

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Idaho Power Company)	Project Nos. 1971-079
)	1971-129

**MOTION OF IDAHO POWER COMPANY FOR LEAVE TO FILE AN ANSWER
AND ANSWER TO PACIFIC RIVERS'
MOTION FOR CLARIFICATION OR REHEARING**

On March 3, 2020, the Federal Energy Regulatory Commission (Commission or FERC) issued a Notice denying a motion to intervene out of time filed by Pacific Rivers in this proceeding. On March 27, 2020, Pacific Rivers filed a Motion for Clarification or Rehearing of the Commission's Notice.¹ Pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), Idaho Power Company (Idaho Power) hereby submits this Motion for Leave to File an Answer and Answer to Pacific Rivers' Motion for Clarification or Rehearing. As explained below, Pacific Rivers is not a party to the relicensing proceeding, and does not have good cause for failing to timely intervene. Accordingly, Idaho Power requests the Commission to deny Pacific Rivers' Motion for Clarification and Rehearing.

I. MOTION FOR LEAVE TO FILE ANSWER

Rule 213 of the Commission's regulations provides that an answer may not be made to a request for rehearing "unless otherwise ordered by the decisional authority."² Rule 713(d) similarly prohibits an answer to a rehearing request, but provides the Commission discretion to "afford parties an opportunity to file briefs on one or more issues presented by a request for

¹ Pacific Rivers Motion for Clarification or Rehearing for Pacific Rivers' Motion for Leave to File an Out-of-time Intervention, Project No. 1971-129 (filed Mar. 27, 2020) (Pacific Rivers Rehearing Request).

² See 18 C.F.R. § 385.213(a)(2).

rehearing.”³ The Commission has allowed answers to rehearing requests where the party seeking rehearing makes new arguments or the answer will assist the Commission in reaching a reasoned decision.⁴

While Pacific Rivers filed a motion for late intervention which initiated this dispute, it now argues on rehearing that it is already an intervenor in this proceeding. This new argument, raised for the first time in Pacific Rivers’ request for rehearing, establishes good cause for the Commission to allow Idaho Power to file an answer. Accordingly, to the extent the Commission deems Pacific Rivers’ “Motion for Clarification or Rehearing” a request for rehearing,⁵ Idaho Power requests that the Commission grant its motion for leave to file this answer.

II. ANSWER TO REQUEST FOR REHEARING

A. Pacific Rivers Has Not Been Granted Intervenor Status in the Hells Canyon Relicensing Proceeding.

While Pacific Rivers filed a motion to intervene out of time in this relicensing proceeding on February 12, 2020, it now argues on rehearing that the Commission previously granted it intervenor status in the relicensing proceeding and seeks clarification that it is already a party. In essence, Pacific Rivers now contends that its motion to intervene out of time was filed in error. Idaho Power disputes Pacific Rivers’ contention that it is a party to the relicensing proceeding.

Pacific Rivers argues that it is a party to the relicensing proceeding because it filed an intervention in response to Idaho Power’s Petition for Declaratory Order, filed on November 23, 2016. FERC issued public notice of the Petition for Declaratory Order on November 30, 2016,

³ *Id.* § 385.713(d)(2).

⁴ See, e.g., *Pub. Util. Dist. No. 1 of Chelan Cty.*, 109 FERC ¶ 61,208 at P 13 (2004); *N.Y. Power Auth.*, 118 FERC ¶ 61,206 at P 6 & n.16 (2007); *N.Y. Indep. Sys. Operator, Inc.*, 97 FERC ¶ 61,118 at p. 61,574 (2001); *Allegheny Power Serv. Corp.*, 84 FERC ¶ 61,131 at p. 61,716 & n.15 (1998).

⁵ Should the Commission deem Pacific Rivers’ filing a Request for Rehearing, it should reject the filing for Pacific Rivers’ failure to include a Statement of Issues, as required by the Commission’s regulations. 18 C.F.R. § 385.713(c)(2).

stating that “[a]ny person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214”⁶ The Commission docketed Idaho Power’s Petition for Declaratory Order in the relicensing docket. Pacific Rivers and a number of conservation groups (some of which were already parties to the relicensing proceeding) jointly filed a motion to intervene in response to the Commission’s notice on December 30, 2016.⁷ Although its request for intervention with respect to the Declaratory Order was filed in response to a Commission notice issued more than 12 years after the deadline for motions to intervene in the relicensing proceeding, that request was timely with respect to intervention in the request for Declaratory Order filing.

In the Order Dismissing the Petition for Declaratory Order, the Commission noted that for “participants who were not already parties to the [relicensing] proceeding, all timely motions are granted by operation of the Commission’s regulations if no party files an answer in opposition within 15 days after the motion to intervene was filed.”⁸ The Commission held that “[i]n light of Idaho Power’s request for expedited action, and in consideration of the broad general interest in [the] petition, we waive the 15-day response period and grant any remaining timely-filed motions to intervene.”⁹

Although the Commission docketed the Petition for Declaratory Order in the relicensing docket, Idaho Power submits that its filing of a Petition for Declaratory Order created a new

⁶ Notice of Petition for Declaratory Order at 1, Project No. 1971-079 (issued Nov. 30, 2016) (emphasis added) (Petition Notice).

⁷ Motion of Conservation Groups to Intervene and Dismiss Idaho Power’s Petition for Declaratory Order, Project No. 1971-079 (filed Dec. 30, 2016) (Conservation Groups’ Motion to Intervene).

⁸ *Idaho Power Co.*, 158 FERC ¶ 61,048 at P 24, *order denying reh’g & granting clarification*, 161 FERC ¶ 61,284 (2017).

⁹ *Id.*

proceeding that was separate and distinct from the relicensing proceeding.¹⁰ The Commission's call for interventions in response to Idaho Power's Petition for Declaratory Order should not be interpreted as reopening the period for intervention in the relicensing proceeding more than 12 years after the deadline.¹¹ Despite Commission staff's decision to docket the Petition in the relicensing docket, the language of FERC's Notice of the Declaratory Order indicates that the Commission treated Idaho Power's Petition as a new and separate proceeding. The Commission stated in the Notice that "[a]nyone filing a motion to intervene or protest must serve a copy of that document on the Petitioner."¹² The fact that the notice only required intervenors to provide service on the Petitioner, rather than all parties on the service list for the relicensing proceeding, supports that the Petition for Declaratory Order initiated a new and separate proceeding.

Moreover, it is evident that Pacific Rivers understood them to be separate proceedings, as it opted to file the request for late intervention in the relicensing proceeding that is the subject of its rehearing request. Pacific Rivers only intervened in 2017 for purposes of the Petition for Declaratory Order, as its intervention is limited to its interest in and opposition to Idaho Power's Petition. In its intervention, Pacific Rivers stated that

[s]everal of the Conservation Groups have coordinated their strategies and filings in the Hells Canyon Project relicensing to date, and all will endeavor to do the same in this proceeding. Thus, the inclusion of all the Conservation Groups as parties will not interfere with the efficient conduct of this proceeding.¹³

¹⁰ See, e.g., *PacifiCorp*, 114 FERC ¶ 61,051 at P 14 n.19 ("Resighini mistakenly believes that it is not required to intervene in this [Petition for Declaratory Order] proceeding on the basis that it is consolidated with the relicensing proceeding in subdocket P-2082-027, in which it has intervened. In fact, this is a separate proceeding, and intervention in the relicensing proceeding does not carry over to this proceeding"), *reh'g denied*, 115 FERC ¶ 61,075 (2016).

¹¹ *Id.*

¹² Petition Notice at 1.

¹³ Conservation Groups' Motion to Intervene at 9 (emphasis added).

Their comparison of the Petition for Declaratory Order proceeding with the relicensing proceeding shows that the Conservation Groups, including Pacific Rivers, considered them two separate proceedings.

The Commission has been inconsistent in its docketing of Petitions for Declaratory Order filed during a relicensing proceeding. In some proceedings, it has docketed such petitions in the relicensing subdocket.¹⁴ In others, it has created a new subdocket that is separate and distinct from the relicensing proceeding.¹⁵ In still others, it has docketed the petition in both the relicensing proceeding and a new subdocket for the petition.¹⁶ Commission staff's docketing of Idaho Power's Petition should not be dispositive of whether Pacific Rivers is an intervenor in the relicensing proceeding. Its decision to docket the Petition in the relicensing subdocket should not be deemed to reopen the relicensing proceeding to additional intervenors, as that does not appear to be the Commission's intent. Moreover, it would be unfair to provide certain stakeholders with an additional opportunity to intervene in the relicensing proceeding when others who missed the 2004 deadline and were not interested in the Declaratory Order did not have that opportunity.

For these reasons, FERC should deny rehearing and hold that Pacific Rivers' intervention in Idaho Power's Petition for Declaratory Order proceeding, initiated 12 years after the intervention deadline in the relicensing, did not make it a party to the relicensing proceeding.

¹⁴ See, e.g., Project No. 2246 (Petition for Declaratory Order currently pending. FERC noted that the petition is part of the relicensing proceeding, but does not trigger a new opportunity to intervene); Project No. 2232-522 (*Duke Energy Carolinas, LLC*, 147 FERC ¶ 61,037 (2014) (Order Denying Petition for Declaratory Order); *Duke Energy Carolinas, LLC*, 153 FERC ¶ 62,134 (2015) (Order Issuing New License).

¹⁵ Project No. 2079 (Relicensing docket P-2079-069, Petition for Declaratory Order docket P-2079-080); Project No. 2085 (Relicensing docket P-2085-014, Petition for Declaratory Order docket P-2085-020); Project No. 12966 (Relicensing docket P-12966-004, Petition for Declaratory Order docket P-12966-005); Project No. 2197 (Relicensing docket P-2197-073, Petition for Declaratory Order docket P-2197-096); Project No. 2157 (Relicensing docket P-2157-188, Petition for Declaratory Order docket P-2157-000); Project No. 2082 (Relicensing docket P-2082-027, Petition for Declaratory Order docket P-2082-058).

¹⁶ Project No. 606 (Order Denying Petition for Declaratory Order issued March 19, 2020 in P-606-027 and P-606-037; relicensing proceeding pending in P-606-027).

B. Pacific Rivers Has Failed to Demonstrate That Good Cause Exists to Grant Its Motion to Intervene Out of Time.

Pacific Rivers offers four arguments as to why it should be granted late intervention in the relicensing proceeding. It argues that: 1) it did not have a need to intervene “until Idaho Power made efforts to avoid meeting requirements of Oregon law through the Commission proceeding,”¹⁷ 2) it did not “identify additional need to intervene in the proceeding”¹⁸ until the terms of the settlement agreement on the water quality certifications were made known,¹⁹ 3) its interests are not represented by any other group, and 4) that late intervention will create no disruption to the relicensing proceeding.²⁰ None of Pacific Rivers’ arguments is persuasive, and the Commission should deny its request for rehearing.

With regard to arguments 1, 2, and 4, the Commission has repeatedly held that it “expects parties 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.”²¹ It has further held that “an entity cannot ‘sleep on its rights’ and then seek untimely intervention.”²² The Commission has held that the

key purpose of the intervention deadline is to determine, early on, who the interested parties are and what information and arguments they can bring to bear. Interested parties are not entitled to hold back awaiting the outcome of the proceeding, or to intervene only when events take a turn not to their liking.²³

¹⁷ Pacific Rivers Rehearing Request at 2.

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See, e.g., Cal. Dep’t of Water Res.*, 120 FERC ¶ 61,057 at P 9 (citation omitted), *reh’g denied*, 120 FERC ¶ 61,248 (2007), *pet. for review denied sub nom. Cal. Trout v. FERC*, 572 F.3d 1003 (9th Cir. 2009).

²² *See, e.g., Cal. Dep’t of Water Res.*, 120 FERC ¶ 61,057 at P 14 (citation omitted); *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189 at P 37 (2006).

²³ *Alcoa Power Generating Inc.*, 144 FERC ¶ 61,218 at P 13 (2013) (citing *Summit Hydropower*, 58 FERC ¶ 61,360 at p. 62,200 (1992) (emphasis added)), *pet. for review denied sub nom. New Energy Capital Partners, LLC v. FERC*, 671 F. App’x 802 (D.C. Cir. 2016); *Cal. Dep’t of Water Res.*, 122 FERC ¶ 61,150 at P 9 (2008) (denying late intervention filed 23 months after deadline); *Cal. Dep’t of Water Res.*, 111 FERC ¶ 62,040 (2005) (denying late

These holdings have been affirmed by the courts.²⁴

Pacific Rivers has not provided any convincing reason why it could not have intervened earlier in the relicensing proceeding. It was well aware from the beginning that the Section 401 process related to the relicensing would involve addressing water quality standards in the State of Oregon. Under Commission precedent, a stakeholder cannot wait until a relicensing proceeding goes contrary to its interests before intervening. In the late stages of a proceeding, such as this relicensing, an entity seeking to intervene out of time must provide “substantial justification to show good cause” for failing to file the motion within the time prescribed.²⁵ Pacific Rivers has not demonstrated good cause, let alone substantial justification, for why it should be permitted to intervene more than 13 years after the deadline for interventions in this relicensing. Allowing Pacific Rivers to intervene and add information to the record at this late stage of the proceeding would be unduly burdensome and prejudicial to Idaho Power and the parties to this proceeding who have abided by deadlines in the licensing process. For these reasons, the rehearing request should be denied.

Pacific Rivers also argues that no other party represents its interest in the relicensing proceeding.²⁶ It states that its mission is “to protect and restore the watershed ecosystems of the

intervention 19 months after deadline); *Duke Energy Shared Servs., Inc.*, 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 Assocs.*, 52 FERC ¶ 61,232 (1990) (denying motion to intervene 11 days after deadline); *Dale L.R. Lucas*, 41 FERC ¶ 61,187 (1987) (denying intervention two years after deadline); *Ga.-Pac. Corp.*, 33 FERC ¶ 61,417 (1985) (denying motion to intervene five months after deadline)).

²⁴ See, e.g., *Cal. Trout v. FERC*, 572 F.3d 1003, 1022 (9th Cir. 2009) (“the 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.”) (citation omitted); *Covelo Indian Cmty. v. FERC*, 895 F.2d 581 (9th Cir. 1990).

²⁵ *Cal. Dep’t of Water Res.*, 122 FERC ¶ 61,150 at P 8.

²⁶ Pacific Rivers Rehearing Request at 3.

West to ensure river health, biodiversity and clean water for present and future generations.”²⁷ It further argues that while there may be federal and state agencies and tribes involved in the relicensing, “these groups have many other concerns other than the specific concerns of water quality in Oregon.”²⁸ To the contrary, the record clearly indicates that Oregon water quality issues are adequately represented, including representation by the Oregon Department of Environmental Quality (ODEQ), the entity vested with authority under Section 401 of the Clean Water Act to ensure the Project complies with state water quality requirements. Pacific Rivers has not demonstrated that its interest in the relicensing cannot be represented by ODEQ and other parties. Moreover, in its intervention in the Petition for Declaratory Order proceeding, the Conservation Groups (including Pacific Rivers) indicated that “several of the Conservation Groups have coordinated their strategies and filings” in the past and would “endeavor to do the same” in the Declaratory Order proceeding.²⁹ Pacific Rivers has not shown good cause why its interests are not adequately represented by other parties to the relicensing proceeding.

²⁷ *Id.* at 2.

²⁸ *Id.* at 3.

²⁹ Conservation Groups’ Motion to Intervene at 9.

III. CONCLUSION

Pacific Rivers is not a party to the relicensing proceeding by virtue of its intervention filed in response to Idaho Power's Petition for Declaratory Order filed in 2016. Moreover, Pacific Rivers has failed to demonstrate that good cause exists to grant its motion to intervene out of time. For these reasons, Idaho Power respectfully requests that the Commission deny Pacific Rivers' Motion for Clarification and Rehearing and affirm its prior ruling.

Respectfully submitted,



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DATED: April 10, 2020

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 10th day of April, 2020.

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