825*l*(a) & (b). “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.” *Id.* § 825l(a). Following the denial of a rehearing petition, parties have 60 days to seek judicial review in an appropriate court of appeals. *Id.* § 825l(b).

For decades, FERC routinely issued a standard “tolling order,” granting rehearing solely for purposes of further consideration, in response to a rehearing petition. *See Allegheny Def. Project v. Fed. Energy Regulatory Comm’n*, No. 17-1098, 2020 WL 3525547, at *6 (D.C. Cir. June 30, 2020) (en banc). As the D.C. Circuit recently explained, these orders would “take[] no action on the application other than buying the Commission more time.” *Id.* at *1. The D.C. Circuit had long accepted that practice. *See, e.g., Delaware Riverkeeper Network v. Fed. Energy Regulatory Comm’n*, 895 F.3d 102, 113 (D.C. Cir. 2018); *Cal. Co. v. FPC*, 411 F.2d 720 (D.C. Cir. 1969).

On December 5, 2019, the D.C. Circuit granted *en banc* rehearing to consider whether FERC’s tolling order practice is consistent with the statutory text. *See Allegheny Def. Project v. Fed. Energy Regulatory Comm’n*, 943 F.3d 496 (D.C. Cir. 2019). On June 30, 2020, the *en banc* D.C. Circuit reversed its prior decisions, holding “that, under the plain statutory language and context, such tolling orders are not

the kind of action on a rehearing application that can fend off a deemed denial and the opportunity for judicial review.” *Allegheny Def.*, 2020 WL 3525547, at *1.¹

2. When multiple parties seek judicial review of the same agency order in different courts, 28 U.S.C. § 2112 provides the mechanism for consolidation.

The ten days following an order are crucial. If, “within ten days after issuance of the order” at issue, parties file petitions for review in two or more courts of appeals, the petitions are referred to the Judicial Panel on Multidistrict Litigation, which is to select one of the circuits by means of a lottery. 28 U.S.C. § 2112(a)(1) & (a)(3). Subsequently filed petitions are transferred to the court so selected. *Id.* § 2112(a)(5).

¹ *Allegheny Defense* formally concerned the judicial review provisions of the Natural Gas Act (another statute administered by the Commission), rather than the FPA—but its textual holding is equally applicable to the identically worded review provision of the FPA. *Compare* 15 U.S.C. § 717r(a) (Natural Gas Act) (“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.”) *with* 16 U.S.C. § 825l(a) (Federal Power Act) (“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.”). The courts have consistently recognized that substantively identical provisions of the two statutes may be “cit[ed] interchangeably.” *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981); *see also City of Clarksville v. FERC*, 888 F.3d 477, 484 (D.C. Cir. 2018) (“Because the NGA is modeled substantively after the FPA, they are interpreted similarly.”). In fact, the D.C. Circuit referenced FERC’s actions in this proceeding as an example of its tolling practice. *Allegheny Def.*, 2020 WL 3525547, at *11.

By contrast, if petitions are filed in only a single circuit during the initial ten-day window, then that court resolves all later-filed petitions relating to the agency order. 28 U.S.C. § 2112(a)(1). And, if the ten-day window elapses without the filing of any petition for review, then the first-filed petition selects the circuit, and all later filed petitions will be transferred there. *Id.*

Notwithstanding these procedures, courts retain express statutory discretion to “transfer all the proceedings” “to any other court of appeals,” as appropriate “[f]or the convenience of the parties in the interest of justice.” 28 U.S.C. § 2112(a)(5).

FACTUAL BACKGROUND

This proceeding arises from a series of FERC orders regarding the rules for the regional energy capacity market administered by PJM Interconnection, L.L.C. (“PJM”). Those rules are set forth in the PJM Open Access Transmission Tariff, a tariff on file with the Commission.

1. On June 29, 2018, the Commission issued an order finding the PJM Tariff to be unjust and unreasonable, because it failed adequately to address the effect of below-cost offers into the capacity market from resources receiving state subsidies. On December 19, 2019, the Commission issued a further order establishing a just and reasonable replacement rate with specific features intended to remedy the price distortions.

Various parties requested rehearing of the December 19, 2019 order before the Commission. On February 18, 2020, per its usual practice, the Commission issued a tolling order, which granted rehearing “for the limited purpose of further consideration,” but did not otherwise act upon the rehearing petition. No. 20-1645, Dkt. 1-1, at PDF p. 236-237 (tolling order).

Because the D.C. Circuit had by then taken *Allegheny Defense en banc* to consider the legality of such tolling orders, multiple parties petitioned the D.C. Circuit for review of the December 19, 2019 order, after FERC issued the tolling order. These parties did so on the theory that, if the D.C. Circuit were to find tolling orders to be unlawful, rehearing of the December 19 order had been denied by operation of law due to FERC’s failure to act on the merits of the requests for rehearing within thirty days. *See* D.C. Cir. Nos. 20-1059, 20-1095, 20-1118, 20-1120, 20-1125, 20-1126. The first of these “protective petitions”² was filed on February 28, 2020. *See N.J. Division of Rate Counsel v. FERC*, No. 20-1059 (D.C. Cir.).

FERC responded by moving the D.C. Circuit to dismiss these petitions as “incurably premature” in view of the tolling order. *See* D.C. Cir. No. 20-1059, Doc. 1838084 (Apr. 14, 2020). The D.C. Circuit issued an order holding the protective

² These protective petitions, along with the other petitions at issue, are catalogued in a chart at Appendix A.

petitions in abeyance pending its resolution of *Allegheny Defense*. See D.C. Cir. No. 20-1059, Doc. 1847539 (June 16, 2020).

2. On April 16, 2020, the Commission issued orders ruling substantively on the applications for rehearing of its earlier June 29, 2018 and December 19, 2019 orders, largely denying rehearing. The denial of rehearing spurred a second round of petitions for review, including petitions filed within ten days of the April 16 orders in this Court and in the D.C. Circuit. Because FERC viewed the protective petitions, which were filed solely in the D.C. Circuit, as jurisdictionally defective, the Commission disregarded those petitions and referred the petitions filed within ten days of the April 16 orders to the Judicial Panel on Multidistrict Litigation, invoking the procedures in 28 U.S.C. § 2112. See Notice of Multicircuit Petitions for Review, *In re Fed. Energy Reg. Comm'n Orders*, MCP No. 160 (J.P.M.D.L. May 4, 2020), Dkt. 1, at 2-3. This Court won the lottery. See *id.* Dkt. 3. Four petitions filed in the D.C. Circuit within ten days of the April 16 orders were therefore transferred from the D.C. Circuit to this Court.

Subsequently, additional parties have filed petitions for review—both in this Court and in the D.C. Circuit—challenging the underlying FERC orders. *See generally* Appendix A. At present, nine petitions for review are currently pending in this Court; eighteen petitions for review are now pending in the D.C. Circuit. *Id.*³

ARGUMENT

The twenty-seven petitions for review challenging the same underlying FERC orders should be consolidated in a single court. Indeed, 28 U.S.C. § 2112 exists to ensure that result. This makes good sense: Not only would it waste judicial and party resources to simultaneously litigate the same FERC orders before two different courts, but it would also risk conflicting results. The status quo—with cases proceeding in both this Court and the D.C. Circuit—should not continue.

Intervenor respectfully submits that the best course of action is for this Court to transfer the consolidated cases before it to the D.C. Circuit.

First, in light of *Allegheny Defense*, the “protective” petitions filed in the D.C. Circuit now appear operative. As a result, Section 2112 directs that the D.C. Circuit is the appropriate court for the resolution of these petitions. Transferring the pending

³ The D.C. Circuit has issued an order asking parties to show cause why the later-filed petitions should not be transferred to this Court. *See* D.C. Cir. No. 20-1059, Doc. 1847539 (June 16, 2020). Simultaneous with this filing, Intervenor is submitting this document to the D.C. Circuit as justification for why it should not transfer cases pending before it.

petitions to the D.C. Circuit would not have this Court sitting in review of the order issued by the Judicial Panel on Multidistrict Litigation. Rather, it would be an exercise of the Court's Section 2112(a)(5) authority to transfer petitions to another court even after a lottery.

Second, prudential and equitable factors counsel in favor of a transfer to the D.C. Circuit. That court is best equipped to apply its recent decision in *Allegheny Defense* to the specifics of this case; it has “relative expertise” given its heavy FERC docket; it has a comparatively lighter caseload; the convenience of the parties favors the D.C. Circuit; and the impacted geographic region encompasses both Circuits.

1. In light of the D.C. Circuit's decision in *Allegheny Defense*, the protective petitions filed in the D.C. Circuit no longer appear to be procedurally defective, as FERC's referral to the Judicial Panel on Multidistrict Litigation assumed, and those petitions now appear operative. In particular, the first petition, filed on February 28, 2020, was *N.J. Division of Rate Counsel v. FERC*, No. 20-1059. That petition challenged the FERC order issued on December 19, 2019; it noted that petitioner had sought rehearing on January 21, 2019, and that FERC responded with a tolling order on February 18, 2020. *Id.* Doc. No. 1831116, at 2. Petitioner stated that, if *Allegheny Defense* were to hold that FERC is “unable through the issuance of tolling orders to grant itself extensions of time to act on requests for rehearing beyond the thirty-day time period set forth in 15 U.S.C. § 717r(a),” then FERC's tolling order might be a

“nullity,” and petitioner’s “request for rehearing would be deemed to have been denied by operation of law on February 20, 2020.” *Id.* at 3-4.

Allegheny Defense issued just such a holding. 2020 WL 3525547, at *1. The petition filed by the New Jersey Division of Rate Counsel thus appears operative.

As a result, no lottery under Section 2112 should have occurred. Because the petition by the New Jersey Division of Rate Counsel was the sole petition for review of this FERC order filed within the ten day period following the denial of rehearing of the December 19, 2020 order by operation of law, coinciding with FERC’s issuance of the tolling order (*see* Appendix A), Section 2112 directs that FERC should file the administrative record in the D.C. Circuit, and that all further proceedings should occur there. *See* 28 U.S.C. § 2112(a).

In its *ex parte* notice to the Judicial Panel on Multidistrict Litigation, FERC explained that it disregarded the petitions “that were filed prior to” the rehearing orders FERC issued on April 16, 2020. *See* Notice of Multicircuit Petitions for Review, *In re Fed. Energy Reg. Comm’n Orders*, MCP No. 160 (J.P.M.D.L. May 4, 2020), Dkt. 1, at 2. This position reflected FERC’s view—also identified in its motion to dismiss—that the protective petitions were “incurably premature.” *See* D.C. Cir. No. 20-1059, Doc. 1838084. That contention, however, relies on a construction of the Federal Power Act that the *en banc* D.C. Circuit has now expressly rejected.

Importantly, Section 2112(a) recognizes that, even after the Judicial Panel on Multidistrict Litigation consolidates petitions for review in a circuit, the court to which the matters are assigned retains discretion, “[f]or the convenience of the parties in the interest of justice,” to “transfer all the proceedings with respect to that order to any other court of appeals.” 28 U.S.C. § 2112(a)(5); *see Sacramento Mun. Utility Dist. v. FERC*, 683 F.3d 769, 770 (7th Cir. 2012) (Easterbrook, J., in chambers) (“The selected circuit ‘thereafter’ can transfer all of the petitions elsewhere, if it chooses, ‘[f]or the convenience of the parties in the interest of justice.’”) (quoting 28 U.S.C. § 2112(a)(5)). Indeed, in its request to delay the filing of the administrative record, FERC recognized “that some or all petitioners may (timely) seek to transfer the petitions back to the D.C. Circuit (or to another court of appeals). *See* 28 U.S.C. § 2112(a)(5).” FERC’s Mot. for Temp. Stay of Filing of the Agency Record, *Ill. Commerce Comm’n v. FERC*, No. 20-1645 (7th Cir. May 28, 2020), Dkt. 40, at 3.

Because petitions for review remain pending in both this Court and the D.C. Circuit challenging the same agency orders (*see* Appendix A), the petitions plainly need to be consolidated *somewhere*. A straightforward application of Section 2112(a) following *Allegheny Defense* points to the D.C. Circuit. This objective statutory guidance is reason enough for this Court to exercise its discretion to direct transfer of these petitions to the D.C. Circuit. *Sacramento Mun. Util. Dist.*, 683 F.3d

at 771 (“[T]he way to determine which circuit will handle the litigation is to follow the procedures specified by law.”).

2. Prudential and equitable factors also counsel in favor of transferring these petitions to the D.C. Circuit.

First, the parties may dispute the effect of *Allegheny Defense* on certain jurisdictional questions implicated here. While this Court is undoubtedly equipped to address those issues, consolidating these proceedings in the D.C. Circuit has the benefit of allowing that court to explore application of its own recent *en banc* decision.

Second, the Federal Power Act provides that the D.C. Circuit—where FERC is located—is a categorically appropriate venue for judicial review of FERC orders. *See* 16 U.S.C. § 825l(b) (providing for review “in the United States court of appeals for any circuit wherein the [entity] to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia”). To be sure, when—as here—a petitioner has a principal place of business in this Circuit, review by this Court is also appropriate. But the Federal Power Act’s determination that the D.C. Circuit is a universally available forum, regardless of the petitioner’s geographic location, has provided that court “relative

expertise” with respect to review of FERC orders. *United Steelworkers of Am. v. Marshall*, 592 F.2d 693, 697 (3d Cir. 1979).⁴

Third, the comparative docket load of the courts slightly favors transfer to the D.C. Circuit. *See United Steelworkers*, 592 F.2d at 697 (considering “the relative state of the dockets of those courts to which the case might be relegated”). As of the most recent statistics, this Court had 1,713 pending cases for its eleven active judges, while the D.C. Circuit, with twelve active judges, had 1,100. *See United States Courts, U.S. Courts of Appeals—Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2018 and 2019*, https://www.uscourts.gov/sites/default/files/data_tables/jb_b_0930.2019.pdf.

Fourth, the convenience of the parties also favors transfer to the D.C. Circuit. As that court noted in a case involving orders of the FERC’s predecessor agency:

The Commission is situated in Washington. The parties before us often come to Washington, at least by counsel, to participate in Commission proceedings, as they have done in the proceedings with which we are presently concerned. Much of the specialized oil and gas bar is concentrated here, consumer groups are well represented here, and industry representatives not based here are continually in attendance.

Am. Pub. Gas Ass’n v. Fed. Power Comm’n, 555 F.2d 852, 857 (D.C. Cir. 1976) (finding “the convenience of the parties [to be] furthered by retention of these cases

⁴ A Westlaw search indicates that, in the past decade, this Court has resolved approximately 5 petitions requesting review of a FERC order. Over that same period, the D.C. Circuit has resolved more than 250 such cases.

in the District of Columbia Circuit”). The same is true here. Additionally, even following the transfer of certain cases to this Court pursuant to the lottery, eighteen petitions remain pending in the D.C. Circuit, whereas only nine are pending here.

Finally, transfer to the D.C. Circuit would not remove the case from the affected geographical area, as Washington, D.C. itself is part of the region served by PJM. *See, e.g.*, No. 20-1645 (7th Cir. May 4, 2020), Dkt. 9, at 1 (PJM’s motion to intervene, listing jurisdictions within its region).

For each of these reasons, transfer to the D.C. Circuit serves “the convenience of the parties in the interest of justice.” 28 U.S.C. § 2112(a)(5).

CONCLUSION

In all, the twenty-seven active petitions for review should be consolidated *somewhere*. Because a straightforward application of Section 2112 identifies the D.C. Circuit as the appropriate venue for consolidation, transfer to that court is warranted. Prudential and equitable factors confirm that result. EPSA thus respectfully requests that the consolidated petitions be transferred to the D.C. Circuit.

Respectfully submitted,

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Dated: July 6, 2020

CERTIFICATE OF SERVICE

I certify that on July 6, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system. All parties or their counsel are registered users.

/s/ Paul W. Hughes

Paul W. Hughes

APPENDIX A

Protective petitions pending in the D.C. Circuit (held in abeyance pending the outcome of Allegheny Defense)

Court	Case No.	Caption	Filed	Order(s) Challenged	Notes
D.C. Cir.	20-1059	<i>N.J. Division of Rate Counsel v. FERC</i>	2/28/2020	December 19 Order	
D.C. Cir.	20-1095	<i>Nat'l Rural Elec. Coop. Ass'n v. FERC</i>	3/27/2020	December 19 Order	
D.C. Cir.	20-1118	<i>Old Dominion Elec. Coop. v. FERC</i>	4/10/2020	December 19 Order	
D.C. Cir.	20-1120	<i>East Ky. Power Coop., Inc. v. FERC</i>	4/13/2020	December 19 Order	
D.C. Cir.	20-1125	<i>Allegheny Elec. Coop., Inc. v. FERC</i>	4/17/2020	December 19 Order	
D.C. Cir.	20-1126	<i>Ill. Mun. Elec. Agency v. FERC</i>	4/17/2020	December 19 Order	

Other consolidated petitions currently pending in the D.C. Circuit (subject to the D.C. Circuit's show-cause order)

Court	Case No.	Caption	Filed	Order(s) Challenged	Notes
D.C. Cir.	20-1131	<i>Envtl. Def. Fund v. FERC</i>	4/20/2020	June 29 Order, December 19 Order, both April 16 Rehearing Orders	
D.C. Cir.	20-1139	<i>N.J. Bd. of Pub. Utils. v. FERC</i>	4/27/2020	June 29 Order, December 19 Order, both April 16 Rehearing Orders	
D.C. Cir.	20-1154	<i>Old Dominion Elec. Coop. v. FERC</i>	5/15/2020	December 19 Order, one April 16 Rehearing Order (¶ 61,035)	
D.C. Cir.	20-1155	<i>Nat'l Rural Elec. Coop Ass'n v. FERC</i>	5/15/2020	December 19 Order, one April 16 Rehearing Order (¶ 61,035)	
D.C. Cir.	20-1191	<i>East Ky. Power Coop. v. FERC</i>	6/8/2020	December 19 Order, one April 16 Rehearing Order (¶ 61,035)	

D.C. Cir.	20-1194	<i>Dominion Energy Servs., Inc. v. FERC</i>	6/9/2020	June 29 Order, December 19 Order, both April 16 Rehearing Orders	
D.C. Cir.	20-1200	<i>Am. Wind Energy Ass'n v. FERC</i>	6/11/2020	June 29 Order, December 19 Order, both April 16 Rehearing Orders	
D.C. Cir.	20-1203	<i>Advanced Energy Economy v. FERC</i>	6/12/2020	December 19 Order, one April 16 Rehearing Order (¶ 61,035)	
D.C. Cir.	20-1204	<i>Enerwise Global Techs., Inc. v. FERC</i>	6/12/2020	June 29 Order, December 19 Order, both April 16 Rehearing Orders	
D.C. Cir.	20-1205	<i>District of Columbia v. FERC</i>	6/12/2020	December 19 Order, February 18 Order, one April 16 Rehearing Order (¶ 61,035)	
D.C. Cir.	20-1209	<i>Allegheny Elec. Coop., Inc. v. FERC</i>	6/15/2020	December 19 Order, one April 16 Rehearing Order (¶ 61,035)	
D.C. Cir.	20-1210	<i>Pub. Serv. Comm'n of D.C. v. FERC</i>	6/15/2020	December 19 Order, both April 16 Rehearing Orders	

Cases transferred from the D.C. Circuit to the Seventh Circuit pursuant to the MDL order

Court	Case No.	Caption	Transferred	Order(s) Challenged	Notes
7th Cir.	20-1759	<i>Am. Pub. Power Ass'n v. FERC</i>	5/6/2020	June 29 Order, December 19 Order, both April 16 Rehearing Orders	D.C. Cir. No. 20-1129
7th Cir.	20-1760	<i>N.C. Elec. Membership Corp. v. FERC</i>	5/6/2020	December 19 Order, one April 16 Rehearing Order (¶ 61,035)	D.C. Cir. No. 20-1130

7th Cir.	20-1761	<i>Energy Harbor, LLC v. FERC</i>	5/6/2020	December 19 Order, one April 16 Rehearing Order (¶ 61,035)	D.C. Cir. No. 20-1133
7th Cir.	20-1762	<i>N.J. Division of Rate Counsel v. FERC</i>	5/6/2020	December 19 Order, one April 16 Rehearing Order (¶ 61,035)	D.C. Cir. No. 20-1135

Petitions filed in the Seventh Circuit that have been consolidated

Court	Case No.	Caption	Filed	Order(s) Challenged	Notes
7th Cir.	20-1645	<i>Ill. Commerce Comm'n v. FERC</i>	4/20/2020	June 29 Order, December 19 Order, both April 16 Rehearing Orders	
7th Cir.	20-1819	<i>Exelon Corp. v. FERC</i>	5/15/2020	June 29 Order, December 19 Order, February 18 Order, both April 16 Rehearing Orders	
7th Cir.	20-1849	<i>Pub. Utils. Comm'n of Ohio v. FERC</i>	5/20/2020	December 19 Order, one April 16 Rehearing Order (¶ 61,035)	
7th Cir.	20-2010	<i>Illinois v. FERC</i>	6/12/2020	June 29 Order, December 19 Order, February 18 Order, both April 16 Rehearing Orders	
7th Cir.	20-2016	<i>PSEG Power LLC v. FERC</i>	6/15/2020	June 29 Order, December 19 Order, February 18 Order, both April 16 Rehearing Orders	