

120 FERC ¶ 61,248
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

California Department of Water Resources and the
City of Los Angeles

Project No. 2426-206

ORDER REJECTING REQUEST FOR REHEARING

(Issued September 20, 2007)

1. California Trout has filed a request for rehearing of the Commission's July 19, 2007 order¹ denying rehearing of a notice denying the group's late motion to intervene in a proceeding involving a proposed amendment to the license of the California Aqueduct Project. Because the order on rehearing did not alter the result of the notice, so that rehearing does not lie, we reject California Trout's latest request for rehearing.

Background

2. On March 17, 2005, the California Department of Water Resources and the City of Los Angeles, co-licensees for the California Aqueduct Project No. 2426, filed an application to amend the project license. On June 8, 2005, the Commission issued a public notice of the application, establishing a deadline of July 8, 2005, for the filing of protests, comments, and motions to intervene in the proceeding.

3. California Trout filed comments on the application on April 6, 2005, April 25, 2005, and July 14, 2005. However, California Trout did not file a timely motion to intervene.

4. On March 1, 2007, the Commission issued a draft environmental assessment (EA) in the proceeding, and provided an opportunity for public comments on the document, with a deadline of April 30, 2007. California Trout filed a late motion to intervene on April 13, 2007, and filed timely comments on April 30, 2007.

¹ *California Department of Water Resources and the City of Los Angeles*, 120 FERC ¶ 61,057 (July 19 Order).

5. In its motion to intervene, California Trout asserted that it had good cause for late intervention because there were no parties to the proceeding that represented its interests and because it has vast experience in similar Commission proceedings. It also stated that granting the motion would not in any way delay, harm or impede the proceeding, or result in any prejudice to, or additional burdens upon, the existing parties.

6. On May 18, 2007, the Commission's Secretary issued a notice denying the motion to intervene. The notice explained that, in acting on motions for late intervention, the Commission may consider factors such as whether the movant has shown good cause for filing late, whether disruption of the proceeding might result from permitting late intervention, whether the movant's interest is adequately represented by other parties, and any prejudice which might be caused to existing parties if intervention were allowed.² The notice stated that California Trout had failed to explain why it did not seek to intervene until 21 months after the deadline, and that California Trout had provided no good cause for its late filing.³

7. On June 11, 2007, California Trout filed a request for rehearing of the notice. The group stated that (1) it had noted that no other party represents its interests and that allowing late intervention would not delay the proceedings or result in prejudice to, or additional burdens upon, existing parties, (2) it had set forth the basis in law and fact for its position in the proceeding, and (3) it has demonstrated that its interests were affected by the matter. It further alleged that it had good cause for intervening late because it only decided to intervene after determining that the EA understated the project's impacts and failed to identify proper mitigation. It asserted that changed circumstances between the intervention deadline and issuance of the draft EA – actions by the National Marine Fisheries Service that California Trout believed deleterious to rainbow trout and the issuance of a report by a consultant allegedly showing that the flows proposed under the amendment were not necessary for their stated purpose, to protect the arroyo toad – justified late intervention.⁴ California Trout also maintained that the Commission's

² The notice cited 18 C.F.R. § 385.214(d) and 18 C.F.R. § 385.214(b)(3)(2006).

³ The notice cited *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at P 29-46 (2006), and cases cited therein.

⁴ While we did not so note in our July 19 Order, California Trout's explanation on rehearing of why it waited to intervene was in fact an improper, *post hoc* rationalization: since the group did not make in its motion the arguments it later made on rehearing, those arguments were untimely. An entity filing a motion must rest its case on the explanation it sets forth in that pleading and, while it may explain on rehearing any deficiencies it

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refusal to let it intervene was inconsistent with the public participation requirements of the National Environmental Policy Act of 1969 (NEPA).

8. On July 19, 2007, the Commission issued an order denying rehearing of the notice.⁵ We stated that our policy is to become more restrictive with respect to granting late intervention as proceedings near their end, and that, because California Trout was seeking to intervene in a proceeding well past its initial stages, it therefore must provide a more substantial justification to show good cause for being allowed to intervene so late.⁶ We went on to explain that California Trout had been aware from the beginning of the proceeding of the fisheries issues in question, and that the fact that new evidence regarding these matters had been developed during the course of the proceedings (as is often the case) did not present a sufficient basis for the group to sleep on its rights and then attempt to intervene late when matters took a turn not to its liking.⁷ We concluded that allowing late intervention would delay, prejudice, and place additional burdens on the Commission and the licensees. As to California Trout's ability to participate in the environmental review phase of the proceeding, we pointed out that the comments it has filed will be fully considered.⁸

9. On August 17, 2007, California Trout filed a request for rehearing of the July 19 Order.

Discussion

10. We have previously explained that rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner

sees in how the Commission answers its initial contentions, it may not later make new points on rehearing that it failed to make originally.

⁵ The order also denied a request for rehearing by the National Marine Fisheries Service, which had also asked the Commission to reverse a notice denying its late motion to intervene.

⁶ 120 FERC ¶ 61,057 at P 8. We cited substantial Commission and judicial precedent supporting denial of insufficiently-justified late motions to intervene. *Id.* at P 9.

⁷ *Id.* at P 13-15.

⁸ *Id.* at P 10, n.9.

that gives rise to a wholly new objection.⁹ Otherwise, the Commission does not allow rehearing of an order denying rehearing.¹⁰ Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing.¹¹ As the U.S. Court of Appeals for the District of Columbia Circuit has concluded, even an "improved rationale" does not justify a further request for rehearing.¹²

11. California Trout does not argue that the July 19 Order modified the result reached in the May 18, 2007 notice, nor could it do so, since the order wholly affirmed the notice. That being the case, rehearing of the July 19 Order does not lie, and we reject California's Trout's August 17, 2007 rehearing request.

12. What California Trout does assert is that the Commission "failed to substantially respond" to its NEPA arguments. In fact, in its initial request for rehearing of the notice, California Trout did not make any detailed arguments with respect to NEPA. Rather, the group stated that "[l]ate intervention is warranted not only by these factual circumstances [that the EA was issued 19 months after the deadline for interventions in the proceeding], but also by long-standing principles of NEPA law. Indeed, only by allowing intervention

⁹ See, e.g., *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,196 at P 8 (2007); *Bridgeport Energy, LLC*, 114 FERC ¶ 61,262 at P 8 (2006); *Duke Power*, 114 FERC ¶ 61,148 at P 2 and n.1 (2006). See also *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)).

¹⁰ See, e.g., *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088 at 61,533 (1993).

¹¹ See, e.g., *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of "infinite regress" that would "serve no useful end").

¹² *Southern*, 877 F.2d at 1073. See also *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001).

at this time will FERC effectuate NEPA's overarching purpose of allowing meaningful public comment on environmental documents."¹³

13. In its order denying rehearing, the Commission responded to these terse contentions by stating, with respect to the allegedly changed factual circumstances, that it did not see why the timing of issuance of the EA was relevant, since it frequently issues environmental documents in time frames similar to those in this proceeding.¹⁴ We also explained that, even though California Trout was not a party, the Commission would accord its comments "full weight."¹⁵ Thus, we did address the issue of allowing meaningful public comment by indicating that it is not implicated here: one need not intervene in order to comment and have one's comments fully considered. In any case, even had we flatly failed to respond to an argument made on rehearing, where, as here, the rehearing order did not change the prior result, California Trout's proper recourse was to seek appellate review, rather than to engage in "infinite regress" that would "serve no useful end."¹⁶

14. We also note that much of California Trout's latest request for rehearing presents arguments that were not raised in its first rehearing request. This is improper. California Trout had an opportunity to raise its arguments during the 30-day statutory period for seeking rehearing of the May 18, 2007 notice.¹⁷ The Commission does not allow entities to supplement their rehearing requests after the 30-day period has run.¹⁸ California

¹³ Request for rehearing at 5. *See also id.* at 9 (asserting similarly that the Commission should extend the intervention deadline in the proceeding to "ensure that FERC satisfies its obligations under NEPA to provide meaningful public participation").

¹⁴ 120 FERC ¶ 61,057 at P 10, n.9. Indeed, the assertion that a lengthy time between the end of a notice period and the issuance of an environmental document should give rise to a further opportunity to intervene is difficult to fathom. It is not unusual in complex administrative proceedings that such a temporal gap occurs, and the mere passage of time, by itself, is not enough to excuse the failure of an entity which was on notice of the commencement of the proceeding to move timely to protect its interests.

¹⁵ *Id.*

¹⁶ *See* n. 11, *supra*.

¹⁷ *See* 16 U.S.C. § 825l(a) (2000).

¹⁸ *See, e.g., Michigan Electric Transmission Company, LLC, et al.*, 116 FERC ¶ 61,164 at P 6 and n.10 (2006).

Trout's attempt to expand its arguments and to cite authorities that it did not include in its first rehearing request is nothing more than an attempt to supplement its initial pleading.

15. California Trout's new arguments are not only time-barred, they also lack merit.

16. California Trout asserts that rejection of its motion to intervene is inconsistent with section 380.10(a) of the Commission's regulations,¹⁹ an argument it did not raise in its first request for rehearing. The regulation in question states that "[a]ny person who files a motion to intervene on the basis of a draft environmental impact statement will be deemed to have filed a timely motion to intervene . . . as long as the motion is filed within the comment period for the draft environmental impact statement." In this case, Commission staff prepared an EA, not an environmental impact statement, so section 380.10(a) by its terms did not apply.

17. California Trout contends that section 380.10(a) "must be read" to apply to instances involving EAs.²⁰ That is incorrect. There are substantive differences between EAs and EISs, and the Commission does not provide an intervention opportunity with respect to the former. In the Commission's rulemaking establishing its NEPA regulations, the Commission clearly distinguished between cases that involved major federal actions affecting the human environment, in which instances EISs must be prepared, and those where a finding of no significant impact could be made, when an EA would be sufficient: an intervention opportunity was provided only in cases involving EISs, that is, those with potentially significant environmental consequences.²¹ Section 380.10(a), by its terms, applies only to cases where EISs are prepared. This is not such a case.

18. California Trout cites two cases, neither of which it referenced in its initial request for rehearing, for the proposition that the Commission has allowed late interventions

¹⁹ 18 C.F.R. § 380.10(a)(2007).

²⁰ Request for rehearing at 4.

²¹ See *Regulations Implementing the National Environmental Policy Act of 1969*, 53 Fed. Reg. 4817 (February 17, 1988) (Order No. 486), FERC Stats. & Regs., Regulations Preambles, 1986-1990 ¶ 30,783 (generally and at p. 30,938-39) (1987); *Regulations Implementing the National Environmental Policy Act of 1969*, Notice of Proposed Rulemaking, 52 Fed. Reg. 20314 (May 29, 1987), FERC Stats. & Regs., Proposed Regulations, 1982-1987 ¶ 32,442 (generally and at p.33,458) (1987). It is far too late for California Trout to contest the validity of these decades-old regulations.

during comment periods on EAs “in several proceedings.” In the first case, *Cameron LNG, LLC*,²² the Commission did indeed allow a late intervention during the comment period in a case where an EA, not an EIS, was prepared and did cite to section 380.10(a) in doing so. We view this case as an exception from our usual practice. It deviates from our construction of our regulations, as discussed above, and we did not there require a justification by the movant of its tardiness, as we typically require.²³ As to the second case, *Southern California Edison Company, et al.*,²⁴ California Trout asserts that the Commission “granted a late motion to intervene that was filed within the comment period on the environmental assessment . . . citing section 381.10.”²⁵ In fact, the Commission there granted motions to intervene at an early stage of the proceeding, before Commission staff had even conducted scoping meetings, let alone drafted an EA,²⁶ and made no reference to section 381.10, other than to note that the entity seeking intervention had cited it.²⁷ Thus, this citation is inapposite.²⁸

19. Finally, California Trout reiterates an argument that it did make in its first request for rehearing, to the effect that rejection of its motion to intervene violates NEPA’s

²² 118 FERC ¶ 61,019 (2007).

²³ In addition, it appears that the comments filed on the EA in *Cameron* were the first action by the entity moving to intervene, which may have been unaware of the proceeding to that point, whereas California Trout had filed three sets of comments in this proceeding prior to moving to intervene, and indeed admits that it chose not to intervene timely (*see* June 11, 2007 request for rehearing at 4: “[i]t was only after determining that the EA understated the project’s impacts and failed to identify adequate mitigation that California Trout determined it needed to intervene in this proceeding”). Also, the motion to intervene in *Cameron* came four months after the deadline, while the motion here was 19 months late.

²⁴ 51 FERC ¶ 61,287 (1990).

²⁵ Request for rehearing at 5.

²⁶ *See* 51 FERC at p. 61,906.

²⁷ *Id.* at 61,905.

²⁸ California Trout also cites several cases where the Commission granted late intervention during EIS comment periods. Request for rehearing at 5. This is unremarkable, since granting intervention at that point is exactly what the regulations allow.

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requirement for meaningful public participation (although, after recapitulating that one-paragraph contention, it goes on to add several pages of new argument and legal citation). None of the cited cases, nor the argument itself, is on point. As we have explained, California Trout's comments are in the record and will be given the same weight as those of any other entity, whether a party or not. Nothing in NEPA, case law, the FPA, or the Commission's regulations remotely suggests that a decision as to whether an entity can become a party to a proceeding has any bearing on whether an agency has properly facilitated public involvement or taken the hard look at environmental issues that NEPA requires. Party status is not a prerequisite for participation in our NEPA process. In this case, the Commission sought public comment both when the amendment application was filed and after Commission staff issued the draft EA. California Trout availed itself of these opportunities by filing four separate sets of comments. In light of this, California Trout's assertion that the Commission has not allowed it to participate meaningfully in this proceeding strains credulity.

The Commission orders:

The request for rehearing filed by California Trout on August 17, 2007 is rejected.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.