

132 FERC ¶ 61,095  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

AG-Energy, L.P.  
AER NY-Gen, LLC  
Eagle Creek Hydro Power, LLC  
Eagle Creek Water Resources, LLC  
Eagle Creek Land Resources, LLC  
Eagle Creek Ogdensburg (LP), LLC  
Eagle Creek Ogdensburg (GP), LLC  
Hudson M3, LLC

Docket No. EC10-61-001

ORDER DENYING INTERVENTION AND DISMISSING REHEARING

(Issued August 2, 2010)

1. In this order, the Commission denies the motion to intervene out of time submitted by the Homeowners on Toronto, Inc. (Toronto Homeowners) and dismisses the requests for rehearing submitted by the Toronto Homeowners and the Swinging Bridge Property Owners Association (Swinging Bridge Property Owners) of the June 1, 2010 order<sup>1</sup> in this proceeding that authorized the transfer of certain jurisdictional facilities pursuant to section 203 of the Federal Power Act (FPA).<sup>2</sup>

**I. Background**

2. On April 28, 2010, AG-Energy, L.P. (AG-Energy), AER NY-Gen, LLC (NY-Gen), Eagle Creek Hydro Power, LLC (Eagle Creek Hydro), Eagle Creek Water Resources, LLC (Eagle Creek Water), Eagle Creek Land Resources, LLC (Eagle Creek Land), Eagle Creek Ogdensburg (LP), LLC (Eagle Creek Ogdensburg (LP)), Eagle Creek Ogdensburg (GP) LLC (Eagle Creek Ogdensburg (GP)), and Hudson M3, LLC (Hudson M3) (collectively, Applicants) filed an application pursuant to section 203 of the FPA requesting Commission authorization for the disposition of jurisdictional facilities.<sup>3</sup> As

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<sup>1</sup> *AG-Energy, L.P.*, 131 FERC ¶ 62,194 (2010) (June 1 Order).

<sup>2</sup> 16 U.S.C. § 824b (2006).

<sup>3</sup> June 1 Order, 131 FERC ¶ 62,194 at 1.

stated in the June 1 Order, the affected jurisdictional facilities include hydroelectric facilities that NY-Gen owns and operates in Sullivan County, New York (the Hydroelectric Facilities).<sup>4</sup> The application stated that NY-Gen sought to transfer the power generation assets of the Hydroelectric Facilities to Eagle Creek Hydro, the water assets of the Hydroelectric Facilities to Eagle Creek Water, and the land assets of the Hydroelectric Facilities to Eagle Creek Land.<sup>5</sup> The Commission's June 1 Order authorized the Applicants' proposed transaction.

3. On April 30, 2010, NY-Gen filed an application in Project Nos. 9690-106, 10482-014, and 10481-064 to transfer the licenses of the Hydroelectric Facilities' to Eagle Creek Hydro, Eagle Creek Water, and Eagle Creek Land.<sup>6</sup> NY-Gen's application for transfer of these hydroelectric licenses is currently pending before the Commission. Additionally, on April 27, 2010, Eagle Creek Hydro submitted a market-based rate authority application for sales of electricity from the Hydroelectric Facilities.<sup>7</sup> The Commission approved Eagle Creek Hydro's application for market-based rate authorization on July 16, 2010.<sup>8</sup>

## **II. Requests for Rehearing**

4. On July 1, 2010, Toronto Homeowners filed a motion to intervene out of time and a request for rehearing or clarification of the June 1 Order. Swinging Bridge Property Owners also filed a request for rehearing or clarification. On July 14, 2010, Applicants filed an answer opposing Toronto Homeowners' motion to intervene out of time and an answer to the requests for rehearing.

5. Toronto Homeowners argue that the Commission erred in not consolidating the license transfer, section 203, and market-based rate authority proceedings for public notice and consideration.<sup>9</sup> Toronto Homeowners also argue that the Commission erred in finding the section 203 transaction consistent with the public interest without addressing

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<sup>4</sup> *Id.* at 1-2

<sup>5</sup> Applicants' April 28, 2010 Filing at 8.

<sup>6</sup> NY-Gen April 30, 2010 Filing at 1.

<sup>7</sup> Eagle Creek Hydro April 27, 2010 Filing at 1-2.

<sup>8</sup> *Eagle Creek Hydro Power, LLC*, 132 FERC ¶ 61,053 (2010).

<sup>9</sup> Toronto Homeowners July 1, 2010 Motion to Intervene Out of Time and Request for Rehearing at 12.

NY-Gen's non-compliance with the terms of its license, fully evaluating the Hydroelectric Facilities' proposed ownership structure, and obtaining more information on the license transferees' future plans.<sup>10</sup> In order to address these alleged Commission errors, Toronto Homeowners request that the Commission require Applicants to provide more information on a publicly available basis as to the transferees' future intentions for the facilities.<sup>11</sup> In addition, the Toronto Homeowners assert that because the Commission did not consolidate the license transfer, section 203, and market-based rate authority proceedings for consideration, the Commission should reverse or stay the June 1 Order.<sup>12</sup> Alternatively, Toronto Homeowners request that the Commission clarify that the June 1 Order is without prejudice to the authority of the Commission to deny Applicants' request to transfer the licenses for the Hydroelectric Facilities at issue, and to place conditions on the requested license transfers.<sup>13</sup>

6. Swinging Bridge Property Owners request that the Commission stay its June 1 Order until issues regarding the capabilities of Eagle Creek Hydro, Eagle Creek Water, and Eagle Creek Land to operate and maintain the Hydroelectric Facilities are resolved and the Commission issues a decision in the license transfer proceeding.<sup>14</sup> In the alternative, Swinging Bridge Property Owners request that the Commission clarify that its approval of the transfer of the Hydroelectric Facilities in the June 1 Order is conditioned on the outcome of the license transfer proceeding.<sup>15</sup>

7. In their answer, Applicants argue that Toronto Homeowners have not met the higher burden imposed by the Commission to demonstrate good cause for granting intervention after the issuance of a dispositive order.<sup>16</sup>

### **III. Discussion**

8. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late

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<sup>10</sup> *Id.* at 13-23.

<sup>11</sup> *Id.* at 24-25.

<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.*

<sup>14</sup> Swinging Bridge Property Owners July 1, 2010 Request for Rehearing at 5.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 5.

intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Toronto Homeowners have not met the higher burden of justifying the late intervention.<sup>17</sup>

9. In light of our decision to deny Toronto Homeowners' late motion to intervene, and because Swinging Bridge Property Owners is not a party to this proceeding, we will dismiss Toronto Homeowners' and Swinging Bridge Property Owners' requests for rehearing. Because neither Toronto Homeowners nor Swinging Bridge Property Owners is a party to this proceeding, they both lack standing to seek rehearing of the June 1 Order under the FPA and the Commission's regulations.<sup>18</sup>

10. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2010), prohibits an answer to a request for rehearing. We will therefore reject Applicants' answer to the requests for rehearing.

11. Notwithstanding our determination to dismiss the requests for rehearing submitted by the Toronto Homeowners and the Swinging Bridge Property Owners, we note that the issues raised by Toronto Homeowners and the Swinging Bridge Property Owners are outside the scope of this proceeding because they are not relevant to our analysis under section 203 of the FPA.<sup>19</sup> Rather, the Toronto Homeowners' and Swinging Bridge Property Owners' concerns are more appropriately addressed by the Commission in proceedings concerning the application for transfer of licenses for the Swinging Bridge

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<sup>17</sup> See, e.g., *Midwest Independent Transmission System Operator, Inc.*, 102 FERC ¶ 61,250 at P 7 (2003).

<sup>18</sup> See 16 U.S.C. § 825(a) (2006); 18 C.F.R. § 385.713(b) (2010); and *Southern Company Services, Inc.*, 92 FERC ¶ 61,167 (2000).

<sup>19</sup> *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044, at 30,127 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997); see also *FPA Section 203 Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 (2007); *SUEZ Energy North America, Inc.*, 125 FERC ¶ 61,188, at P 46 (2008) (stating that issues related to hydroelectric relicensing proceedings are wholly separate from, and unrelated to, the Commission's section 203 analysis). See also *Portland General Electric Co.*, 93 FERC ¶ 61,184, at 61,606 (2000); *New England Power Co.*, 82 FERC ¶ 61,179, at n.2 (1998), *reh'g denied*, 83 FERC ¶ 61,275, at n. 20 (1998) (addressing FPA section 203 applications and stating that the Commission will address license transfer applications in a separate order).

Hydroelectric Project, the Mongaup Falls Hydroelectric Project, and the Rio Hydroelectric Project (Project Nos. 10482, 10481, and 9690).<sup>20</sup>

The Commission orders:

(A) Toronto Homeowners' motion for late intervention is hereby denied, as discussed in the body of this order.

(B) Toronto Homeowners' and Swinging Bridge Property Owners' requests for rehearing are hereby dismissed, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>20</sup> Our decision in this proceeding was under section 203 of the FPA, and is not an authorization for the licensee to sell, lease, transfer, abandon, or otherwise dispose of the project property of the Swinging Bridge Hydroelectric Project, the Mongaup Falls Hydroelectric Project, or the Rio Hydroelectric Project until authorization is also received pursuant to section 8 of the FPA. Our decision in this proceeding under section 203 of the FPA does not prejudge the Commission's determination in the license transfer proceedings.