

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CITY OF FORT MORGAN,

Petitioner,

v.

No. 01-9514

FEDERAL ENERGY REGULATORY
COMMISSION,
Respondent.

ORDER

Entered April 8, 2002

Before KELLY, PORFILIO, and ANDERSON, Circuit Judges.

This case is before us for a second time. In our first decision, City of Fort Morgan v. FERC, 181 F.3d 1155 (10th Cir. 1999), we granted Fort Morgan's petition and reversed and remanded the Federal Energy Regulatory Commission's ("FERC") November 1997 order exercising regulatory jurisdiction over and

authorizing the construction of a natural gas pipeline by K N Wattenberg Limited

Liability Company ("KNW"). We remanded to FERC to reconsider its conclusion

that the KNW pipeline was not exempt from FERC regulation as a Hinshaw

Amendment facility under section 1(c) of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717z.

On remand, FERC reversed its prior decision, concluding in a March 29,

2000, order that the KNW line was exempt from FERC jurisdiction as a Hinshaw

Amendment line. KN Wattenberg Transmission Ltd. Liability Co., 90 FERC

¶ 61,321 (2000). FERC accordingly vacated its prior orders.

KNW requested rehearing of that order, while Fort Morgan did not. In an

order dated October 12, 2000, FERC denied KNW's request for rehearing and

clarified its prior order. KN Wattenberg Transmission Ltd. Liability Co., 93 FERC ¶ 61,041 (2000). Fort Morgan requested rehearing of this order. In February 2001, FERC denied Fort Morgan's requested rehearing, further clarifying its prior orders. KN Wattenberg Transmission Ltd Liability Co., 94 FERC ¶ 61,189 (2001).

Fort Morgan did not request rehearing of this order. Rather, sixty days after its issuance, Fort Morgan petitioned for review of this order in our court. FERC filed a motion to dismiss for lack of jurisdiction, on the ground that Fort Morgan failed to request rehearing of the February 2001 order, as required by statute, and that, in any event, Fort Morgan is not aggrieved by FERC's order. Fort Morgan then filed an "Amended and Supplemental Petition for Review,"

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petitioning for review of both the October 12, 2000, and the February 23, 2001, orders. FERC moved to dismiss that petition, arguing that it was untimely.

We agree with FERC that we lack jurisdiction over Fort Morgan's initial

petition for review, seeking review of the February 23, 2001, order. 15 U.S.C. § 717r provides for an aggrieved party to seek review of "an order issued by [FERC] . . . in the court of appeals of the United States . . . by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition . . ." 15 U.S.C. § 717r(b). Section 717r(a) provides that "[n]o proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon." 15 U.S.C. § 717r(b).

Thus, a party seeking review of a FERC order must first request rehearing, and then file its petition for review within sixty days after FERC has issued an order on the request for rehearing. The requirement to request rehearing before the Commission is mandatory and jurisdictional. See Londonderry Neighborhood Coalition v. FERC, 273 F3d 416, 421-22 (1st Cir. 2001) ("The NGA mandates that, as a predicate to filing an appeal from an order of the Commission, the affected party must move for rehearing within thirty days of the date on which

the

order was issued."); Colorado Interstate Gas Co. v. FERC, 890 F.2d 1121, 1128

(10th Cir. 1989) ("We are unable to review the validity of the blanket certificate

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acceptance limitation . . . since [petitioner] did not properly challenge them on rehearing below.").

Fort Morgan argues its initial petition for review, in which it explicitly designated the February 23 order as the order for which it sought review, contains

merely a "technical error." It alleges that we should infer from that petition that

it really was seeking review of the October 12 order, with respect to which it did

seek rehearing. We decline to do so. The petition and docketing statement

expressly identify the February 23 order as the order for which review is sought.

We do not view that designation as a mere technical error. And, while there may

be some extraordinary circumstances in which a court might toll or waive the rehearing requirement, see Londonderry Neighborhood Coalition, 273 F.3d at 425 (noting that "we are reluctant to say there are no circumstances – no matter how extraordinary- that would toll the rehearing deadline"), we perceive no such extraordinary circumstances here.

Since Fort Morgan failed to request rehearing of the February 23, 2001, order prior to explicitly petitioning for review of that order, we lack jurisdiction over the petition. Furthermore, Fort Morgan's Amended and Supplemental Petition is untimely.

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For the foregoing reasons, we **DISMISS** the petition and the amended and supplemental petition.

The oral argument scheduled in this matter on May 8, 2002 in Denver, Colorado is vacated. All counsel are excused from attendance.

ENTERED FOR THE COURT:

Patrick Fisher, Clerk of the Court

By Deputy Clerk

