

122 FERC ¶ 61,150
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. 2426-208

ORDER DENYING REHEARING

(Issued February 21, 2008)

1. On June 8, 2005, the Commission issued a public notice of California Department of Water Resources' (California DWR) and the City of Los Angeles' application to amend their license for the California Aqueduct Project No. 2426. On June 11, 2007, Friends of the River filed a late motion to intervene in the proceeding. On November 28, 2007, the Commission issued a notice denying Friends of the River's late intervention. Friends of the River seeks rehearing of this notice. For the reasons discussed below, the Commission denies the request for rehearing.

Background

2. The California Aqueduct Project, licensed to California DWR and the City of Los Angeles (licensees), is located on the California Aqueduct in San Bernadino, Los Angeles, San Luis Obispo, Ventura, and Kern Counties, California. The project was designed to be an integral component of the State Water Project, which provides water for agricultural and domestic purposes to Southern California through a system of canals, pipelines, pumping stations, and reservoirs.

3. On March 17, 2005, licensees filed an application to amend the project license.¹ The application sought a revision to the minimum flow schedule for Piru Creek below Pyramid Dam and a modification of the trout fishery requirements of the project license. On April 12, 2005, the Commission approved a temporary waiver of the minimum instream flow requirements of the license in advance of the license amendment.²

¹ Friends of the River was included on the distribution list for licensees' application to amend the project license filed with the Commission on May 17, 2005. See Licensees' Application Part 1 at p. 8 and Part 2 at p. 8.

² *California Department of Water Resources and the City of Los Angeles (California DWR and the City of Los Angeles)*, 120 FERC ¶ 61,057 (2007).

4. On June 8, 2005, the Commission issued public notice of licensees' application for amendment. The notice established a deadline of July 8, 2005, for the filing of protests, comments, and motions to intervene in the proceeding.

5. 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. On April 30, 2007, on behalf of its members and supporters, Friends of the River forwarded comments on the draft EA.

6. As noted above, Friends of the River filed a late motion to intervene in the amendment proceeding on July 11, 2007. On November 28, 2007, the Commission issued a notice denying Friends of the River's late intervention, stating that Friends of the River failed to show good cause for seeking late intervention and the movant "slept on its rights" by failing to intervene until after the issuance of the draft EA.

7. On December 17, 2007, Friends of the River filed a request for rehearing of the notice denying its motion to intervene.

Discussion

8. The Commission's regulations dealing with motions for late intervention state that, in acting on such a motion, the decisional authority may consider: whether the movants had good cause for not filing timely; any disruption of the proceeding that might result from permitting intervention; whether the movant's interest is adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result from permitting intervention.³ Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interest of any party. The Commission is therefore more liberal in granting late intervention at the early stages of a proceeding, but becomes progressively more restrictive as the proceeding nears its end.⁴ Even though Friends of the River is not seeking to intervene after the issuance of a final order, it is seeking to intervene in a proceeding well past its initial stages, and therefore must provide substantial justification to show good cause for being allowed to intervene nearly two years after the deadline for interventions.

³ 18 C.F.R. § 385.214(d) (2007).

⁴ *Transok, LLC (Transok)*, 89 FERC ¶ 61,055, at 61,168 (1999). A petitioner for late intervention bears a higher burden to show good cause for late intervention after the issuance of a final order in a proceeding and generally it is Commission policy to deny late intervention at the rehearing stage, even when the movant claims that the decision established a broad policy of general application. *See, e.g., Williston Basin Interstate Pipeline Co. (Williston)*, 112 FERC ¶ 61,038 at P 12; *Williston*, 81 FERC ¶ 61,033, at 61,178 (1997) citing *Transcontinental Gas Pipeline Corp.*, 79 FERC ¶ 61,205 (1997); *Cameron LNG*, 112 FERC ¶ 61,146, at P 6 (2005).

9. The Commission has, on many occasions, denied late intervention where movants failed to adequately support their motions.⁵ The Commission expects parties to intervene in a timely manner based on the reasonably foreseeable issues arising from the applicant's filings and the Commission's notice of proceedings.⁶ The Commission has previously explained that "[a] key purpose of the intervention deadline is to determine, early on, who the interested parties are and what information and arguments they can bring to bear. Interested parties are not entitled to hold back awaiting the outcome of the proceeding, or to intervene when events take a turn not to their liking."⁷ These holdings have been affirmed by the courts.⁸

⁵ *California DWR and the City of Los Angeles*, 120 FERC ¶ 61,057 at P 9. See, e.g., *Calpine Oneta Power, LP*, 119 FERC ¶ 61,177 at P 8 (movants did not meet their burden of justifying late intervention); *Duke Energy Shared Services, Inc. et al. (Duke Energy)*, 119 FERC ¶ 61,146, at P 8 (2007) (movant did not show good cause for not filing timely beyond noting that it was not aware of the proceeding); *Crown Landing, LLC (Crown Landing)*, 117 FERC ¶ 61,209 at P 12 (movant's assertion that it saw no need to intervene prior to the issuance of a dispositive order does not provide good cause); *Erie Boulevard Hydropower, LP (Erie Boulevard)*, 117 FERC ¶ 61,189, at P 31-33 (2006) (denial of late motion to intervene because movant failed to demonstrate cognizable interest in the proceeding or a justification for lateness); *Florida Gas Transmission Company*, 100 FERC ¶ 61,241, at P 31 (2002) (denial of late motion to intervene six months after intervention deadline because movants had or should have had knowledge of the subject matter of the proceeding); *Northern Utilities, Inc.*, 20 FERC ¶ 61,343, at 61,718 (1982) (movants gave no reason for lateness of notice).

⁶ *California DWR and the City of Los Angeles*, 120 FERC ¶ 61,057 at P 9. See *Texas Eastern Transmission, LP*, 102 FERC ¶ 61,262, at P 11-12 (2003) (denying late intervention where proceeding had been underway for several years and granting motions would have been disruptive); *Southern California Edison Company*, 100 FERC ¶ 61,327 at P 7 ("[A]ny . . . party . . . must take appropriate steps to protect its interests. Choosing to focus on other matters rather than to timely respond to a filing before this Commission falls far short of good cause that would support a later intervention request."); *Niagara Mohawk Power Corporation*, 100 FERC ¶ 61,247 (2002) (fact that intervenors thought that "either there appeared to be no disputes relevant to their interests, or . . . assumed that any disputes would be resolved without their intervention" not sufficient to justify late intervention).

⁷ *Summit Hydropower*, 58 FERC ¶ 61,360, at 62,199-2000 (1992). See, e.g., *California DWR and the City of Los Angeles*, 111 FERC ¶ 62,040 (2005) (denying late intervention 19 months after deadline); *Duke Energy*, 119 FERC ¶ 61,146 (2007) (denying late intervention less than one month after deadline); *PJM Interconnection, LLC (PJM)*, 116 FERC ¶ 63,031 (2006) (denying late intervention five months after deadline); *Rancho Riata Hydro Partners (Rancho Riata)*, 55 FERC ¶ 61,389 (denying late intervention four years after the deadline); *Cogeneration, Inc.*, 54 FERC ¶ 61,178

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10. Friends of the River disputes that it failed to provide good cause for seeking late intervention, and states that it had good cause for filing out-of-time because the Commission did not issue a draft EA until 19 months after the deadline for interventions. Friends of the River states that critical regulatory decisions and scientific reports were issued after the intervention deadline that changed the legal and biological situation at Piru Creek. In January 2006, National Marine Fisheries Service (NMFS) issued a final rule regarding the listing of the endangered steelhead trout and designation of critical habitats. Friends of the River states that the final rule omitted the portion of Piru Creek upstream of the Santa Felicia Dam from critical habitat designation, thus limiting the legal protection for steelhead under the Endangered Species Act (ESA).⁹ Friends of the River cites to two additional reports which also contributed to it filing for late intervention.¹⁰ Friends of the River states that the reports contradict California DWR's

(1991) (denying late interventions six years after the deadline); *Mohawk Dam 14 Associates*, 52 FERC ¶ 61,232 (1990) (denying motion to intervene 11 days after deadline); *Dale L.R. Lucas and Alternative Energy Resources, Inc.*, 41 FERC ¶ 61,187 (1987) (denying intervention two years after deadline); *Georgia-Pacific Corporation*, 33 FERC ¶ 61,417 (1985) (denying motion to intervene five months after deadline).

⁸ See, e.g., *Covelo Indian Community v. FERC*, 895 F.2d 581 (9th Cir. 1990) (affirming denial of late intervention where the tribe alleged it had not received actual notice of proceeding and Commission found that late intervention would be burdensome). Here, Friends of the River argues that it did not have actual notice of licensees' amendment request. While it in fact appears that this is not true, given that Friends of the River was served with a copy of the amendment application, see, *supra* n.1, actual notice of a proceeding is not required. As previously stated in the Secretary's motion rejecting Friends of the River's request for rehearing, the Supreme Court has held that *Federal Register* publication provides sufficient notice to all affected parties; actual notice of the contents contained within the *Federal Register* is not required to necessitate compliance. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385 (1947).

⁹ 70 *Fed. Reg.* 52,488, 52,581 (Sept. 2, 2005).

¹⁰ D. Girman & J.C. Garza, *Population structure and ancestry of O. mykiss populations in South-Central California based on genetic analysis of microsatellite data*, Final Report of the National Marine Fisheries Service, Southwest Fisheries Science Center, Santa Cruz, California, for the California Department of Fish and Game Project No. P0350021 and Pacific States Marine Fisheries, Contract No. AWIP-S (November 2006) (provides evidence that contemporary rainbow trout are genetically identical to steelhead, indicating that the steelhead historically accessed the habitat in the Santa Felicia Dam); Nancy H. Sandburg, *Middle Piru Creek Arroyo Toads (Bufo californicus) Clutch Surveys 2006*, prepared for California Department of Water Resources (February 2006) (suggests that the proposed amendment would reduce summer flows and thereby eliminate the rainbow trout in Piru Creek).

Environmental Impact Report and believes that its intervention is warranted to further protect the steelhead population. Friends of the River contends that the above documents caused it to recognize the need to intervene in the proceeding in order to protect its interests and the interests of the public.

11. Friends of the River states that no other parties to the proceeding can adequately represent its interests.¹¹ It also contends that allowing intervention at this point in the proceeding will not result in any disruption or prejudice. Friends of the River states that on December 6, 2007, licensees withdrew and resubmitted their request for a state water quality certificate from the California State Water Board. As a result of the action, Friends of the River asserts that the licensee created a situation where the Commission cannot act on the license amendment until the California State Water Board issues the water quality certificate. Since the Commission is not able to act, Friends of the River contends that allowing it late intervenor status would not create delay or burden or prejudice the parties to the proceeding.¹²

12. Friends of the River has not provided any convincing reasons why it could not have intervened earlier in the proceeding. Although Friends of the River claims to have not had actual notice (by which it apparently means personal service) of the deadline for interventions, it has been well aware from the beginning that the amendment could have an impact on steelhead trout.¹³ In March 2005, Friends of the River was served with a copy of California DWR's amendment application and thereby placed on notice that the proposed amendment could potentially have an impact on species in the proposed project area.¹⁴ In fact, even before the license amendment was filed, Friends of the River was served with California DWR's Draft Environmental Impact Report distribution list issued

¹¹ If granted intervenor status, Friends of the River states, it would be the only party to the proceeding whose mandate is to advocate on behalf of fish, wildlife, and recreation.

¹² Friends of the River also claims that even if allowing late interventions were to cause a delay, this delay would not create any additional burdens because licensees are already operating under an interim flow regime similar to the one requested in the proposed license amendment.

¹³ Friends of the River argues that parties should be provided with actual notice of a proceeding. The Commission's precedent holding that notice in the *Federal Register* is sufficient suggests that every party has constructive notice. Friends of the River contends that this logic implies that no party can ever have good cause for failing to timely file a motion to intervene.

¹⁴ See Licensees' Application Part 1 at p. 110. Friends of the River was included on the licensee' distribution list located in Licensees' Application Part 1 at p. 8 and Licensees' Application Part 2 at p. 8.

in November 2004¹⁵ and an Environmental Coalition Letter to California DWR regarding the Notice of Preparation of an Environmental Report for the Stimulation of Natural Flows in Middle Piru Creek Project dated June 24, 2004.¹⁶ Moreover, the Commission published notice of licensees' amendment application in the *Federal Register*,¹⁷ which has been held to constitute adequate notice to all interested parties.¹⁸ Friends of the River still failed to intervene in a timely manner. The Commission has held that the party bears the responsibility for determining when a proceeding is relevant to its interests, such that it should file a motion to intervene. When a party fails to intervene in a timely fashion, the party assumes the risk that the case will be settled in a manner that is not to its liking.¹⁹

13. The Commission has previously explained that an entity cannot "sleep on its rights" and then seek untimely intervention.²⁰ The Commission's rules are designed to

¹⁵ See Licensees' Application Part 2 at p. 101.

¹⁶ See Licensees' Application Part 1 at p. 90.

¹⁷ 27 *Fed. Reg.* 34,750 (2005).

¹⁸ *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). See also *Doswell Limited Partnership*, 117 FERC ¶ 63,017, at P 123-25 (2006).

¹⁹ *California DWR and the City of Los Angeles*, 120 FERC ¶ 61,057 at P 13. See *PJM*, 116 FERC ¶ 63,031 at P 3; *Williston*, 112 FERC ¶ 61,038 at P 14; *Transok*, 89 FERC at 61,187; *El Paso Natural Gas Company*, 75 FERC ¶ 63,011, at 65,302 (1996); *Pacific Gas and Electric Company*, 51 FERC ¶ 61,371, at 62,264 (1990); *Southwestern Public Service Company*, 22 FERC ¶ 61,341, at 61,153 (1983).

²⁰ See, e.g., *California DWR and the City of Los Angeles*, 120 FERC ¶ 61,057 at P 14; *Erie Boulevard*, 117 FERC ¶ 61,189 at P 37; *San Diego Gas & Electric Co., Complainant v. Sellers of Energy and Ancillary Services Into Markets Operated by the California Independent Sales Operator and the California Power Exchange, Respondents; Investigation of Practices of the California Independent System Operator and the California Power Exchange*, 112 FERC ¶ 61,226 at 3, n.4 (finding that allegation by movants that it could not rely on other party to protect its interests did not justify late intervention in proceeding that had been pending for a number of years); *PJM*, 112 FERC ¶ 61,031, at P 10 (2005) (denying late intervention where issue raised by movants had always been an issue in the proceeding); *Williams Energy Marketing & Trading Company California, et al. v. Cabrillo Power I LLC, et al.*, 105 FERC ¶ 61,165, at P 8 (2003) (unsupported intervention would result in disruption to proceeding and prejudice to parties); *Southern Company Services*, 87 FERC ¶ 61,097, at 61,416-17 (1999), citing *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 879 (1st Cir. 1995) (equity ministers to the vigilant, not to those who sleep upon their rights); *Russell Canyon Corporation*, 58 FERC ¶ 61,288, at 61,922 (1992) (mistaken belief that intervention

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“ensure an orderly administrative process” and “the certainty that there will be an end to interventions which prolong the proceeding is an important consideration of parties filing before the Commission.”²¹ The fact that studies issued during the course of this proceeding, and NMFS’ action, provided additional information about steelhead trout does not excuse tardy intervention.²² Friends of the River was inarguably aware when the application was filed that steelhead trout could be impacted, yet did not intervene in a timely manner.²³ It is the very nature of our licensing actions (such as amendments) that studies are conducted and new information is developed as they proceed. It is the responsibility of the interested entities to intervene if, as occurred early on here, they became aware that resources of concern to them may be affected by the proposed action. Were the Commission to allow new intervention every time a new study was conducted or new information was otherwise placed in the record, we would never be able to establish a deadline for interventions, which is necessary for us to conduct orderly proceedings. Allowing interventions, 21 months after the deadline, would delay, prejudice, and place additional burdens on the Commission and the licensees. In addition, Friends of the River’s argument that it only became aware of a need to intervene

unnecessary to protect rights not good cause for late intervention); *BP Gas Transmission Company*, 45 FERC ¶ 61,475 (1988) (those who sit on their rights “passively anticipating a regulatory outcome favorable to their interests” will be denied permission to intervene out of time).

²¹ *Palisades Irrigation District*, 34 FERC ¶ 61,377, at 61,702 (1986). See *California DWR and the City of Los Angeles*, 120 FERC ¶ 61,057 at P 14; *Erie Boulevard*, 117 FERC ¶ 61,189 at P 37.

²² “To permit . . . a person . . . to stand aside and speculate on the outcome . . . and then permit the whole matter to be reopened . . . would create an impossible situation.” *Easton Utilities Commission v. Atomic Energy Commission*, 424 F.2d 847, 851 (D.C. Cir. 1970) quoting *Red River Broadcasting Co. v. Federal Communication Commission*, 98 F.2d 282, 286-87 (D.C. Cir. 1938), cert. denied, 305 U.S. 625 (1938). See *Crown Landing*, 117 FERC ¶ 61,209 at P 12 (the wait-and-see approach does not provide good cause under Rule 214); *Florida Power & Light Company*, 99 FERC ¶ 61,318, at P 9 (2002) (the wait-and-see attitude falls far short of demonstrating good cause that would support a late motion to intervene); *Central Illinois Public Service Company*, 59 FERC ¶ 61,219, at 61,754 (1992) (lack of foresight does not constitute good cause for late intervention); *Rancho Riata*, 55 FERC at 62,187 (movant not entitled to intervene when the outcome of the proceeding is not to his liking).

²³ Moreover, while Friends of the River forwarded timely comments to the draft EA on behalf of its members on April 30, 2007, it inexplicably waited two months until it filed its motion to intervene in the proceeding on June 11, 2007. This weakens its argument that it intervened once it became aware of the contents of the EA.

after action by NMFS in January 2006, and the publication of studies in February and November 2006, is seriously undercut by the fact that it did not file its motion until well over a year after NMFS acted and the first study it references was published.²⁴

14. Friends of the River asserts that late intervention is warranted by the long-standing principles of the National Environmental Policy Act (NEPA) laws.²⁵ We disagree.

15. Friends of the River cites to two cases to support its proposition that the Commission has allowed late interventions during the comment periods for EAs or environmental impact statements (EIS) in several proceedings.²⁶ In the first case, *Cameron LNG, LLC*,²⁷ the Commission did indeed allow a late intervention during the comment period in a case where an EA, not an EIS, was prepared and cited to section 380.10(a) as justification for doing so.²⁸ We view this case as an exception from our usual practice. It deviates from our construction of our regulations and we did not require a justification by the movant of its tardiness as we typically require.²⁹ As to the second

²⁴ Friends of the River notes that it “(1) set forth the basis in law and fact for Friends of the River’s position in the matter and (2) demonstrated both that Friends of the River’s interests will be directly affected by the proceeding and that the organization’s participation is in the public interest.” Request for rehearing at 13. Given that Friends of the River has failed to demonstrate good cause for late intervention, these showings are immaterial.

²⁵ Request for rehearing at 6.

²⁶ Given that, even had interventions been permitted during the comment period of the draft EA in this proceeding, Friends of the River filed its late intervention two months after the deadline for comments on the draft EA, this argument is irrelevant.

²⁷ 118 FERC ¶ 61,019 (2007).

²⁸ 18 C.F.R. 380.10(a) (2007) (“[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”).

²⁹ 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 Friends of the River was notified of the proceeding by the publication of numerous documents relating to the proposed amendment. Also, the motion to intervene in *Cameron* came four months after the deadline, while the motion here was 21 months late. See *California DWR and the City of Los Angeles*, 120 FERC ¶ 61,057, *reh’g denied*, 120 FERC ¶ 61,248, at P 18 n.23 (2007).

case, *Southern California Edison Company, et al.*,³⁰ Friends of the River 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.”³¹ 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,³² and made no reference to section 381.10, other than to note that an entity seeking intervention had cited it.³³ Thus, the citation is inapposite.

16. Friends of the River argues that the rejection of its motion to intervene violates NEPA’s requirement for meaningful public participation. However, none of the cases cited, nor the argument, is on point. Friends of the River’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. Nor is an agency required to permit an extension of the deadline for motions to intervene until the publication of the final EA in order to provide for meaningful public participation. 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 a draft EA. Friends of the River availed itself of these opportunities by filing comments during the comment period of the draft EA. In light of this, Friends of the River’s assertion that the Commission has not allowed it to participate meaningfully in this proceeding is unpersuasive.³⁴

17. Finally, the Commission has previously held that the timing of the issuance of an EA is not relevant to late intervention in proceedings where there are allegedly changed circumstances, since it frequently issues environmental documents in time frames similar to those in this proceeding.³⁵

³⁰ 51 FERC ¶ 61,287 (1990).

³¹ Request for rehearing at 8.

³² See 51 FERC at 61,901.

³³ *Id.* at 61,905.

³⁴ See *California DWR and the City of Los Angeles*, 120 FERC ¶ 61,248 at P 19.

³⁵ See *California DWR and the City of Los Angeles*, 120 FERC ¶ 61,248 at P 13 (2007). The Commission has held, “the assertion that a lengthy time between the end of a notice period and the issuance of an environmental document should give rise to further opportunity to intervene is difficult to fathom. It is not unusual in complex

18. Friends of the River has not provided sufficient justification for the Commission to grant its late motion to intervene, and we therefore deny rehearing.

The Commission orders:

The request for rehearing filed by Friends of the River on December 18, 2007 is rejected.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

administrative proceedings that such a temporal gap occurs, and the mere passage of time, by itself, is not enough to excuse failure of an entity which was on notice of the commencement of the proceeding to move timely to protect its interests.” *Id.* at P 13, n.14.