

131 FERC ¶ 61,035
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

PPL Great Works, LLC and
Penobscot River Restoration Trust

Project No. 2312-023

ORDER DENYING REHEARING

(Issued April 15, 2010)

1. On February 5, 2010, Red Shield Acquisition, LLC (Red Shield) filed a request for rehearing of the Commission Secretary's January 10, 2008 notice denying Red Shield's late motion to intervene in the proceeding to surrender the license and remove the dam for the Great Works Hydroelectric Project No. 2312. For the reasons discussed below, we deny Red Shield's rehearing request.

Background

A. Relicensing Proceeding

2. The license for the Great Works Project was issued in 1963 with an expiration date of March 31, 2002.¹ The project is on the Penobscot River in Penobscot County, Maine. In March 1997, James River Paper Company (James River) filed a notice of intent (NOI) to file an application for a new license. At that time, James River was the licensee for the Great Works Project and also owned the adjacent paper mill. Shortly after filing the NOI, James River changed its name to Fort James Operating Company, Inc. (Fort James). The license was subsequently transferred from Fort James to PPL Great Works, LLC,²

¹ 30 F.P.C. 1465 (1963).

² 89 FERC ¶ 62,255 (1999)

which filed an application for new license in March 2000.³ In June 2000, Fort James (the prior licensee and then-current owner of the paper mill) filed a timely motion to intervene in the relicense proceeding.⁴

3. In 2003, Commission staff suspended the processing of the relicense application to allow negotiation of a multi-project, basin-wide settlement agreement.⁵

B. Transfer and Surrender of License

4. Pursuant to the settlement agreement, on November 7, 2008, PPL Great Works and the Penobscot River Restoration Trust (Trust) filed an application to transfer the license to the Trust, and the Trust filed an application to surrender the license for the Great Works Project and remove the project's dam.

5. On January 6, 2009, Commission staff approved the transfer of the license from PPL Great Works to the Trust.⁶

6. On January 26, 2009, the Commission issued public notice of the Trust's application to surrender the license and remove the dam.⁷ The notice set February 25, 2009, as the deadline to file comments and motions to intervene.

7. On August 11, 2009, Red Shield filed a late motion to intervene. In its motion Red Shield stated that if the dam is removed and the reservoir is drained, the mill's existing water intake will be above the new water level and will not function. A new intake will need to be constructed so that the mill can acquire water needed for pulp production, cooling, and fire suppression.⁸ Red Shield stated that it met with the Trust

³ When the license was transferred to PPL Great Works, Fort James retained ownership of the paper mill. In 2006, the paper mill was transferred to Red Shield Environmental, LLC, and in November 2008 to Red Shield Acquisition, LLC.

⁴ The timely motion to intervene was unopposed and thus automatically granted. 18 C.F.R. § 385.214(c)(1)(2009).

⁵ The Lower Penobscot Basin Comprehensive Settlement Accord was filed on June 25, 2004.

⁶ 126 FERC ¶ 62,004 (2009). The transfer will become effective upon issuance of an order approving surrender of the license and removal of the dam. *Id.*

⁷ Notice of the application was published in the *Federal Register* on February 2, 2009. 74 Fed. Reg. 5830 (2009).

⁸ Red Shield stated that the new water intake will cost over three million dollars.

regarding removal of the Great Works project in early 2009, but did not learn until July that the Trust did not intend to pay for the new water intake. Red Shield contended that it had good cause for its untimely intervention because it intervened as promptly as possible after it learned that the Trust did not intend to pay for the new water intake.

8. The Trust timely filed an answer to Red Shield's motion, stating that it did not object to Red Shield's intervention, but noting that Red Shield had known about the Trust's plans to acquire, decommission, and remove the dam since at least October 2008.⁹

9. By notice of January 8, 2010, the Secretary denied Red Shield's late motion to intervene because Red Shield "slept on its rights" and thus failed to show good cause for its late intervention. On February 5, 2010, Red Shield filed a request for rehearing of the January 8 notice. On March 2, 2010, the Trust filed a motion for leave to file an answer and an answer to Red Shield's request for rehearing in which it now objects to Red Shield's late intervention. On March 5, 2010, Red Shield filed a response to the Trust's answer. The Commission does not permit answers to requests for rehearing or answers to answers.¹⁰ Accordingly, we deny the Trust's March 2, 2010 motion for leave to file an answer and reject the Trust's March 2, 2010 answer and Red Shield's March 5, 2010 response to the Trust's answer.

Discussion

10. The purpose of the intervention deadline is to determine, at an early stage of the proceeding, who are the interested parties and what information and arguments they bring to bear. In acting on a late motion to intervene, the Commission considers whether the movant had good cause for failing to file the motion within the time prescribed; any disruption of the proceedings that might occur; whether the movant's interest is adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result.¹¹

⁹ See Trust's August 26, 2009 filing. The Trust further stated that issues relating to replacement of the water intake were beyond the scope of the surrender proceeding. *Id.* at 2-6.

¹⁰ Rules 714(d)(1) and 213(a)(2) of the Commissions Rules of Practice and Procedure, 18 C.F.R. §§ 714(d)(1), 213(a)(2) (2009).

¹¹ Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 214(d)(2009).

11. The Commission has on many occasions denied late intervention where movants failed to provide adequate justification to support their motions. The Commission expects entities to intervene in a timely manner based on the reasonably foreseeable issues arising from the applicant's filings and the Commission's notice of proceedings.¹² Interested parties are not entitled to wait and intervene when events take a turn that is not to their liking.¹³

12. On rehearing, Red Shield argues that it did not "sleep on its rights" because it filed a motion to intervene in the surrender proceeding "as soon as reasonably possible despite receiving no notice of the Trust's position."¹⁴

13. The facts belie Red Shield's argument. Red Shield acknowledges that publication of the notice of the Trust's application to surrender the Great Works project in the *Federal Register* gave Red Shield constructive notice of the application. Red Shield further acknowledges that it was contacted by the Trust in early 2009, "nearly coincident with the Commission's *Federal Register* publication of notice regarding the Trust's Surrender and Removal Application," to discuss removal of the dam.¹⁵ Thus, Red Shield was aware, at least by late January 2009, that its interests would be affected by the Trust's plan to remove the Great Works dam. Red Shield waited to intervene until it discovered that it might have to pay for the construction of the new water intake. The realization, five months after the intervention deadline, that Red Shield might face new or

¹² See, e.g., *California Department of Water Resources and the City of Los Angeles*, 120 FERC ¶ 61,057, at P 9 (2007) (*California Water Resources*), affirmed, *California Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009) (*California Trout*).

¹³ *California Water Resources*, 120 FERC ¶ 61,057 at P 9; *California Trout*, 572 F.3d at 1025 ("[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.") .

¹⁴ Request for Rehearing at 3. Red Shield complains that neither PPL Great Works (the current licensee) nor the Trust have provided any of their Commission filings to Red Shield. However, there is no obligation for licensees or applicants to serve copies of filings on non-parties to a proceeding. Moreover, if Red Shield desired copies of filings, it could have registered with the Commission online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances in the proceeding or in other proceedings related to the project.

¹⁵ *Id.*

additional costs associated with the Trust's proposal does not constitute good cause for Red Shield's late intervention.¹⁶ For these reasons, we deny rehearing.¹⁷

14. Red Shield asks, in the alternative, that the Commission recognize Red Shield "as a party to these proceedings as Fort James's successor in interest and update the service list accordingly."¹⁸ We decline to do so. Fort James, the prior licensee of the project and former owner of the mill, is a corporate entity unrelated to Red Shield. That it no longer owns the mill has no effect on its status as a party to the relicensing proceeding. It remains a party to that proceeding, and Red Shield cannot substitute its name for Fort James's. In any event, we note that Fort James is a party only to the relicense application proceeding, which is separate and distinct from this surrender proceeding.¹⁹ Being a party to one proceeding does not grant party status in other proceedings involving that project.

¹⁶ See, e.g., *Duke Energy*, 119 FERC ¶ 61,146 (2007) (denying late intervention less than one month after deadline); *PJM Interconnection, LLC*, 116 FERC ¶ 63,031(2006) (denying late intervention five months after deadline); *Mohawk Dam 14 Associates*, 52 FERC ¶ 61,232 (1990) (denying late intervention eleven days after deadline); *Georgia-Pacific Corporation*, 33 FERC ¶ 61,417 (1985) (denying late intervention five months after deadline).

¹⁷ Red Shield also argues that it should be allowed to intervene because the Trust will not be able to operate the project or remove the dam without Red Shield's consent. Red Shield claims that its consent is required before PPL Great Works can assign operating agreements and easements to the Trust. However, any questions as to the nature or extent of any legal obligations or contractual issues that may exist between Red Shield, PPL Great Works, and the Trust must be addressed in the appropriate forum. They are not matters that would be affected by whether Red Shield has party status in the surrender proceeding. Moreover, even though Red Shield is not a party to the surrender proceeding, its comments and arguments will nevertheless be considered in determining whether, or under what conditions, to approve surrender of the license and removal of the dam. See, e.g., *California Water Resources*, 122 FERC ¶ 61,150, at P 16 (2008), *aff'd*, *California Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009)(stating of a party whose motion to intervene was denied that "Friends of the River's comments are in the record and will be given the same weight as those of any other entity, whether a party or not").

¹⁸ Request for rehearing at 8.

¹⁹ *New York State Electric and Gas Corporation*, 42 FERC ¶ 61,386 (1988). Fort James is on the service list for Project No. 2312, which is a compilation of the parties for all proceedings involving that project number. Fort James intervened in the relicense proceeding but not in the surrender proceeding.

The Commission orders:

(A) The motion for leave to file an answer, filed by Penobscot River Restoration Trust on March 2, 2010, is denied.

(B) The answer filed on March 2, 2010, by filed Penobscot River Restoration Trust, and the response to the Trust's answer, filed on March 5, 2010, by Red Shield Acquisition, LLC are rejected.

(C) The request for rehearing filed by Red Shield Acquisition, LLC on February 5, 2009, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.