

169 FERC ¶ 61,215
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Public Utility District No. 1 of Okanogan County, Project No. 12569-018
Washington

ORDER DENYING MOTIONS TO INTERVENE, REJECTING REQUEST FOR
REHEARING, AND DISMISSING REQUEST FOR STAY

(Issued December 19, 2019)

1. On August 13, 2019, Commission staff issued an order terminating the license for the Public Utility District No. 1 of Okanogan County, Washington's (Okanogan PUD) Enloe Hydroelectric Project No. 12569 (Enloe Project), pursuant to section 13 of the Federal Power Act (FPA).¹ On September 9, 2019, American Whitewater, Center for Environmental Law and Policy, Columbiana, and Sierra Club (collectively, Conservation Groups) filed individual motions to intervene,² and a joint request for rehearing and stay of the Termination Order. For the reasons discussed below, we deny intervention, reject the request for rehearing, and dismiss the request for stay as moot.

I. Background

2. On July 9, 2013, the Commission issued an original license to Okanogan PUD for the Enloe Project.³ The project would have utilized the existing Enloe Dam,⁴ located on the Similkameen River near the City of Oroville in Okanogan County, Washington, and

¹ *Pub. Util. District No. 1 of Okanogan County, Wash.*, 168 FERC ¶ 62,084 (2019) (Termination Order).

² Although the motions to intervene were contained in the same document, each entity requests to intervene individually. Conservation Groups September 9, 2019 Request for Rehearing at 7-8 (Conservation Groups Request for Rehearing).

³ *Pub. Util. District No. 1 of Okanogan County, Wash.*, 144 FERC ¶ 62,018 (2013) (Original License Order).

⁴ *Id.* P 10.

would have occupied 56.62 acres of federal land administered by the U.S. Department of Interior's Bureau of Land Management (BLM).⁵

3. Article 301 of the license required Okanogan PUD to commence construction of the project works within two years from the issuance date of the license, by July 9, 2015, and to complete construction of the project within five years from the issuance date of the license, by July 9, 2018.⁶ On March 19, 2015 Okanogan PUD requested a two-year extension of time to start project construction, which Commission staff granted on July 31, 2015.⁷ On June 22, 2017, Okanogan PUD requested a two-year stay of the commencement and completion deadlines, which the Commission granted on September 20, 2017.⁸ The Stay Order explained that upon expiration of the stay on June 22, 2019, Okanogan PUD would have until July 9, 2019, to begin construction.⁹

4. Okanogan PUD did not commence construction by July 9, 2019, and, on July 10, 2019, Commission staff issued a notice of probable termination of the Enloe Project license.¹⁰ The notice provided Okanogan PUD 30 days to respond, but it did not submit a

⁵ See *Pub. Util. District No. 1 of Okanogan County, Wash.*, 146 FERC ¶ 62,137, at P 4 (2014) (approving revised Exhibit G drawings demonstrating that 56.62 acres of Bureau of Land Management lands would be occupied by the project).

⁶ Original License Order, 144 FERC ¶ 62,018 at art. 301.

⁷ *Pub. Util. District No. 1 of Okanogan County, Wash.*, Project No. 12569-001 (July 31, 2015) (Order Granting Extension of Time). The order only extended the deadline to commence construction because the licensee stated that it planned to revisit the completion deadline once it developed a more definitive plan and schedule for construction activities.

⁸ *Pub. Util. District No. 1 of Okanogan County, Wash.*, 160 FERC ¶ 61,094 (2017) (Stay Order), *reh'g denied*, 162 FERC ¶ 61,040 (2018).

⁹ Stay Order, 160 FERC ¶ 61,094 at P 27. Conservation Groups, along with other organizations, sought rehearing of the Stay Order, requesting that the Commission terminate the license instead. See Conservation Groups October 20, 2017 Request for Rehearing. The Commission denied rehearing on January 18, 2018, *Pub. Util. District No. 1 of Okanogan County, Wash.*, 162 FERC ¶ 61,040 (2018), and Conservation Groups filed an appeal in the United States Court of Appeals for the Ninth Circuit, which is currently pending. *American Whitewater v. FERC*, No. 18-70765 (9th Cir. filed Oct. 9, 2018).

¹⁰ July 10, 2019 Notice of Probable Termination of the Enloe Hydroelectric Project License.

response.¹¹ On August 13, 2019, Commission staff issued the Termination Order, terminating the license for the Enloe Project for failure to commence construction.¹²

5. On September 9, 2019, Conservation Groups filed individual motions to intervene and joint requests for rehearing and stay of the Termination Order. Conservation Groups argue that: (1) the Commission failed to properly notice the proposed termination of the project license, and (2) the Termination Order should have required Okanogan PUD to develop a plan for the disposition of the Enloe Dam and other facilities that existed at the project site prior to licensing.

II. Procedural Issues

A. Motion to Intervene

6. Conservation Groups individually request to intervene in the termination proceeding, asserting that Okanogan PUD, the only party to the proceeding, cannot represent Conservation Groups' interests, and that each Conservation Group has a direct and substantial interest in the outcome of this proceeding.¹³

7. The FPA creates no absolute right of intervention and gives the Commission authority to reasonably limit those eligible to intervene or to seek review of Commission orders.¹⁴ License terminations pursuant to section 13 of the FPA are not proceedings where the Commission permits intervention. Section 13 states that if a licensee fails to "commence actual construction of the project works . . . within the time prescribed in the license or as extended by the Commission, then, after due notice given, the license shall . . . be terminated upon written order of the Commission."¹⁵ Thus, termination of a license is a ministerial act that involves only a determination that construction of the

¹¹ Additionally, no other comments were filed.

¹² Termination Order, 168 FERC ¶ 62,084 at P 8.

¹³ Conservation Groups Request for Rehearing at 8.

¹⁴ See 16 U.S.C. § 825g(a) (2018); see also *Eagle Crest Energy Co.*, 168 FERC ¶ 61,186, at P16 (2019) (Glick, Comm'r, dissenting) (*Eagle Crest*) (citing *Scenic Judson Pres. Conference v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965) ("Since the right to seek review under § 313(a) and (b) [16 U.S.C. § 825g(a), (b)] is limited to a 'party' to the Commission proceeding, the Commission has ample authority reasonably to limit those eligible to intervene or to seek review.")).

¹⁵ 16 U.S.C. § 806 (2018).

project has not timely commenced and is a matter solely between the Commission and its licensee.¹⁶

8. Although the Commission has permitted intervention in post-licensing proceedings in certain limited circumstances,¹⁷ those circumstances do not apply here. Termination of a project license is not a change in the plan of project development, as Article 301 of the license specifies that construction must commence by a specific date or as extended by the Commission.¹⁸ Termination of the Enloe Project license also does not adversely—or in any way—affect the rights of a property holder in a manner not contemplated by the license or lead to unanticipated environmental impacts. Moreover, Conservation Groups do not have a role in the license termination, as the only issue at hand is whether Okanogan PUD commenced construction before the extended deadline. Accordingly, Conservation Groups’ motions to intervene are denied.¹⁹

¹⁶ See *Marseilles Hydro Power, LLC*, 123 FERC ¶ 61,041 (2008) (denying intervention in license termination proceeding); see also *City of Tacoma*, 98 FERC ¶ 61,266 (2002) (notice rejecting rehearing of issuance of an annual license because issuance of an annual license is a ministerial and non-discretionary act and entails no proceeding in which intervention and rehearing may be sought).

¹⁷ *Marseilles Hydro Power, LLC*, 123 FERC ¶ 61,041 at P 3 (stating that the Commission will entertain intervention in post-licensing proceedings that (1) entail a material change in the plan of project development or in the terms and conditions of the license, (2) could adversely affect the rights of a property holder in a manner not contemplated by the license, or (3) involve an appeal by an agency or entity specifically given a consultation role with respect to the proceeding); see also *Eagle Crest*, 168 FERC ¶ 61,186 at P 16 (same).

¹⁸ While terminating a project could be viewed as a change in the plan of project development in a literal sense, it is not the type of change that gives rise to a right to intervene under our policy. The policy governs changes in a plan of development that might result in a constructed project affecting the environment or property rights in a manner not contemplated in the license, such as if a licensee was proposing to locate facilities on lands that were not considered in a license order or to construct or operate a project in a manner that would have environmental impacts that were not previously considered. A decision not to construct a project, which returns matters to the status *quo ante*, is not a change of that nature.

¹⁹ Contrary to the dissent, we are not denying the Conservation Groups’ motion to intervene “simply because the Commission is bothered by the need to address their comments”—indeed, the dissent acknowledges that we respond to the comments—but

B. Okanogan PUD's Answer and Conservation Groups' Answer to Answer

9. On September 24, 2019, Okanogan PUD filed an answer to Conservation Groups' request for rehearing. On October 9, 2019, American Whitewater, Center for Environmental Law and Policy, and the Washington State Chapter of Sierra Club filed an answer to Okanogan PUD's answer. The Commission's rules do not permit answers to requests for rehearing or answers to answers;²⁰ these pleadings are therefore rejected.

III. Request for Rehearing

10. Rule 713 of the Commission's regulations specifies that only parties to a proceeding may file a request for rehearing.²¹ Because we deny Conservation Groups' motions to intervene,²² they are not parties to the proceeding, and their request for rehearing is rejected. Nevertheless, we address Conservation Groups' arguments below.

A. Notice of the License Termination

11. Conservation Groups allege that the Commission failed to properly notice the license termination in violation of the FPA and the Commission's regulations. Specifically, Conservation Groups state that section 2.1 of the Commission's regulations requires notice of a license termination be published in the *Federal Register* to maximize public awareness and provide an opportunity for meaningful public participation.²³

12. Conservation Groups misinterpret the FPA and our regulations. Section 13 of the FPA only requires that the Commission provide "due notice" prior to terminating a license for failure to commence construction.²⁴ Although section 2.1 of our regulations states that "whenever appropriate," the Commission will publish notice of termination of a license in the *Federal Register*,²⁵ our regulations also authorize the Director of the

rather because granting intervention under the circumstances here would be contrary to well-established, well-reasoned Commission precedent.

²⁰ 18 C.F.R. § 385.213(a)(2) (2019).

²¹ 18 C.F.R. § 385.713(b) (2019).

²² *See supra* P 8.

²³ Conservation Groups Request for Rehearing at 10-11.

²⁴ 16 U.S.C. § 806 (2018).

²⁵ 18 C.F.R. § 2.1(a)(1)(iii)(G) (2019).

Office of Energy Projects to issue an order terminating a license for failure to timely commence construction pursuant to section 13 of the FPA, provided that the Director gives notice by certified mail to the licensee of probable termination no less than 30 days prior to the issuance of the termination order, and that the licensee does not oppose the issuance of the termination order.²⁶ Further, contrary to Conservation Groups' suggestion, section 2.1(a) does not establish a policy that the general public has a right to receive notice through Federal Register publication. Rather, the policy was established to limit the instances in which the Commission would provide personal service.²⁷ Accordingly, where, as here, the Commission provided individual notice through a letter to the licensee and placed the letter in the Commission's e-library, so that notification of the document was automatically provided to all persons, including members of the Conservation Groups, that had e-subscribed to the project docket or were on the project's service list, nothing further was required. We also note that, as a general statement of policy, section 2.1 "does not establish a 'binding norm.' [] It is not finally determinative of the issues or rights to which it is addressed [but rather] . . . announces the agency's tentative intentions for the future."²⁸ Thus, section 2.1 did not establish a regulation binding on the Commission.

13. Here, Okanogan PUD was provided notice via certified mail in accordance with our regulations. In addition, the Commission gave all interested stakeholders notice by publishing the notice of probable termination in the docket for the project. The absence of notice in the *Federal Register* did not affect Conservation Groups' rights, as they had

²⁶ 18 C.F.R. § 375.308(f) (2019). *See also License Termination*, Order No. 556, FERC Stats. & Regs. ¶ 30,979 (1993) (cross referenced- at 64 FERC ¶ 61,349) (stating that by the time the Commission issues the notice of probable termination of a license, the licensee's inability to commence construction "has become common knowledge to both the licensee and Commission staff such that the notice becomes a procedural formality that confirms the obvious").

²⁷ *See* 18 C.F.R. § 2.1(a) (2019) (stating that "[t]he mailing or e-mailing of individual copies shall be confined to that which is required by law, by the Commission's rules and regulations, or other considerations deemed valid by the [Commission's] Secretary in specific instances"); 24 Fed Reg. 1345 (Feb. 21, 1959) (explaining that the purpose of the policy established by § 2.1 "is to effect efficiencies in the distribution of documents, to reduce the burden of routine clerical operations of the Commission's staff and to minimize the mailing of copies to recipients who have no use for or otherwise receive them, while maintaining flexible procedures for mailing such copies where requested").

²⁸ *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, (D.C. Cir. 1974) (citation omitted).

actual notice of this proceeding and filed their motions to intervene and requests for stay and rehearing less than 30 days after issuance of the Termination Order. Therefore, we conclude that it was not necessary to publish notice in the *Federal Register* and that the Commission fulfilled its obligations under the FPA and our regulations. More to the point, the Conservation Groups do not allege that they were in any way adversely affected by the form of notice of the proposed termination, rendering this argument moot.

B. Disposition of Existing Project Facilities

14. Conservation Groups allege that the Commission must require Okanogan PUD to consult with jurisdictional agencies and interested stakeholders to develop a plan for the disposition of the Enloe Dam and other facilities that existed at the project site prior to licensing.²⁹ Conservation Groups state that failure to account for the disposition of preexisting facilities when terminating a license for failure to start construction violates section 6 of the FPA,³⁰ which Conservation Groups assert gives the Commission authority “to take appropriate steps that will satisfactorily protect the public interests involved” in the termination of a license.³¹ In support of their argument, Conservation Groups cite *Public Utility District No. 1 of Pend Oreille County, Washington*, where the Commission required the licensee to dispose of project works and obtain a special use permit from the U.S. Forest Service before the Commission terminated its jurisdiction over the project,³² and *Southern California Edison Co.*, where a licensee had to submit a surrender application and decommissioning plan in order to surrender the project, even though the project was not being used for power production at the time.³³ Conservation Groups conclude that the Commission should apply a similar policy here and require a plan to dispose of the preexisting structure, arguing that terminating the license without decommissioning the preexisting facilities will harm the public interest because it is not

²⁹ Conservation Groups Request for Rehearing at 12.

³⁰ *Id.*

³¹ *Id.* at 13 (citing *Project Decommissioning at Relicensing; Policy Statement*, FERC Stats. & Regs. ¶ 31,011 (1994) (cross-referenced at 69 FERC ¶ 61,336) (Decommissioning Policy Statement)).

³² *Id.* at 14-16 (citing *Pub. Util. District No. 1 of Pend Oreille County, Wash.*, 122 FERC ¶ 61,249, at PP 20, 22 (2008) (Moeller, Comm’r, concurring) (*Pend Oreille PUD*)).

³³ *Id.* at 17 (citing *Southern California Edison Co.*, 106 FERC ¶ 61,212, at P 2 (2004)).

clear what agency has jurisdiction over the Enloe Dam and other facilities or how dam safety will be monitored once the Commission's jurisdiction is terminated.³⁴

15. We disagree. Conservation Groups wrongly conflate license termination pursuant to section 13 of the FPA with the license surrender process. Section 6 of the FPA provides that a license may be surrendered upon mutual agreement between the licensee and the Commission.³⁵ If a licensee voluntarily decides to surrender its license and no other parties wish to take over the license, the Commission requires the licensee to file a surrender application that includes a decommissioning plan.³⁶ If project works have been constructed on federal land, the licensee may be required to restore the lands to a condition satisfactory to the Department having supervision over such lands.³⁷ The Commission will only approve a license surrender once the licensee has fulfilled its obligations under the license or as established by the Commission.

16. Conversely, section 13 of the FPA requires license termination for failure to commence construction,³⁸ and termination does not require an application or other action by the licensee. As discussed above, it is an administrative matter between the Commission and the licensee as the consequence for failing to begin timely construction.³⁹

17. The Decommissioning Policy Statement cited by Conservation Groups applies to the relicensing, surrendering, and decommissioning of licensed hydropower projects after the original license has expired, pursuant to section 6 of the FPA, and does not contemplate situations where the license is terminated because a licensee has failed to

³⁴ *Id.* at 18. Conservation Groups also assert that the Enloe Dam is a barrier to fish passage and interferes with recreational uses and visual resources. *Id.*

³⁵ 16 U.S.C. § 799 (2018).

³⁶ 18 C.F.R. § 6.1 (2019). A decommissioning plan can include leaving project features in-place for other uses or removal of project features and site restoration. *Id.* § 6.2.

³⁷ *Id.*

³⁸ 16 U.S.C. § 806 (2018) (If a licensee fails to commence construction within the time prescribed, "the license shall . . . be terminated upon written order of the Commission.").

³⁹ *See Marseilles Hydro Power, LLC*, 123 FERC ¶ 61,041 (2008).

commence construction.⁴⁰ Similarly, we are not persuaded by our holdings in *Pend Oreille PUD* and *Southern California Edison Co.* because both cases involved the surrender of previously-operational projects and are not applicable to this proceeding.⁴¹

18. Okanogan PUD has not engaged in any construction whatsoever, and there are accordingly no steps it needs to take to remedy impacts on the environment. Because the Enloe Project license was terminated by the Commission for failure to commence construction rather than surrendered by Okanogan PUD, we will not require Okanogan PUD to decommission the Enloe Dam and other preexisting facilities.⁴² To now require Okanogan PUD to dispose of the structures and facilities that exist independent of the 2013 license would go beyond the requirements of the license and the authority set out in our regulations.⁴³ Indeed, the suggestion that a licensee that has failed to timely commence construction should be required to remove or modify structures that it did not build pursuant to its license is inappropriate and would, even assuming we had the authority to impose such measures, represent bad policy. Requiring the developer of a failed, unconstructed project might be subjected, in addition to the loss of capital and money invested in the project, to requirements designed to remedy actions taken by others could provide a substantial, unwarranted disincentive to hydropower development.

19. With respect to Conservation Groups concerns regarding what entity would ensure dam safety of the now non-jurisdictional facilities, when the Commission terminates a license, if there is a preexisting dam, the applicable state agency assumes jurisdiction for

⁴⁰ Decommissioning Policy Statement, FERC Stats. & Regs. ¶ 31,011 at 31,222.

⁴¹ *Pend Oreille PUD*, 122 FERC ¶ 61,249 at PP 20, 22 (2008) (Moeller, Comm’r, concurring); *Southern California Edison Co.*, 106 FERC ¶ 61,212 at P 2.

⁴² Indeed, because the project was not constructed, the Commission would not require a decommissioning plan even if Okanogan PUD was surrendering the license. See 18 C.F.R. § 6.2 (2019) (the Commission may condition license surrender on disposition of project works authorized under the license if they are partially or fully constructed); see also *Pittsburgh Water and Sewer Authority*, 67 FERC ¶ 61,200, at 61,629 (1994) (“Since the [licensee] has not commenced construction of [the project], acceptance of its surrender application need not be conditioned on any site restoration measures.”).

⁴³ See *Mahoning Hydropower, LLC*, 168 FERC ¶ 62,166 (2019) (terminating a license for failure to commence construction at an existing dam and not requiring decommissioning); *City of New York, N.Y.*, 168 FERC ¶ 62,167 (2019) (same); *Putnam Green Power, LLC*, 121 FERC ¶ 62,041 (2007) (same); *Turnbridge Mill Corp.*, 114 FERC ¶ 62,222 (2006) (same); *CPS Products, Inc.*, 111 FERC ¶ 61,071 (2005) (same); *Geoffrey Shadroui*, 70 FERC ¶ 61,237 (1995) (same).

dam safety concerns, and state and federal resource agencies oversee applicable natural resource issues. Commission staff have discussed the future of the Enloe Dam with the Washington state Department of Ecology, Dam Safety Division.⁴⁴ In any event, the fact that section 13 requires the Commission to terminate a license when construction has not timely commenced renders this argument moot: the Commission was statutorily required to terminate the license regardless of the condition of the dam. And as was true with respect to the argument that Okanogan PUD should be required to take steps to decommission project works, we find that it would be inappropriate to require a licensee that took no action under its license to remedy concerns regarding facilities that exist independently from the license.

20. Last, Conservation Groups argue that without a license from the Commission, Okanogan PUD is trespassing on BLM land.⁴⁵ This is a matter solely between Okanogan PUD and BLM, which is free to take any steps it deems necessary to protect the lands it manages that were formerly subject to the license.

IV. Request for Stay

21. In addition to the request for rehearing, Conservation Groups also request a stay of the Termination Order until the Commission completes proceedings for the disposition of the Enloe Dam and other facilities that existed at the project site prior to licensing. As we have denied the request for rehearing and found that decommissioning the Enloe Dam and other preexisting facilities is not required, Conservation Groups request for a stay is dismissed as moot.

The Commission orders:

(A) The Conservation Groups' motions to intervene are denied, as discussed in the body of this order.

(B) The Conservation Groups' request for rehearing is rejected, as discussed in the body of this order.

⁴⁴ Commission staff met with representatives from the Department of Ecology and Okanogan PUD on January 29, 2019, and have had several coordination phone calls with the Department of Ecology.

⁴⁵ Conservation Groups Request for Rehearing at 19.

(C) The Conservation Groups' request for stay is dismissed as moot, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting in part with a separate statement attach.

(S E A L)

Kimberly D. Bose,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Utility District No. 1 of Okanogan County, Project No. 12569-018
Washington

(Issued December 19, 2019)

GLICK, Commissioner, *dissenting in part*:

1. I dissent in part from today’s order because I disagree with the Commission’s decision to deny the motions to intervene filed by American Whitewater, Center for Environmental Law and Policy, Columbiana, and Sierra Club (Conservation Groups). As I have previously explained,¹ I do not think it is appropriate for the Commission to deny an entity party status—and the rights that come with it²—simply because the Commission is bothered by the need to address their comments. In a proceeding such as this one, if we disagree with commenters’ arguments, we should so say on the record rather than keeping them out of the proceeding altogether. That is especially so where the Commission has persuasive responses on the merits, as it does here in response to the Conservation Groups’ arguments regarding the disposition of the Enloe Dam and associated facilities. At the end of the day, I simply do not see what public purpose is served by restricting participation in Commission proceedings, especially when the Commission proceeds to address the would-be intervenors’ comments all the same.

For these reasons, I respectfully dissent in part.

Richard Glick
Commissioner

¹ *Eagle Crest Energy Co.*, 168 FERC ¶ 61,186 (2019) (Glick, Comm’r, dissenting).

² In order to seek rehearing or judicial review on the merits, it is necessary to be a party to the underlying proceeding. See 16 U.S.C. § 8251(b) (2018) (providing that “[a]ny party to a proceeding” may appeal the Commission’s order in that proceeding); *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 n.7 (9th Cir. 2009); *N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984) (a non-party must be considered a party only “for the limited purpose of reviewing the agency’s basis for denying party status”).