

171 FERC ¶ 61,238
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Idaho Power Company

Project No. 1971-129

ORDER DENYING CLARIFICATION AND DISMISSING REQUEST
FOR REHEARING

(Issued June 18, 2020)

1. On March 3, 2020, the Commission issued a notice denying the late motion to intervene of Pacific Rivers Council (Pacific Rivers),¹ filed in response to a notice of settlement filed by Idaho Power Company (Idaho Power) in the relicensing proceeding for the Hells Canyon Project. On March 27, 2020, Pacific Rivers requested clarification or rehearing of the March 3 Notice. We deny clarification and dismiss Pacific Rivers' request for rehearing.

I. Background

2. The Hells Canyon Project is located on a 38-mile section of the Snake River that forms the border between Idaho and Oregon. The Commission issued a 50-year license for the project in 1955.² The license expired on July 31, 2005, and since then, the project has operated under annual license. For many years, relicensing was delayed because of disputes between Idaho and Oregon about water quality issues and the reintroduction and passage of anadromous fish, which delayed Idaho's and Oregon's issuance of water quality certifications for the project and obstructed the Commission's efforts to initiate consultation under the Endangered Species Act with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service. As discussed below, the states have since entered into a settlement agreement and have issued water quality certifications for the Hells Canyon Project.

¹ Notice Denying Intervention (Mar. 3, 2020) (March 3 Notice).

² *Idaho Power Company*, 14 FPC 55 (1955).

3. On December 2, 2003, the Commission issued public notice of Idaho Power's application for a new license for the project. The notice established February 2, 2004, as the deadline to file motions to intervene. On July 28, 2006, the Commission issued public notice of the draft environmental impact statement (EIS) for the project, which established October 3, 2006, as the deadline to file motions to intervene based on the draft EIS.³ Pacific Rivers did not file a motion to intervene during either of these periods.

4. On November 23, 2016, Idaho Power filed a petition for a declaratory order requesting that the Commission find that the Federal Power Act preempts Oregon's fish passage requirements for the Hells Canyon Project.⁴ The Commission issued notice of the petition on November 30, 2016, establishing December 30, 2016, as the deadline for filing interventions for that proceeding.⁵ On December 30, 2016, various conservation groups, including Pacific Rivers, filed a timely, unopposed motion to intervene,⁶ which was granted by operation of Rule 214(c)(1) of the Commission's Rules of Practice and Procedure.⁷ The Commission dismissed the petition on January 19, 2017.⁸

5. On December 30, 2019, Idaho Power filed an explanatory statement regarding an offer of settlement between Idaho Power, the State of Oregon, and the State of Idaho.⁹ The statement explained that these parties had reached agreement on disputed issues related to spring Chinook salmon and summer steelhead fish passage and reintroduction,

³ Section 380.10(a) of the Commission's regulations, 18 C.F.R. § 380.10(a) (2019) provides that a motion to intervene on the basis of a draft environmental impact statement will be deemed timely if filed within the comment period for that document.

⁴ See *Idaho Power Co.*, 158 FERC ¶ 61,048, at P 1 (Declaratory Order), *on reh'g*, 161 FERC ¶ 61,284 (2017).

⁵ Notice of Petition for Declaratory Order (Nov. 30, 2016).

⁶ Conservation Groups Motion to Intervene at 1 (Dec. 30, 2016).

⁷ 18 C.F.R. § 385.214(c) (2019).

⁸ Declaratory Order, 158 FERC ¶ 61,048 at P 1.

⁹ Idaho Power, Offer of Settlement Explanatory Statement (Dec. 30, 2019).

within the context of the Clean Water Act section 401 water quality certifications issued by the states for the project.¹⁰

6. The Commission issued public notice of Idaho Power's offer of settlement, setting February 6, 2020, as the deadline for filing comments.¹¹ The January 7, 2020 notice did not invite new interventions in the proceeding. On February 12, 2020, Pacific Rivers filed a motion to intervene out of time,¹² which the Commission denied on March 3, 2020, due to Pacific Rivers' failure to show good cause.¹³

7. Pacific Rivers requests clarification or rehearing of the March 3 Notice, arguing that its intervention in the declaratory order proceeding gives it party status in the underlying relicensing proceeding, and that if this is not the case, the March 3 Notice erred in finding that Pacific Rivers failed to show good cause for its untimely intervention.

II. Procedural Matters

8. On April 10, 2020, Idaho Power filed a motion for leave to file an answer and an answer in opposition to Pacific Rivers' request for clarification or rehearing of the March 3 Notice. On April 21, 2020, Pacific Rivers filed an answer in opposition to Idaho Power's answer. Commission regulations prohibit answers to a request for rehearing, as well as answers to an answer, unless otherwise ordered by the decisional authority.¹⁴ However, Pacific Rivers' request for clarification was a motion, and Commission regulations permit an answer to a motion.¹⁵ We therefore accept Idaho Power's answer to the extent that it addresses Pacific Rivers' motion for clarification, and otherwise reject both answers.

¹⁰ *See id.* at 1.

¹¹ Notice of Offer of Settlement (Jan. 7, 2020), *Federal Register*, 85 Fed. Reg. 2128 (Jan. 14, 2020).

¹² Pacific Rivers Motion to Intervene Out-of-Time (Feb. 12, 2020).

¹³ Notice Denying Late Intervention (Mar. 3, 2020).

¹⁴ 18 C.F.R. § 385.213(a)(2) (2019).

¹⁵ *Id.* § 385.213(a)(3); *see also id.* § 385.213(d)(1) ("Any answer to a motion or to an amendment to a motion must be made within 15 days after the motion or amendment is filed[.]").

9. Pacific Rivers' rehearing request fails to comply with the Commission's rules and is therefore dismissed.¹⁶ Specifically, the rehearing request fails to include a separate section entitled "Statement of Issues" listing each issue presented to the Commission in a separately enumerated paragraph, and Pacific Rivers has therefore waived the issues raised.¹⁷ Nevertheless, we address Pacific Rivers' arguments below and find that none of them has merit.

III. Discussion

A. Motion for Clarification

10. Pacific Rivers requests that the Commission clarify that Pacific Rivers was previously granted intervention status in the relicensing proceeding.¹⁸ Pacific Rivers quotes the Declaratory Order, which states that, "[t]o the extent that participants were already parties to [the relicensing] proceeding, there was no need to file a second motion to intervene or notice of intervention."¹⁹ Pacific Rivers argues that this text supports its conclusion that the grant of party status in that proceeding gives it party status to the underlying relicensing proceeding.

11. We disagree. The notice of the petition expressly states that "[a]ny person desiring to intervene or to protest *this filing* must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure."²⁰ The language quoted by Pacific Rivers merely indicates that parties to the underlying relicensing proceeding need not file a new motion to intervene in the declaratory order proceeding, and further expresses the Commission's intent to allow entities that had not intervened in the licensing proceeding to become party to the proceeding on the petition for declaratory order. It in no way suggests the reverse—that entities intervening in response to the petition would be granted party status in the licensing proceeding, the deadlines for

¹⁶ *Id.* § 385.713(c)(2); see also *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 112 FERC ¶ 61,297, at P 1 (2005).

¹⁷ *E.g., Merimil Ltd. P'ship*, 157 FERC ¶ 61,089, at P 3 (2016); *Tenn. Gas Pipeline Co., LLC*, 156 FERC ¶ 61,007, at P 7 (2016).

¹⁸ Pacific Rivers Request at 1-2.

¹⁹ *Id.* at 1 (quoting Declaratory Order, 158 FERC ¶ 61,048 at P 24).

²⁰ Notice of Petition for Declaratory Order at 1 (Nov. 30, 2016) (emphasis added) (citing 18 C.F.R. §§ 385.211 and 385.214 (2019)).

intervening in which had passed more than a decade before. The Declaratory Order proceeding, and Pacific Rivers' party status in that limited matter, therefore terminated

with the Commission's dismissal of the petition, once the period for judicial review of that order expired.²¹

12. Idaho Power argues that although Commission staff docketed the petition in the relicensing docket, the filing of the petition created a new proceeding, and the call for intervenors in response to the petition should not be interpreted as reopening the period for intervention in the underlying relicensing proceeding.²² Idaho Power adds that the Commission has been inconsistent in its docketing of petitions for declaratory orders filed during relicensing proceedings, sometimes using the relicensing subdocket, sometimes establishing a new subdocket, and sometimes using both the relicensing subdocket and a new subdocket.²³ Idaho Power contends that Commission staff's docketing of Idaho Power's petition in this case should not be dispositive of whether Pacific Rivers gained intervenor status in the relicensing proceeding.

13. As discussed above, we have determined that Pacific Rivers gained intervention in only the declaratory order proceeding, and not the underlying relicensing proceeding. We acknowledge that the Commission's docketing of petitions filed in hydroelectric licensing proceedings has not always been consistent. However, project numbers and subdockets are used internally for organizational purposes and are not dispositive of whether a filing should be viewed as beginning a separate proceeding.²⁴

²¹ 16 U.S.C. § 825l (2018) (Commission proceedings terminate after denial of any rehearing once the time for seeking judicial review expires); *see also Eagle Crest Energy Co.*, 168 FERC ¶ 61,186, at P 30 (2019) (finding that an intervenor's party status in a relicensing proceeding does not grant party status to post-licensing proceedings); *Kings River Conservation Dist.*, 36 FERC ¶ 61,365, at 61,881 (1986) (citing 16 U.S.C. § 825l) ("Commission proceedings terminate after denial of any rehearing once the time for seeking judicial review expires, and the party status of any intervenors in that proceeding also terminates at that point.").

²² Idaho Power Answer at 3-4.

²³ *Id.* at 5.

²⁴ *See Eagle Crest Energy Co.*, 168 FERC ¶ 61,186 at P 31. Although the Commission invited interventions in response to the petition for a declaratory order in this case, it was not required to do so and could have concluded that there were no grounds to allow any entity that had not intervened in the licensing proceeding to intervene with respect to the more limited declaratory order petition. *See Yuba Cty. Water Agency*, 171 FERC ¶ 61,139, at P 11 n.13 (2020).

14. Because Pacific Rivers did not gain party status to the relicensing proceeding through its intervention regarding the Declaratory Order petition, we deny its request for clarification.

B. Request for Rehearing

15. Pacific Rivers contends that the March 3 Notice wrongly found that it failed to show good cause for its late intervention. Pacific Rivers asserts that it did not have a legal need to participate in the proceeding until Idaho Power sought to avoid meeting the requirements of Oregon law in the relicensing proceeding, and that allowing late intervention will not disrupt the proceeding.²⁵

16. In the alternative to dismissing the request for rehearing, we affirm that the March 3 Notice properly denied Pacific Rivers' motion to intervene out of time. Movants for late intervention are required to "show good cause why the time limitation should be waived."²⁶ Here, Pacific Rivers filed its motion for late intervention more than 16 years after the February 2, 2004 deadline, and more than 13 years after the October 3, 2006 deadline, with no explanation of why it was unable to intervene in a timely manner or any other explanation that would justify missing the intervention deadlines in the relicensing proceeding.

17. Moreover, the issues of concern cited by Pacific Rivers, water quality, fish passage, and reintroduction of anadromous fish, were identified early in the relicensing proceeding, and were hardly raised for the first time by the settlement. Participants in Commission proceedings may not sit back and wait to see how issues might be resolved before deciding whether to intervene to protect their interests.²⁷ Therefore, we find Pacific Rivers has failed to show good cause for filing late.

²⁵ Pacific Rivers Request at 2-3.

²⁶ 18 C.F.R. § 385.214(b)(3); *see Cal. Trout v. FERC*, 572 F.3d 1003, 1022 (9th Cir. 2009) (finding that failure to show good cause is a sufficient basis for the Commission to deny late intervention).

²⁷ *Cal. Trout*, 572 F.3d at 1022 ("[T]he Commission has steadfastly and consistently held that a person who has actual or constructive notice that his interests might be adversely affected by a proceeding, but who fails to intervene in a timely manner, lacks good cause under Rule 214."); *see, e.g., Bradwood Landing, LLC*, 126 FERC ¶ 61,035, at PP 11, 16 (2009) (denying late intervention to movant who claimed that scientific studies made it more aware of its interests in the proceeding); *Cent. Neb. Pub. Power & Irrigation Dist.*, 125 FERC ¶ 61,192, at P 12 (2008) ("The Commission expects parties to intervene in a timely manner based on the *reasonably*

The Commission orders:

Pacific Rivers' March 27, 2020 request for clarification is denied, and its request for rehearing is dismissed.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

foreseeable issues arising from the applicant's filings and the Commission's notice of proceedings." (emphasis added)); *Broadwater Energy, LLC*, 124 FERC ¶ 61,225, at P 13 (2008) ("Those entities with interests they intend to protect are not entitled to wait until the outcome of a proceeding and then file a motion to intervene once they discover the outcome conflicts with their interests.").