In the United States Court of Appeals for the Ninth Circuit

No. 18-70765

AMERICAN WHITEWATER, *ET AL.*,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

SUPPLEMENTAL BRIEF OF RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

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INTRODUCTION

Following oral argument on May 15, 2019, the Court ordered supplemental briefing on the following questions:

> 1) Whether this petition for review is moot in light of the America's Water Infrastructure Act of 2018, and the Commission's recent order in *Eagle Crest Energy Co.*, 167 FERC ¶ 61,117 (May 7, 2019); and
>
> 2) The relevance, if any, of *Public Service Commission of New York v. Federal Power Commission*, 284 F.2d 200 (D.C. Cir. 1960) and *Green Island Power Authority v. FERC*, 577 F.3d 148 (2d Cir. 2009) on this pending appeal, including the issue of the proper remedy, if any, on a finding that the Commission wrongly denied a

motion to intervene or applied an incorrect legal standard in deciding the motion to intervene.

I. This Court should dismiss Conservation Groups' petition as moot.

A. America's Water Infrastructure Act of 2018 authorizes the Commission to extend the Enloe Project construction deadline to July 2023, leaving this Court without any means of granting effective relief.

Amended Federal Power Act § 13, 16 U.S.C. § 806, allows the Commission to extend the Enloe Project construction deadline by "not more than 8 additional years." America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3001, 132 Stat. 3765, 3862 (2018) ("Act"). *See* Commission Oct. 25, 2018 and May 17, 2019 Letters. The Act therefore authorizes the Commission to extend the construction deadline until no later than July 9, 2023. So, if the Court were to remand the case for further proceedings and if Okanogan were to seek another extension, the Commission would not be obligated to begin a process to terminate the license, which is the outcome desired by Conservation Groups.[1] Consequently,

[1] The Commission notes that Okanogan has informed the Court that, by a June 10, 2019 vote, Okanogan has decided to allow the existing July 9, 2019 construction deadline to expire and not to pursue any further extensions. *See* Okanogan Supp. Br. at 3 (filed June 12, 2019). The Commission is evaluating the potential impact of this new information on this case, but continues to support dismissal of the case as moot based upon 16 U.S.C. § 806, as amended in the Act. Nonetheless, should the Commission ultimately terminate the license, the Court would be able to dismiss the case as moot on that basis. *See Oregon v. FERC*, 636 F.3d 1203, 1206 (9th Cir. 2011) (dismissing as moot an appeal of FERC orders

there is no effective relief the Court can grant Conservation Groups, and the Court should therefore dismiss the petition for review. *See Nevada v. Watkins*, 943 F.2d 1080, 1083-84 (9th Cir. 1991) (dismissing petition for review as moot where court could grant petitioner no effective relief in light of amendments to federal law).

Conservation Groups argue Congress did not clearly express an intent for the amendment to apply to existing licenses, much less to licenses that could have been terminated before the amendment was enacted. *See* Conservation Groups Nov. 9, 2018 Letter at 1-2. But, as the Commission recently explained, the Act is not limited exclusively to projects licensed after its enactment. *Eagle Crest Energy Co.*, 167 FERC ¶ 61,117, at P 9 (2019). As a result, the Commission may apply 16 U.S.C. § 806, as amended, in considering whether to exercise its discretion to determine whether projects such as Okanogan's, "which previously missed the deadline to commence construction under section 13 of the FPA as previously constituted but still have a valid license, can be granted a further extension of time." *Id.* The Commission is entitled to deference in interpreting a statute it administers when the statute is silent or ambiguous. *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1054 (9th Cir. 2010); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

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authorizing infrastructure project where the future of the project was in "grave doubt").

Conservation Groups reference two other provisions of the Act directed at two particular projects and argue that these provisions demonstrate that Congress otherwise intended for the Act to apply prospectively. *See* Conservation Groups Nov. 9, 2018 Letter at 2 (citing § 3007 (J. Bennett Johnston Waterway Hydropower Project) and § 3008 (Mahoney Lake Hydroelectric Project)).[2] But nothing in the Act's treatment of those two particular projects in § 3007 and § 3008 indicates an intent to limit how § 3001 otherwise applies.

Conservation Groups also cite a case involving an exception to the mootness doctrine based on the "voluntary cessation rule." *See* Conservation Groups Nov. 9, 2018 Letter at 2 (citing *Armster v. U.S. Dist. Court*, 806 F.2d 1347, 1359 (9th Cir. 1986)). That exception, however, does not apply here where mootness arises from a Congressional enactment, rather than a voluntary statement from the agency not to engage in certain conduct. On remand, the Commission would, if requested, be able to exercise its authority to extend a license construction deadline under

[2] Section 3007 permits three consecutive two-year extensions for the J. Bennett Johnston Project, while section 3008 requires the Commission to issue an order continuing an existing stay for the Mahoney Lake Project. Sections 3007 and 3008 are common examples of special purpose legislation for FERC-licensed hydroelectric projects; those sections were introduced as stand-alone bills, separate from section 3001 and other sections of the Act. *See* H.R. Res. 4317, 115th Cong. (Mahoney Lake Hydroelectric Project Licensing Act) (introduced Nov. 8, 2017); S. 1142, 115th Cong. (J. Bennett Johnston Waterway Hydropower Extension Act of 2018) (introduced May 16, 2017).

amended 16 U.S.C. § 806, and would not need to issue a stay under 16 U.S.C. § 825h.

B. Applying 16 U.S.C. § 806, as amended, to the Enloe Project would not be an improper retroactive application of law.

Under leading Supreme Court authority on retroactivity, *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), this Court must first determine whether Congress has "expressly prescribed the statute's proper reach." *Id.* at 280. If not, this Court must "determine whether the new statute would have retroactive effect." *Id.*; *see also Cardenas-Delgado v. Holder*, 720 F.3d 1111, 1115 (9th Cir. 2013) (citing *Landgraf*). Congress did not expressly provide for limits to the proper reach of amended 16 U.S.C. § 806. Thus, the Court should consider whether the statute would have retroactive effect.

It would not. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Landgraf*, 511 U.S. at 269. Rather, a statute having retroactive effect is one that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id* at 280.

None of these descriptors of retroactive effect apply here. Nor does the Act limit how or when the Commission may exercise its power to extend a construction deadline by "not more than 8 years." *See Landgraf*, 511 U.S. at 273 ("When the

intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.").

C. *Eagle Crest* demonstrates that the Commission will exercise its authority under amended 16 U.S.C. § 806, even for projects that were subject to termination under the prior version of the statute.

The Commission's recent decision in *Eagle Crest Energy Co.*, 167 FERC ¶ 61,117, demonstrates that this case is moot. In *Eagle Crest*, the 4-year construction deadline under the prior version of 16 U.S.C. § 806 had expired months before enactment of amended § 806 and the filing of the licensee's request for an extension under the amended statute. *Id.* P 3. Therefore, at the time of the licensee's request, the license was "subject to termination under [16 U.S.C. § 806]." *Id*. P 3. Despite the license being subject to termination, the Commission found it was not required to terminate the license, explaining that because the Commission had not issued notice or begun the termination process, the license remained in effect. *Id*. P 8.

So too here. Because the Commission has not begun the process of terminating the Enloe Project license (and is under no time constraint for doing so), the license remains in effect. If this case is remanded, the Commission will similarly be authorized to extend the deadline under amended 16 U.S.C. § 806.

II. This Court only has jurisdiction over the Commission's denial of Conservation Groups' motion to intervene.

Green Island Power Authority v. FERC, 577 F.3d 148 (2d Cir. 2009), and *Public Service Commission of New York v. FPC*, 284 F.2d 200 (D.C. Cir. 1960), both demonstrate that this Court only has jurisdiction over the denial of Conservation Groups' motion to intervene. If the Court finds against the Commission on intervention, the appropriate remedy under these cases—as well as the cases cited in the Commission's brief (at 3, 12, 14-16)—is to remand so the Commission may address notice and intervention consistent with the Court's opinion. Neither *Green Island* nor *Public Service Commission of New York* supports a different approach to remedy or a finding that the Commission should have granted intervention to Conservation Groups.

Green Island concerned the Commission's denial of intervention in a relicensing proceeding, not the post-licensing context here. That decision thus does not address the Commission's longstanding policy to limit opportunities to intervene in proceedings after the Commission has issued a license to operate a hydroelectric facility, to allow the Commission to more efficiently carry out its responsibilities consistent with the requirements of the Federal Power Act and due process. *See* FERC Br. 16-17, 20-23 (describing Commission's consistent application of precedent on post-licensing intervention); *City of Tacoma, Wash.*, 89 FERC ¶ 61,275, at 61,799 (1999) (explaining that the Commission can proceed by

adjudication when interpreting its post-license intervention rule); Rehearing Order P 5, ER 2-3. The Second Circuit held that the Commission erred by denying intervention without evaluating whether a settlement constituted a material amendment or a "fundamental and significant change" to the license application as required by the Commission's regulations.[3] *Green Island*, 577 F.3d at 163 (discussing a regulation applicable to licensing proceedings, 18 C.F.R. § 4.35(f)); *see also* FERC Br. 17-18 (describing precedent declining to treat requests to extend compliance deadlines in a license as "material changes").

While *Green Island* is factually distinct, it remains instructive here on the issue of a proper remedy. As the Second Circuit explained, the prejudicial-error rule eliminates the need for remand if the agency's error "was not prejudicial and did not impinge on fundamental rights." *Green Island*, 577 F.3d at 165 (internal quotation marks omitted). So if a court can determine "that the outcome of the administrative proceedings will be the same absent FERC's error," then a court should not set aside the Commission's orders. *Id*. The Second Circuit held that it could not determine whether FERC's error in denying Green Island's motion to intervene was harmless because FERC never considered evidence offered by

[3] After remand, the Commission found that the settlement was not a material amendment and the Second Circuit affirmed that finding. *Green Island Power Auth. v. FERC*, 497 F. App'x 127 (2d Cir. Sept. 25, 2012).

Green Island in the relicensing proceeding. *See id*. at 166, 168 (noting that, if Green Island is permitted to intervene, then FERC is statutorily obligated to consider Green Island's evidence in a relicensing proceeding).

But here there is no such uncertainty because the outcome on remand will be the same regardless of whether Conservation Groups are admitted as intervenors: as explained above, even if the Commission permits Conservation Groups to intervene, the Commission would not be obligated to begin terminating Okanogan's license. *See supra* pp 2-3. 16 U.S.C. § 806, as amended, authorizes the Commission to extend the construction deadline until July 2023. *See supra* pp. 2-3; *see also Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004), *amended*, 387 F.3d 968 (9th Cir. 2004) ("In circumstances where an agency errs, we may evaluate whether such an error was harmless.").

Public Service Commission of New York does not support a different conclusion on how the Court may proceed should it determine that the Commission improperly denied intervention. One petition in that case sought review of an order by the Commission's predecessor agency that denied a motion

to intervene by the New York Public Service Commission ("New York").[4] In a separate petition, New York also sought review of a subsequent order that both granted a certificate under the Natural Gas Act and denied New York's renewed motion to intervene. The D.C. Circuit held that a would-be intervenor was "a party to the record in a limited sense," solely to appeal "the matter of intervention." 284 F.2d at 204; *see also Cal. Trout v. FERC*, 572 F.3d 1003, 1013 n.7 (9th Cir. 2009); FERC Br. at 14, 16 (citing cases). In addressing a motion to dismiss, the court found that the proper remedy, upon a later finding that the Commission erred in denying intervention, would be to remand and reopen the proceeding before the Commission so New York could participate. *Pub. Serv. Comm'n of N.Y.,* 284 F.2d at 206.

The court further held that its jurisdiction over the denial of intervention was not limited by the fact that the agency also made a finding on the merits: "the administrative agency cannot destroy the jurisdiction of this court by simply taking final action in the proceeding." *Id*. This result, in the court's view, "would create too ready a means by which the administrative agencies could thwart the power of a reviewing court to pass upon the validity of orders denying intervention." *Id*.

[4] New York had filed another petition seeking review of the Commission's original decision to deny New York's intervention, which was dismissed as untimely. 284 F.2d at 204-05.

This reasoning works both ways—just as an agency cannot limit a court's jurisdiction over intervention by ruling on the merits, a court cannot expand its jurisdiction beyond review of the denial of intervention simply because the agency also addresses the merits. *See* Rehearing Order P 9 ("Nevertheless, we will address Conservation Groups' remaining arguments below."), ER 4.

As to the agency decision on the merits—i.e., the grant of the certificate—the D.C. Circuit found "no event" in which it could entertain New York's petition for review. *Pub. Serv. Comm'n of N.Y.*, 284 F.2d at 207. Under the Natural Gas Act, the court's jurisdiction to review Commission orders is limited only to those orders in which a challenging "party" has first sought rehearing before the agency. *See* 15 U.S.C. § 717r(a) ("Any person . . . aggrieved by an order issued by the Commission in a proceeding . . . to which the person . . . is a party may apply for a rehearing . . . ."); *id*. § 717r(b) ("Any party to a proceeding . . . aggrieved by an order issued by the Commission in such proceeding may obtain a review" in the appropriate U.S. court of appeals).

So, even if the Commission improperly denied intervention, the D.C. Circuit held that it could not grant a petition for review of anything other than the Commission's order denying intervention, if the petition was filed by an entity that did not meet the statutory prerequisites for review—i.e., New York, as a non-party, had no right under the Natural Gas Act to seek agency rehearing; and only parties

that have sought rehearing of FERC orders may then petition for judicial review. *See Pub. Serv. Comm'n of N.Y.,* 284 F.2d at 207 ("Under the statute here involved, the . . . Commission should not entertain from one denied intervention an application for rehearing after a final order. Were we to accept the implications of [New York's] position, we would be saying that an application for rehearing which cannot and should not be considered on its merits by the . . . Commission, under this particular statute, is sufficient to satisfy the review provisions of the statute. Such a defeat of Congressional policy cannot be permitted, absent plain words contrary to apparent policy.") (footnote omitted).

Public Service Commission of New York thus supports the Commission's position here: the only issue on which this Court has jurisdiction is the denial of Conservation Groups' motion to intervene; should the Court find that the Commission erred in denying that motion, the only remedy available is remanding for further proceedings. And under *Green Island*'s articulation of the prejudicial-error rule, there is no need for a remand because the outcome on remand would be the same. *See supra* pp. 2-3.

The result dictated by cases like *Green Island* and *Public Service Commission of New York*, as well as this Court's own precedent, comports with fairness. It is fair that Conservation Groups get their day in court for review of the Commission's orders on their intervention request, and this Court has jurisdiction

to decide that issue. *See, e.g.*, *Cal. Trout*, 572 F.3d at 1013 n.7; FERC Br. 3, 16. And any remand solely on intervention—should this Court find prejudicial error—would not prevent Conservation Groups from later seeking review of a final order on the merits. *See N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984) ("If the matter is reopened, any ensuing final order then may be reviewed in accordance with the review statute.").

CONCLUSION

The Court should dismiss Conservation Groups' petition as moot, in light of Congress' decision in 2018 to afford licensees additional time to commence project construction. If the Court does not agree, it should deny the petition because the Commission reasonably denied intervention for the reasons stated in the Commission's brief. *See* FERC Br. 7-14. If, however, the Court finds both that the Commission erroneously addressed intervention and that the error is prejudicial, then the proper remedy is to remand so the Commission may address Conservation Groups' intervention request consistent with this Court's instructions. *See* Conservation Groups Br. 18 (citing *Cal. Trout* and *Covelo Indian Cmty. v. FERC*, 895 F.2d 581, 585 (9th Cir. 1990), and explaining that the Court should consider Conservation Groups as a party for the limited purpose of reviewing the Commission's basis for denying party status); FERC Br. 16.

Respectfully submitted,

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June 12, 2019

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I certify that the Supplemental Brief for Respondent has been prepared in a proportionally spaced typeface (using Microsoft Word 2013, in 14-point Times New Roman), and I certify that this brief complies with the Court's May 28, 2019 Order because it is fewer than 15 pages long, not including the cover page, the tables of contents and authorities, and the certificates of counsel.

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June 12, 2019

American Whitewater, et al. v. FERC
9th Cir. No. 18-70765

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 12, 2019. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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June 12, 2019

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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