

168 FERC ¶ 61,186
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Eagle Crest Energy Company Project No. 13123-028

ORDER DENYING REHEARING AND STAY

(Issued September 19, 2019)

1. On May 7, 2019, the Commission issued an order granting extensions of time to commence and complete construction for the Eagle Crest Energy Company's (Eagle Crest) Eagle Mountain Pumped Storage Hydroelectric Project No. 13123 (Eagle Mountain Project), pursuant to section 13 of the Federal Power Act (FPA).¹ In the order, the Commission denied the National Parks Conservation Association's (the Association) motion to intervene and explained that the Desert Protection Society's (the Society) previous party status did not extend to this proceeding. On June 4, 2019, the Association requested rehearing and stay of the May 2019 Order, and on June 6, 2019, the Society requested rehearing. For the reasons discussed below, we deny the request for stay and the requests for rehearing.

I. Background

2. On June 19, 2014, the Commission issued an original license to Eagle Crest to operate and maintain a closed-loop, pumped storage facility known as the Eagle Mountain Project.² The unconstructed project is located on the site of the inactive Eagle Mountain mine, in Riverside County, California, on private lands and on federal lands under the jurisdiction of the U.S. Department of the Interior, Bureau of Land Management (BLM).

3. Article 301 of the license required the licensee to commence construction of the project works within two years from the issuance date of the license, i.e., by June 19, 2016, and to complete construction of the project within seven years from the issuance

¹ *Eagle Crest Energy Company*, 167 FERC ¶ 61,117 (2019) (May 2019 Order).

² *Eagle Crest Energy Company*, 147 FERC ¶ 61,220 (2014) (License Order).

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date of the license, i.e., by June 19, 2021.³ Consistent with then-section 13 of the FPA, the Commission was permitted to extend the commencement of construction deadline once by up to two additional years.⁴ On March 17, 2016, Commission staff granted Eagle Crest's request to extend this deadline to June 19, 2018.

4. Though Eagle Crest failed to begin construction by June 19, 2018, such failure did not automatically terminate its license. Section 13 of the FPA provides that "the license shall . . . be terminated upon written order of the Commission."⁵ Prior to the Commission issuing any written order terminating the license, on October 23, 2018, the America's Water Infrastructure Act was enacted, which amended, inter alia, section 13 of the FPA to allow the Commission to extend a project construction deadline by "not more than 8 additional years."⁶ On November 7, 2018, Eagle Crest requested a two-year extension of time to commence project construction. On December 18, 2018, Eagle Crest also requested a corresponding two-year extension of time to complete project construction.

5. The Association filed a motion to intervene and comments opposing the extension requests, and the Society filed comments opposing the extension requests. The Association and the Society argued that the Commission did not have the authority to grant the extensions because the deadline to commence construction had passed before the America's Water Infrastructure Act went into effect.⁷ Alternatively, each contended that Eagle Crest failed to show the reasonable diligence necessary to warrant an extension of the deadline to complete construction.⁸ The Association also argued that if the Commission granted the extensions, the National Environmental Policy Act (NEPA) would compel the Commission to conduct a supplemental environmental review based on new information and changed circumstances.⁹

³ *Id.* at ordering para. (E).

⁴ 16 U.S.C. § 806 (2018).

⁵ *Id.*

⁶ 16 U.S.C. § 806, *amended by* America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3001, 132 Stat. 3765, 3862 (2018).

⁷ May 2019 Order, 167 FERC ¶ 61,117 at PP 6-7.

⁸ *Id.* PP 6-7, 11.

⁹ *Id.* P 10.

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6. On May 7, 2019, the Commission granted Eagle Crest's request to extend the deadlines to commence and complete construction. The Commission explained that, although the license was subject to termination at the time of Eagle Crest's request, Eagle Crest's failure to commence construction did not automatically terminate the license.¹⁰ Because the Commission had not issued notice or begun the termination process, the license remained in effect and Eagle Crest's request was subject to the currently effective section 13 of the FPA.¹¹ In the May 2019 Order, after determining that Eagle Crest had pursued development of the project with good faith and reasonable diligence, the Commission extended the Article 301 deadlines to commence construction to June 19, 2020, and complete construction to June 19, 2023.¹²

7. The May 2019 Order also rejected the request to intervene by the Association. The order explained that, consistent with Commission precedent, an extension of time to commence construction is typically not the type of post-licensing proceeding in which the Commission issues notices and entertains intervention requests.¹³ The Commission also explained that, although the Society had been a party in the project's licensing proceeding, the Society's party status ended with the termination of the licensing proceeding and the Society was not a party to the extension proceeding.¹⁴

II. Stay Request

8. The Association seeks a stay of the May 2019 Order, arguing that because the Association is not currently a party to the proceeding, it is unable to challenge the merits of the May 2019 Order by seeking rehearing or challenging the May 2019 Order in court.¹⁵ The Association states that a stay is necessary to allow it "the ability to fully

¹⁰ *Id.* PP 8-9. See also *Idaho Power Co*, 38 FERC ¶ 61,126, at 61,274 (1987) ("Section 13 explicitly requires termination by affirmative Commission action and only after notice is given.").

¹¹ May 2019 Order, 167 FERC ¶ 61,117 at PP 8-9.

¹² *Id.* P 11 & ordering para. (A).

¹³ *Id.* P 12.

¹⁴ *Id.* P 13.

¹⁵ The National Park Conservation Association's Request for Rehearing and Stay of May 7, 2019 Order, 167 FERC ¶ 61,117 at PP 18-19 (the Association's Rehearing and Stay Request).

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exercise its legal rights with respect to these substantial and important legal issues.”¹⁶ The Association asks that the Commission grant a stay until the Commission grants intervention or a court resolves the Association’s concerns.¹⁷

9. The Commission reviews requests for stays under the standard established by the Administrative Procedure Act: a stay will be granted when “justice so requires.”¹⁸ In determining whether this standard has been met, the Commission considers several factors, including: (1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.¹⁹ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.²⁰

10. In order to support a stay, the movant must substantiate that irreparable injury is “likely” to occur.²¹ The injury must be both certain and great, and it must be actual and not theoretical. Bare allegations of what is likely to occur do not suffice.²² The movant must provide proof that the harm has occurred in the past and is likely to occur again or proof indicating that the harm is certain to occur in the near future.²³ Further, the movant must show that the alleged harm will directly result from the action that the movant seeks to enjoin.²⁴

¹⁶ *Id.* at 19.

¹⁷ *Id.*

¹⁸ 5 U.S.C. § 705 (2018).

¹⁹ Ensuring definiteness and finality in our proceedings is also important to the Commission. See *Constitution Pipeline Co.*, 154 FERC ¶ 61,092, at P 9 (2016); *Enable Gas Transmission, LLC*, 153 FERC ¶ 61,055, at P 118 (2015); *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, at P 13 (2012).

²⁰ See, e.g., *Algonquin Gas Transmission*, 156 FERC ¶ 61,111, at P 9 (2016).

²¹ See *Transcontinental Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183, at P 10 (2015) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

²² *Transcontinental Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183 at P 10.

²³ *Id.*

²⁴ *Id.*

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11. The Association has not satisfied the standards for granting a stay. Specifically, the Association fails to support its assertion that a stay is necessary to allow it to seek judicial review. The Association may seek judicial review of this order for the limited purpose of reviewing the Commission's basis for denying party status.²⁵ If a reviewing court determines that the Commission was required to grant the Association party status, the Commission would then address the Association's opposition to the extensions to commence and complete project construction, and the resulting order(s) would then be subject to judicial review. Because the Association has failed to explain how it will suffer irreparable harm absent a stay, its request is denied.

III. Rehearing Requests and Commission Determination

12. On rehearing, the Association alleges that the Commission violated Rule 214 of the Commission's regulations²⁶ and section 6 of the FPA²⁷ when it denied the Association's motion to intervene.²⁸ The Association contends that, because its motion to intervene complied with Rule 214 of the Commission's regulations, its intervention was automatically granted.²⁹ Alternatively, the Association argues that its intervention should be accepted because Commission regulations and the FPA require that Eagle Crest's requests be treated as material amendments that should have been publicly noticed and subject to intervention.³⁰

13. The Society argues that the May 2019 Order was issued ultra vires because the Commission had a legal obligation to terminate Eagle Crest's license. Further, the Society claims that the Commission applied section 13 of the FPA, as amended by America's Water Infrastructure Act, retroactively.³¹ The Society also contends that Eagle Crest failed to act in good faith and with reasonable diligence because Eagle Crest

²⁵ See *Cal. Trout v. FERC*, 572 F.3d 1003, 1013 n.7 (9th Cir. 2009).

²⁶ 18 C.F.R. § 385.214 (2019).

²⁷ 16 U.S.C. § 799 (2018).

²⁸ The Association's Rehearing and Stay Request at 2.

²⁹ *Id.* at 2-3.

³⁰ *Id.* at 3.

³¹ The Desert Protection Society's June 6, 2019 Request for Rehearing and Petition for Modification of the Commission's May 7, 2019 Order, 167 FERC ¶ 61,117, at 3-4 (The Society's Rehearing Request).

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previously received an extension to commence construction but never began construction.³² The Society argues that it may seek rehearing as a party to this proceeding because its party status, as granted in the licensing proceeding, should continue for the term of the license.³³

A. Rule 214 of the Commission’s Regulations Is Inapplicable Here

14. The Association argues that the Commission erred in rejecting its intervention because the Association satisfied the requirements for intervention in Rule 214 of the Commission’s regulations. Of relevance here, Rule 214 states, “a motion to intervene must also state the movant’s interest in sufficient factual detail to demonstrate that . . . the movant has or represents an interest which may be directly affected by the outcome of the proceeding . . . or [t]he movant’s participation is in the public interest.”³⁴ If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15-day period.³⁵ The Association argues that it met these requirements because it has a direct interest in the area affected by the Eagle Mountain Project and represents the public interest in opposing the Commission’s decision to grant the requested extensions.³⁶ The Association argues that because there was no opposition to its timely intervention motion, its intervention was automatically granted.

15. We disagree. Rule 214 of the Commission’s regulations is inapplicable because this is not a proceeding where the Commission permits intervention.³⁷ As explained in the May 2019 Order, such issues generally do not adversely affect any entities’ rights because they do not alter the licensee’s obligations or impose new burdens on new

³² *Id.* at 4.

³³ *Id.* at 2, 4-6.

³⁴ 18 C.F.R. § 385.214(b)(2)(ii), (iii) (2019).

³⁵ 18 C.F.R. § 385.214(c)(1).

³⁶ The Association’s Rehearing and Stay Request at 4, 9, 16.

³⁷ See May 2019 Order, 167 FERC ¶ 61,117 at P 12 & n.23 (citing *Wis. Valley Improvement Co.*, 88 FERC ¶ 61,054, at 61,136 (1999)). See, e.g., *FFP Missouri 23, LLC*, Project No. 13755-002 (December 10, 2018) (Order Granting Extension of Time Pursuant to Article 301) (FERC Accession Number 20181210-3032).

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parties.³⁸ Limiting notice and intervention in post-licensing matters allows the Commission to act on numerous hydroelectric compliance matters in a manner that is administratively efficient and consistent with FPA and due process notice requirements.³⁹

16. As noted in the May 2019 Order, the Commission will permit post-licensing intervention in certain limited circumstances.⁴⁰ In *Kings River Conservation District*, the Commission explained that it is only required to give notice of, and entertain interventions in, post-licensing proceedings where the licensee's filings entail material changes in the plan of project development or in the terms and conditions of the license, or could adversely affect the rights of property holders in a manner not contemplated by the license.⁴¹ In *Pacific Gas and Electric Co.*, the Commission clarified that it would also entertain interventions by agencies and other entities involving a license provision that grants "a consultation role" to the entity seeking to intervene.⁴² None of these circumstances are present here.⁴³

17. The Association claims that Rule 214 cannot be overruled by an "uncodified informal policy against interventions."⁴⁴ Our long-term policy, as enunciated in *Kings River* and *PG&E*, did not overrule Rule 214, but rather clarifies in which circumstances the rule applies. Contrary to the Association's claim, the Commission's post-licensing intervention precedent and policy need not be codified in our regulations to be effective. Moreover, the Commission may, in any event, articulate a rule in the course of an

³⁸ *Id.* P 12.

³⁹ We also note that the 15-day rule applies to the absence of objection by other parties to a case, but would not prevent the Commission – which can in any event waive its regulations when appropriate – from determining at some point after 15 days has expired that intervention has been improvidently granted or otherwise should not be permitted.

⁴⁰ *Id.* P 12 & n.22.

⁴¹ *Kings River Conservation District*, 36 FERC ¶ 61,365, at 61,882-61,883 (1986) (*Kings River*).

⁴² *Pacific Gas & Electric Co.*, 40 FERC ¶ 61,035, at 61,099 (1987) (*PG&E*).

⁴³ May 2019 Order, 167 FERC ¶ 61,117 at P 12.

⁴⁴ The Association's Rehearing and Stay Request at 13.

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adjudication.⁴⁵ Of relevance here, we note *Kings River* was a published decision; therefore, it cannot reasonably be characterized as an unpublished informal policy.⁴⁶ Finally – and significantly – the FPA creates no absolute right of intervention and gives the Commission authority to reasonably limit those eligible to intervene or to seek review.⁴⁷

B. The Extensions to Commence and Complete Construction Are Not Material Amendments to the License

18. The Association next argues that the requested extensions are not merely administrative matters but rather constitute a material change to the Eagle Crest license because the extensions will directly affect the Association’s interests.⁴⁸ The Association explains that, in 2016, the National Park Service did not recommend for inclusion within Joshua Tree National Park’s boundary the lands associated with the Eagle Mountain Pumped Storage Project. According to the Association, if the Commission had terminated the license, the Association could petition the National Park Service and Congress to include those lands in any boundary adjustment.⁴⁹ The Association also claims that the project land would also immediately be protected by land and

⁴⁵ See, e.g., *SEC v. Chenery Corp.*, 332 U.S. 194, 202-204 (1947) (ruling that the decision to make new law through rulemaking or adjudication “is one that lies primarily in the informed discretion of the administrative agency”); *City of Summersville*, 86 FERC ¶ 61,149, at 61,534 (1999) (citing *Consolidated Freightways v. NLRB*, 892 F.2d 1052 (D.C. Cir. 1989) (acknowledging that new rules may be announced in agency adjudications)).

⁴⁶ See *Kings River*, 36 FERC at 61,882.

⁴⁷ See 16 U.S.C. § 825g(a). See also *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 617 (2d Cir. 1965) (“Since the right to seek review under § 313(a) and (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.”) (citing *Alston Coal Co. v. FPC*, 137 F.2d 740, 742 (10th Cir. 1943) (construing similar provisions in the NGA)).

⁴⁸ The Association’s Rehearing and Stay Request at 13-15.

⁴⁹ *Id.* The Association argues that even if extending the commencement of the construction date is an administrative matter, extending the completion date is a material amendment because that extension creates a bigger hurdle for Congress to act on a possible National Park Service recommendation to initiate a boundary adjustment to include project land in Joshua Tree National Park. *Id.* at 15. This is simply incorrect, Congress possesses plenary authority to set the boundaries of national parks.

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groundwater requirements under the California Energy Commission’s 2016 Desert Renewable Energy Conservation Plan.⁵⁰ The Association contends that the project will not be viable under the new deadline to complete construction because other renewable energy technologies will become more attractive. Thus, according to the Association, the Commission’s extensions revived an effectively defunct project that harms the larger public interest in advancing sustainable energy development that would not adversely affect wilderness, groundwater, or wildlife habitat.⁵¹

19. As discussed, the Commission accepts interventions in a post-licensing proceeding if that proceeding concerns a material change to the project development plan or terms of the license.⁵² The Commission does not treat requests for extensions of compliance deadlines in a license—including deadlines for starting and completing construction—as material changes.⁵³ The Commission has explained that “[e]very case where the Commission concluded that amendments to the applicant’s plan of development were material involved significant changes to the project’s physical features . . . and changes that do not concern a project’s physical features would seldom, if ever, rise to the level of a fundamental and significant change to the plans of development.”⁵⁴ Under the Commission’s regulations for licensing proceedings, the Commission also considers material amendments to be only those fundamental and significant changes that result in physical changes, such as changes to the proposed project’s installed capacity, dam, powerhouse, reservoir, or units of development within the project boundary.⁵⁵ As the

⁵⁰ *Id.* at 3.

⁵¹ *Id.* at 15.

⁵² *Kings River*, 36 FERC at 61,882-83.

⁵³ See, e.g., *Pub. Util. Dist. No. 1 of Okanogan Cty., Wash.*, 160 FERC ¶ 61,094, at P 6 & n.11 (2017); *Felt Mills Energy Partners, L.P.*, 87 FERC ¶ 61,094, at 61,409 (1999); *Baldwin Hydroelectric Corp.*, 84 FERC ¶ 61,132, at 61,743 (1998).

⁵⁴ *Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036, at PP 15-17 (2010), *aff’d*, *Green Island Power Authority v. FERC*, 497 Fed. Appx. 127 (2d Cir. 2012).

⁵⁵ 18 C.F.R. § 4.35(f)(1) (2019) (defining a material amendment as “any fundamental and significant change” to “plans of development proposed in an application for a license”); *Green Island Power Auth. v. FERC*, 497 F. App’x 127, 128-29 (2d Cir. 2012) (approving FERC finding of no material amendment to license application under FERC’s regulation); *Green Island Power Auth. v. FERC*, 577 F.3d 148, 162-63 (2d Cir.

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Commission explained in the May 2019 Order, the requested extensions are routine administrative matters and do not affect the merits or physical nature of the project.⁵⁶ The extension of construction deadlines adds no environmental impacts to those already studied in the now-final licensing proceeding.

20. Moreover, with regard to the Association's concerns with the Desert Renewable Energy Conservation Plan and Joshua Tree National Park boundary, the Association does not directly challenge the extensions sought by Eagle Crest but rather uses the extensions as a basis to renew its challenges to the license itself. The Association essentially asks that the Commission reevaluate whether the project is in the public interest and reapply the comprehensive development standard of the FPA, which entails balancing the protection of environmental resources with the need for the power to be produced by the project.⁵⁷ The Commission already conducted this analysis during the underlying license proceeding and specifically considered the environmental impacts to BLM-managed project lands near Joshua Tree National Park raised by the Association and other commenters.⁵⁸ The Association cannot use the extension proceeding as grounds to mount an untimely collateral attack on the license order.

21. The Association next argues that the extensions are material amendments because they involve contested legal questions.⁵⁹ Specifically, the Association questions whether the Commission is retroactively applying section 13 of the FPA as amended by the America's Water Infrastructure Act.⁶⁰ Similarly, the Association opposes the Commission's reliance on a categorical exclusion from further review under NEPA for the extensions and argues that this legal objection makes the extensions material amendments.⁶¹ The Association argues that the Commission should have conducted a supplemental environmental impact statement (EIS) because the need for the project's

2009) (approving FERC decision that 1995 and 2001 licensee actions did not constitute material amendments to license application under 18 C.F.R. § 4.35(f)(1), but holding that FERC failed to address whether a 2005 settlement offer was a material amendment).

⁵⁶ May 2019 Order, 167 FERC ¶ 61,117 at P 6.

⁵⁷ See 16 U.S.C. §§ 797(e), 803(a) (2018).

⁵⁸ License Order, 147 FERC ¶ 61,220 at PP 32, 85-86.

⁵⁹ The Association's Rehearing and Stay Request at 14-15.

⁶⁰ *Id.*

⁶¹ *Id.*

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energy storage identified in the original EIS has since been reduced and the groundwater impact modeling in the original EIS has been replaced by newer modeling results.⁶²

22. The Association's legal objections do not render Eagle Creek's extensions of time material amendments. Eagle Crest's request does not involve any construction or changes to the project development, therefore there is no resulting environmental impact to assess. As explained in the May 2019 Order, such administrative actions are appropriately categorically excluded from further NEPA review.⁶³ The Commission has reserved the authority to deal with matters such as unanticipated environmental impacts that occur during the term of a license through its retention of reserved authority to reopen a license, but this limited proceeding is not the appropriate place to do so.⁶⁴

C. The Commission Did Not Violate the Federal Power Act's Notice Requirements

23. The Association next argues that the Commission's denial of its motion to intervene violates the FPA and Commission regulations. The Association contends that the requested extensions are license amendments that are subject to the thirty-day public notice requirement in section 6 of the FPA and Rule 210 of Commission rules of practice and procedure, requiring applicable notices to include a deadline for the filing of interventions.⁶⁵

24. Neither section 6 of the FPA nor Rule 210 require that requests for extensions of time to commence and complete construction be noticed and subject to intervention. As an initial matter, Rule 210 is inapplicable because it only requires the Commission to establish a deadline for interventions if the Commission issues an applicable notice, and, as the Commission has explained, notice is not required here.⁶⁶

25. With regard to section 6 of the FPA, that provision states that "licenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the

⁶² *Id.*

⁶³ May 2019 Order, 167 FERC ¶ 61,117 at P 10 (citing 18 C.F.R. § 380.4(a)(1) (2019)).

⁶⁴ *See* License Order, 147 FERC ¶ 61,220 at Form L-2, Article 15.

⁶⁵ 18 C.F.R. § 385.210(b) (2019).

⁶⁶ *See supra* P 15.

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Commission after thirty days public notice.”⁶⁷ But long-standing Commission precedent and Commission regulations have interpreted section 6 as only applying to a *significant* alteration of the license. Section 4.202 of the Commission’s regulations only requires thirty days of public notice “[i]f it is determined that approval of the application for amendment of license would constitute a *significant* alteration of license pursuant to section 6 of the [FPA]”⁶⁸ The Commission has explained that such amendments include those that are no longer consistent with the plan of development contemplated when the project was licensed.⁶⁹

26. This interpretation is consistent with Commission’s long-standing precedent interpreting section 6 of the FPA. In 1923, the Commission’s predecessor, the Federal Power Commission, requested an opinion of its chief counsel regarding section 6 of the FPA, noting that “it becomes necessary to make changes in licenses for such purposes as correction of errors, modification of plans, extensions of time, etc.”⁷⁰ The opinion approved by the Federal Power Commission concluded that public notice was not required for “extensions of time within the scope authorized by the act,” as such a change involves no substantial modification or departure from the plan of development as originally proposed and is consistent with the general scheme authorized by the license.⁷¹

27. Eagle Crest’s requested extensions of time to commence and complete construction are not significant alterations because, as discussed, neither extension is inconsistent with the project’s plan of development or terms of the license.

28. We also note that the absence of notice did not affect the Association’s rights. The Association clearly had actual notice of this proceeding and filed its motion to intervene and subsequent timely request for rehearing. Public notice of Eagle Crest’s request

⁶⁷ 18 U.S.C. § 799.

⁶⁸ 18 C.F.R. § 4.202(a) (2019) (emphasis added).

⁶⁹ *Application for License for Major Unconstructed Projects and Major Modified Projects; Application for License for Transmission Lines Only; and Application for Amendment to License*, Order No. 184, FERC Stats. & Regs. ¶ 30,308 (1981) (cross-referenced at 17 FERC ¶ 61,122).

⁷⁰ Third Annual Report of the Federal Power Commission, at 225 (1923).

⁷¹ *Id.* This reading of section 6 of the FPA was brought to the attention of the Congress in 1935 when the Federal Power Commission recommended amendments to the Federal Water Power Act that became Part I of the FPA. *Kings River*, 36 FERC at 61,882.

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would not have altered the fact that this is not the type of proceeding in which we allow intervention. We rejected the Association's motion to intervene based on the nature of the proceeding, not based on a lack of timeliness. In instances where we do not issue public notice of a proceeding, but where intervention is appropriate, we consider motions to intervene filed within 30 days of an order (the same time period for requesting rehearing) to be timely.⁷²

D. The Desert Protection Society's Previous Intervention Is Not Valid In this Post-Licensing Proceeding

29. The Society claims that it may seek rehearing of the May 2019 Order because it is already a party to the proceeding. The Society contends the May 2019 Order and License Order are within the same proceeding, and, because the Society had party status in the License Order, its party status carries over to the May 2019 Order.⁷³ As evidence, the Society points out that both the May 2019 Order and on the License Order list the project number and subproject number as Project No. 13123-002.⁷⁴

30. The Society is not a party to this post-licensing proceeding. Under section 313 of the FPA, Commission proceedings terminate after denial of any rehearing once the time for seeking judicial review expires. The party status of any intervenors in that proceeding also terminates at that point.⁷⁵ The License Order proceeding, and the Society's party status, therefore terminated once the period for judicial review expired on December 14, 2015, sixty days after the Commission issued its rehearing order.

31. We note that the Commission's use of the same project number in its docketing system is not evidence that the May 2019 Order and License Order are part of a single proceeding. Project numbers are used internally for organizational purposes. The Commission's current practice is to use the same project number, including sub-project

⁷² See, e.g., *Alabama Power Company*, 80 FERC ¶ 61,231 (1997) (granting as timely a motion to intervene in post-licensing proceeding when accompanying a request for rehearing when intervention was appropriate but no notice had been issued).

⁷³ The Society's Rehearing Request at 2.

⁷⁴ *Id.* Compare May 2019 Order, 167 FERC ¶ 61,117 with License Order, 147 FERC ¶ 61,220.

⁷⁵ *Kings River*, 36 FERC 61,881 (citing 16 U.S.C. § 8251).

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number, for routine administrative changes, such as license extensions, but nonetheless considers such a matter a distinct proceeding from the underlying license.⁷⁶

32. The Commission dismisses the Society's remaining arguments challenging the Commission's decision to grant Eagle Crest's requests for extensions to commence and complete construction. Under section 313 of the FPA and Rule 713(b) of the Commission's rules of practice and procedure, only a party to a proceeding may request rehearing of a final Commission decision.⁷⁷ Because the Society is not a party, it may not seek rehearing of the Commission's decision to grant the extensions in the May 2019 Order.

The Commission orders:

(A) The National Parks Conservation Association's request for stay is hereby denied, as discussed in the body of this order.

(B) The National Parks Conservation Association's request for rehearing is hereby denied, as discussed in the body of this order.

(C) The Desert Protection Society's request for rehearing is hereby dismissed, as discussed in the body of this order.

By the Commission. Commissioner Glick is dissenting with a separate statement attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁷⁶ Conversely, consistent with Commission practice, this rehearing order was granted a separate sub-project number (Project No. 13123-028) but is part of the same proceeding as the May 2019 Order, 167 FERC ¶ 61,117 (Project No. 13123-002).

⁷⁷ 16 U.S.C. §825*l*; 18 C.F.R. § 385.713 (2019).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Eagle Crest Energy Company

Project No. 13123-028

(Issued September 19, 2019)

GLICK, Commissioner, *dissenting*:

1. As I noted in my partial dissent from the underlying order, I support Eagle Crest's requests to extend the deadlines in its license. I also agree with the rationale in the underlying order for granting those extensions.¹ Eagle Crest has diligently pursued the project and I believe that extending the deadlines for commencing and completing construction is consistent with the Commission's authority as modified by the America's Water Infrastructure Act of 2018 (AWIA).²

2. I dissent, however, because I disagree with the Commission's decision to deny the National Parks Conservation Association's (Association) motion to intervene.³ No party opposed the Association's motion, which adequately stated the Association's interests in this proceeding and explained how the outcome might adversely affect those interests.⁴

¹ *Eagle Crest Energy Co.*, 167 FERC ¶ 61,117, at PP 8-11 (2019) (Extension Order).

² America's Water Infrastructure Act of 2018, Pub. L. No. 115-270, § 3001, 132 Stat. 3765, 3862 (2018).

³ I dissented only in part from the underlying order because it addressed the substantive arguments in the record in addition to the intervention issue. *See* Extension Order, 167 FERC ¶ 61,117 at PP 8-11. Today's order, by contrast, addresses only the intervention issue and, therefore, I dissent in full.

⁴ Association Motion to Intervene and Opposition at 2-4; *see also* Association Rehearing Request at 4-11. The Desert Protection Society (Society) also filed comments on Eagle Crest's extension requests, but did not file a motion to intervene, apparently assuming that its status as a party in the underlying licensing proceeding would carry over to this proceeding. Society Opposition at 2. Although one might excuse that failure given that the Commission did not notice Eagle Crest's filing as a new proceeding requiring intervention, the fact remains that it did not seek to intervene in this new proceeding, which is required under Commission precedent. *See Eagle Crest Energy (continued ...)*

That should be sufficient for the Commission to grant the Association party status and consider its arguments on the merits.⁵

3. Instead, today's order states that it does not allow interventions under these circumstances.⁶ The majority apparently regards modifying the deadlines to commence or complete construction as an immaterial change to a license and there is, therefore, no need to consider comments by the parties that are affected by that change.⁷ I disagree. Although it is true that a post-licensing proceeding generally should not re-litigate the underlying license,⁸ that does not mean that would-be intervenors have nothing useful to say or that the Commission does not benefit from hearing their perspective. Deadlines to commence or complete construction are important measures for ensuring that a project is consistent with the public interest, and the Commission ought to consider the perspectives of all affected parties before modifying those deadlines. In any case, I do not think it is appropriate for the Commission to deny an entity party status—and the rights that come with it⁹—simply because the Commission is bothered that it would need to address their comments opposing the extension. If we disagree with commenters' arguments, we should so say on the record rather than keeping them out of the proceeding altogether.

Co., 168 FERC ¶ 61,186 at PP 30-32 (2019) (Rehearing Order); Extension Order, 167 FERC ¶ 61,117 at P 13 & n.30. In any case, while the Commission makes that failure the nominal basis for denying the Society party status, the logic of the Commission's order indicates that the Commission would have denied any such motion.

⁵ See 18 C.F.R. § 385.214(b) (2019) (stating the bases for intervention); *see also id.* § 385.214(c)(1) (“If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.”).

⁶ Rehearing Order, 168 FERC ¶ 61,186 at P 15 (“[T]his is not a proceeding where the Commission permits intervention.”). The Commission states that intervention in a “post-licensing proceeding” is proper only in certain limited circumstances defined by the Commission. *See id.* P 16.

⁷ *Id.* P 19.

⁸ *Id.* P 20.

⁹ As noted, *infra* n.12, in order to seek rehearing or judicial review on the merits, it is necessary to be a party to the underlying proceeding.

(continued ...)

4. The Commission also points to the administrative efficiency of excluding parties from participating in post-licensing proceedings.¹⁰ I fully recognize the importance of administrative efficiency, especially when it comes to hydroelectric licensing where license applications take years to process. But just as a hospital should seek to do more than simply minimize the length of patient stays, the Commission cannot let the desire for administrative efficiency prevent us from developing a full record and giving that record the consideration it deserves. In any case, the underlying order responded to the Association's and the Society's merits arguments in four concise and convincing paragraphs.¹¹ That is hardly an oppressive administrative burden. I believe that the Commission—and the public interest—would be better served by permitting intervention in these proceedings, responding fully to would-be intervenors' arguments, and allowing them to challenge our responses in court and vindicate any rights they may have.

5. This proceeding perfectly illustrates what is wrong with the Commission's approach. The principal substantive issues before us are whether the authority contained in the AWIA applies to the Eagle Crest project and, if it does, whether Eagle Crest diligently pursued the project. In considering those questions, I reviewed the filings by the Association and the Society on both issues. Although I ultimately was not persuaded by either group's arguments, I found them helpful in making my decision in part because they make important arguments that are not otherwise presented in the record. Regarding the application of the AWIA in particular, I recognize that the question is not straightforward and that reasonable minds could differ as to whether the new authority created by the AWIA applies to this proceeding. By denying intervention, the Commission prevents this issue from being litigated in an appeal of this order. Instead, the would-be intervenors can litigate only whether the Commission properly denied them intervention, not whether the Commission correctly applied the AWIA.¹² I fail to see how preventing them from litigating an important and unresolved legal question is good government or consistent with our responsibility to the public interest.

¹⁰ Rehearing Order, 168 FERC ¶ 61,186 at P 15.

¹¹ Extension Order, 167 FERC ¶ 61,117 at PP 8-11.

¹² 16 U.S.C. § 825l(b) (2018) (providing that “[a]ny party to a proceeding” may appeal the Commission's order in that proceeding); *see 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”).

(continued ...)

6. Finally, I also dissent from the decision to deny a stay of the underlying order pending judicial review.¹³ As noted, the applicability of the AWIA is an important and unresolved legal question that could determine the fate of the Eagle Crest project. I believe that the Association deserves a full opportunity to make its case for why the law should not apply to the project, which can only come with party status.¹⁴ So long as the Commission denies the Association that opportunity, it is only fair to stay the underlying order until the Association has the opportunity to convince a court that the Commission erred in denying it that status.

For these reasons, I respectfully dissent.

Richard Glick
Commissioner

¹³ Rehearing Order, 168 FERC ¶ 61,186 at PP 8-11.

¹⁴ As noted, because the Commission denied the Association's motion to intervene, it can appeal only for the limited purpose of contesting the denial of intervention. *See supra* note 12.