

120 FERC ¶ 61,247  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Midwest Hydraulics, Inc.

Project No. 12734-002

ORDER DENYING REHEARING AND  
DENYING REQUEST FOR STAY

(Issued September 20, 2007)

1. On March 30, 2007, Energie Group LLC (Energie) filed a late motion to intervene and request for rehearing of Commission staff's March 8, 2007 order granting Midwest Hydraulics, Inc. (Midwest), a preliminary permit to study the feasibility of its proposed Williams Dam Project No. 12734, proposed to be located at Williams Dam on the East Fork of the White River in Lawrence County, Indiana.<sup>1</sup>
2. On June 4, 2007, the Commission's Secretary issued a notice denying Energie's late motion to intervene and, because it was not a party to the Midwest proceeding, rejected its request for rehearing. On July 5, 2007, Energie filed a timely request for rehearing of the Secretary's notice.<sup>2</sup> The pleading also requests a stay of Midwest's preliminary permit. For the reasons discussed below, we deny Energie's request for rehearing and for stay.

**Background**

3. On June 7, 2006, Energie filed a license application for a proposed project (docketed Project No. 12684) to be located at Williams Dam. By letter dated June 19, 2006, Commission staff rejected the application, finding that Energie was unfit to hold a license. On July 18, 2006, Energie filed a timely request for rehearing of the rejection,

---

<sup>1</sup>118 FERC ¶ 62,182 (2007).

<sup>2</sup>The pleading was filed electronically on July 4, 2007, a federal holiday. The pleading is thus deemed to have been filed on the next business day, July 5, 2007.

which the Commission denied by order of September 9, 2006.<sup>3</sup> Energie subsequently filed a petition for review of the Commission's action in the United States Court of Appeals for the District of Columbia Circuit.<sup>4</sup> Action on the petition is pending.

4. On August 31, 2006, while Energie's rehearing request was pending, Midwest filed an application for a preliminary permit to study the feasibility of a project at the Williams Dam site. On September 21, 2006, the Commission issued public notice of Midwest's permit application, establishing November 20, 2006, as the deadline for filing comments, protests, motions to intervene, or notices of intent to filing competing applications.<sup>5</sup> In addition, notice was published in the *Times-Mail* in Lawrence County, Indiana, on September 28, 2006, and October 5, 12, and 19, 2006.<sup>6</sup>

5. On March 8, 2007, Commission staff issued a three-year preliminary permit to Midwest to study its proposed Williams Dam Project No. 12734.<sup>7</sup> On March 30, 2007, Energie filed a late motion to intervene and a request for rehearing of the order issuing Midwest's permit.<sup>8</sup> On June 4, 2007, the Commission by notice denied Energie's late motion to intervene, explaining that Energie has failed to meet the good cause standard, much less the higher burden required for late interventions filed after the issuance of a dispositive order (in this case, the order issuing a permit to Midwest).<sup>9</sup> Because of

---

<sup>3</sup>116 FERC ¶ 61,220 (2006). On October 30, 2006, the Commission upheld its prior decision. 117 FERC ¶ 61,124 (2006).

<sup>4</sup>*Energie Group, LLC et al. v. FERC*, D.C. Cir. No. 06-1429 (docketed December 29, 2006). Consolidated with this docket is the docket for Energie's earlier petition for review of a 2004 Commission denial of its application for a preliminary permit (in Project No. 12454) to study the Williams Dam site.

<sup>5</sup>The notice was published in the Federal Register on September 27, 2006 (71 Fed. Reg. 56,518).

<sup>6</sup>See publisher's affidavit dated October 19, 2006, and placed in the public record of the Project No. 12734 proceeding on August 27, 2007.

<sup>7</sup>118 FERC ¶ 62,182 (2007).

<sup>8</sup>Only intervenors in (i.e., parties to) a proceeding may seek rehearing of dispositive orders issued in that proceeding. See section 313(a) of the Federal Power Act, 16 U.S.C. § 825l(a) (2000).

<sup>9</sup>119 FERC ¶ 61,229 (2007).

Energie's lack of party status, the notice rejected its request for rehearing of the order issuing a permit to Midwest. On July 5, 2007, Energie filed a timely request for rehearing of the denial of its motion to intervene and the rejection of its rehearing request.

## **Discussion**

### **A. Request for Rehearing**

6. When intervention is sought after issuance of a dispositive order, as is the case here, the prejudice to other parties and the burden on the Commission of granting late intervention are substantial, and a movant bears a higher burden to show good cause to justify favorable action on its motion.<sup>10</sup>

7. On rehearing, Energie contends, as it did in its motion to intervene, that it should be allowed to intervene late because it did not timely receive notice of Midwest's permit application. Energie alleges that, contrary to the finding in the Commission's June 4, 2007 notice, Energie remains a competing applicant in the Midwest permit proceeding because the timely filing of its request for rehearing of the order rejecting its license application prevented the rejection from becoming effective.<sup>11</sup> It therefore argues that since it was never properly served with the direct notice of Midwest's application that it was entitled to as a competing applicant, its lateness in requesting intervention should be excused.

8. Energie's arguments are without merit. It is confusing the finality of a Commission order with its effectiveness. Section 313(c) of the Federal Power Act<sup>12</sup> expressly provides that the filing of a request for rehearing or a petition for judicial review does not operate as a stay of the order of which rehearing or judicial review is sought.<sup>13</sup> Although a request for rehearing may make an order non-final and thus subject

---

<sup>10</sup>See *International Paper Company and Turner Falls Hydro LLC*, 99 FERC ¶ 61,066 (2002).

<sup>11</sup>Indeed, under Energie's theory that orders are not effective until the completion of rehearing and judicial review, its 2003 permit application (whose denial is on judicial review) would still be pending, which would mean that its 2006 license application would have been subject to rejection as a late-filed application in competition with the 2003 permit application.

<sup>12</sup>16 U.S.C. § 8251(c) (2000).

<sup>13</sup>This provision is also contained in Rule 713(e) of the Commission's Rules of  
(continued)

to potential revocation or modification, the request does not stay the effectiveness or enforceability of the order's provisions.<sup>14</sup>

9. Energie incorrectly cites to a 1985 Commission order in *Hydro Resources Company (Hydro Resources)* in support of its argument that its license application remains pending before the Commission.<sup>15</sup> The *Hydro Resources* case was part of a multi-project proceeding involving complex facts and procedures, none of which are applicable to this case.<sup>16</sup>

10. For the above reasons, the letter order rejecting Energie's license application was effective upon its issuance on June 19, 2006, notwithstanding Energie's later filing of a rehearing request. Energie, at the time of filing of Midwest's permit application on August, 31, 2006, was therefore not a competing applicant entitled to direct notice of Midwest's application. Nor was there any reason to include or cross-reference Midwest's

---

Practice and Procedure, 18 C.F.R. § 385.713(e) (2007).

<sup>14</sup>See *City of Tacoma, Washington*, 87 FERC ¶ 61,197 at 61,732 (1999).

<sup>15</sup>31 FERC ¶ 61,079 (1985).

<sup>16</sup>The proceedings implemented the decision of the United States Court of Appeals for the Ninth Circuit in *Tulalip Tribes of Washington v. FERC*, 732 F.2d 1451 (9<sup>th</sup> Cir. 1984), invalidating the Commission's definition of an exemption. The Commission issued a series of orders addressing the validity of more than 100 issued exemptions and invalidating 74 of them. See *Eagle Power Co. et al.*, 28 FERC ¶ 61,061 (1984). To minimize the unfair burden imposed on the 74 exemptees that had relied on the invalidated rule, the Commission adopted procedures to reopen terminated proceedings by giving the former exemptees the opportunity to revise their exemption applications. The Commission also gave former competitors the opportunity to request reinstatement of their competing applications. See the Commission's "Notice of Opportunity to Reinstatement Previously Denied Applications Filed in Competition with Invalidated Natural Water Feature Exemptions," *City of Seattle et al.*, 28 FERC ¶ 61,065 (1984). However, in those cases (like *Hydro Resources*) where an order granting an exemption and denying competing applications was not yet final and the exemptee decided not to further pursue its project, competing applicants would not have had to request reinstatement of their applications. Rather, the Commission would have automatically reinstated and acted such applications. See *Eagle Power Co. et al.*, Order on Rehearing, 30 FERC ¶ 61,254 (1985). The reference to "still pending" applications was no doubt a reference to their automatic reinstatement.

filing with the filings in the dockets for Energie's permit and license applications.<sup>17</sup> Moreover, as noted above, notice of Midwest's application was published in the Federal Register and in a local newspaper. Energie has not produced any basis to excuse its failure to intervene timely in the Project No. 12734 proceeding.

11. In conclusion, we affirm the finding in the Commission's June 4, 2007 notice that Energie has not demonstrated good cause, much less met the higher burden applicable to its case, to warrant a grant of late intervention in the Midwest permit proceeding.<sup>18</sup>

**B. Request for Stay**

12. Energie requests that the Commission stay Midwest's preliminary permit to "prevent entities like Midwest Hydraulics from unnecessarily expending resources to develop the site,"<sup>19</sup> should Energie succeed in its petitions for review of the Commission's findings on Energie's lack of fitness to be an applicant.<sup>20</sup>

---

<sup>17</sup>Noting that Midwest's permit application was filed one week before the denial of Energie's request for rehearing of the rejection of its license application, Energie speculates that Commission staff may have improperly informed Midwest in advance that it intended to deny Energie's request for rehearing in violation of Rule 2201's (18 C.F.R. § 385.2201 (2007)) prohibition against off the record communications between decisional staff and parties in contested proceedings. This unsupported speculation warrants no further consideration.

<sup>18</sup> Energie also asserts that Commission staff issued a permit to Midwest after finding, in the Energie permit proceeding, that there were concerns about the safety of the Williams Dam. Because the Midwest order became final 30 days after it was issued, given the rejection of Energie's rehearing request, we cannot now revisit issuance of Midwest's permit. However, it is not necessarily the case that conditions at the Williams Dam were the same when staff issued Midwest's permit then when it denied Energie's permit application in 2004. The State of Indiana, owner of the dam, filed a number of comments in Energie's permit proceeding objecting to Energie's proposed project and raising concerns about the dam's safety, but it did not file any comments in the Midwest proceeding.

<sup>19</sup> Rehearing request at 12.

<sup>20</sup> See n.5, *supra*.

13. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act; that is, a stay will be granted if the Commission finds that “justice so requires.”<sup>21</sup> Under this standard, the Commission considers such factors as whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay would substantially harm other parties, and where the public interest lies. Here, however, we find no need for a stay. Potential monetary losses, without more, are not sufficient to justify a stay.<sup>22</sup> Moreover, neither Midwest nor any other entity currently has Commission authorization to engage in any project construction or operation. We therefore fail to see how the interests of Energie, Midwest, or any other entity would be substantially or irreparably harmed if a stay is not granted at this time.

The Commission orders:

(A) The request for rehearing filed in this proceeding on July 5, 2007, by Energie Group LLC is denied.

(B) The request for stay filed in this proceeding on July 5, 2007, by Energie Group LLC is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

---

<sup>21</sup> 5 U.S.C. § 705 (2000). *See, e.g., City of Tacoma, Washington*, 87 FERC ¶ 61,197 at 61,732 (1999).

<sup>22</sup> *See, e.g., City of Centralia, Washington*, 20 FERC ¶ 61,311 (1982).