

125 FERC ¶ 61,369  
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.

Broadwater Energy LLC

Docket Nos. CP06-54-003

Broadwater Pipeline LLC

Docket Nos. CP06-55-003  
CP06-56-003

ORDER DENYING REHEARING OF DENIAL OF LATE INTERVENTIONS

(Issued December 29, 2008)

1. This order addresses the New York State Department of State's (NYSDOS) and the New York State Department of Environmental Conservation's (NYSDEC) requests for rehearing of the Commission's September 4, 2008 order denying their requests for late intervention in this proceeding.<sup>1</sup> For the reasons discussed below, we deny rehearing.

**Background**

2. On March 20, 2008, the Commission issued an order in this proceeding authorizing Broadwater Energy LLC (Broadwater Energy) under section 3 of the Natural Gas Act (NGA) to site, construct, and operate a liquefied natural gas (LNG) import terminal in Long Island Sound in New York State waters.<sup>2</sup> The Commission also issued a certificate of public convenience and necessity to Broadwater Pipeline LLC (Broadwater Pipeline), an affiliate of Broadwater Energy, under section 7 of the NGA to

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<sup>1</sup> *Broadwater Energy LLC*, 124 FERC ¶ 61,225 (2008) (September 4 Order).

<sup>2</sup> *Broadwater Energy LLC*, 122 FERC ¶ 61,255 (2008) (March 20 Order).

construct, own, and operate a 21.7-mile long pipeline lateral from the outlet of the LNG terminal to a subsea interconnection with the Iroquois Gas Transmission System.<sup>3</sup>

3. In addition to the authorizations granted under the NGA, Broadwater must receive all other necessary federal authorizations, including those delegated to the states, prior to construction. In this regard, the NYSDOS has the responsibility under the Coastal Zone Management Act (CZMA)<sup>4</sup> to ensure proposed federal agency activities in Long Island Sound coastal zones are consistent with New York's federally-approved Long Island Sound Coastal Management Program.<sup>5</sup> The NYSDEC has the responsibilities under section 401 of the Clean Water Act (CWA)<sup>6</sup> to issue water quality certifications, where appropriate, for facilities seeking federal authorizations involving discharges to navigable waters.<sup>7</sup> Both agencies participated in this proceeding, the NYSDOS as a cooperating agency and the NYSDEC by submitting comments on environmental issues.

4. The NYSDEC and the NYSDOS filed requests for late intervention on April 18, 2008. Broadwater filed its applications in this proceeding on January 30, 2006. Interventions were due on or before March 10, 2006.<sup>8</sup>

5. In the September 4 Order, the Commission denied the requests of several parties for rehearing of the Commission's March 20 Order. The September 4 Order also denied NYSDOS' and NYSDEC's requests for late intervention.<sup>9</sup> The September 4 Order found that the NYSDOS is barred from becoming a party because of its participation in this proceeding as a cooperating agency. The order also found that when intervention is sought after the issuance of a dispositive order, as was the case here, the prejudice to

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<sup>3</sup> Broadwater Energy and Broadwater Pipeline will be collectively referred to herein as Broadwater.

<sup>4</sup> 16 U.S.C. §§ 1451-1464 (2006).

<sup>5</sup> The NYSDOS' consistency determination was issued on April 10, 2008, and found that the project was inconsistent with the New York Coastal Management Program. Broadwater has appealed that finding to the Commerce Department.

<sup>6</sup> 33 U.S.C. § 1341 (2006).

<sup>7</sup> The NYSDEC has not issued a water quality certification to date.

<sup>8</sup> 71 Fed. Reg. 9,807 (Feb. 27, 2006).

<sup>9</sup> September 4 Order at P 10-14.

other parties and the burden on the Commission of granting late intervention are substantial, and movants bear a higher burden to show good cause to justify favorable action on their motions. The order found that the NYSDOS and the NYSDEC had not met that higher burden. Since neither the NYSDOS nor the NYSDEC were granted party status, the September 4 Order addressed their concerns as motions for reconsideration.<sup>10</sup>

### **Requests for Rehearing**

6. The NYSDOS and the NYSDEC, jointly and severally, request that the Commission reconsider its denial of their requests for late intervention in this proceeding. Petitioners disagree that the Commission's policy of precluding cooperating agencies from subsequently intervening in a proceeding is applicable to the NYSDOS' request to intervene here. Petitioners assert that the Commission's policy of precluding cooperating agencies from intervening as a party pertains to a substantive challenge on the "merits of [the] issues" of a Commission order.<sup>11</sup> However, petitioners maintain that NYSDOS is not challenging the merits of the March 20 Order at this time, but rather the Commission's legal authority to issue the order in the first instance before receiving the consistency determination and water quality certification. They claim that the Commission's *ex parte* concerns do not apply because the NYSDOS' intervention is not based on the National Environmental Policy Act (NEPA) process and any information shared between the Commission and the NYSDOS nor the content of the Commission's decision but rather on the authority of the Commission to act allegedly in contravention of the plain language of the CZMA.<sup>12</sup> For these reasons, they assert that acting as a cooperating agency should not serve as a barrier to the NYSDOS joining the Broadwater proceeding as a late intervenor.

7. The NYSDOS and the NYSDEC also contend that they had reasonable grounds for requesting late intervention because they are not, at this time, challenging the substantive content of the Commission's March 20 Order but are moving to correct an error of law and jurisdictional violation of the CZMA and the CWA. The petitioners claim that the NYSDOS could not, prior to March 20, 2008, have moved to intervene on this procedural matter (i.e., the Commission's asserted violation of the CZMA when it

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<sup>10</sup> See 18 C.F.R. § 385.713(b) (2008).

<sup>11</sup> *Citing Hydroelectric Licensing under the Federal Power Act*, Order No. 2002, FERC Stats. & Regs. ¶ 31,150, at P 295 (2003), 69 Fed. Reg. 51,099 (Aug. 25, 2003).

<sup>12</sup> *Citing State-Federal Regional RTO Panels*, 98 FERC ¶ 61,309 (2002) (Regional RTO Order).

issued its March 20 Order in advance of NYSDOS's consistency determination). Similarly, petitioners assert that the NYSDEC could not have moved to intervene on this procedural matter until the Commission actually violated the CWA and interfered with the state's authority to determine whether the Broadwater project proposal would meet the New York State's water quality standards, which petitioners claim the Commission did when it issued its March 20 Order.

8. Petitioners also submit that extraordinary circumstances exist because the September 4 Order's denial of intervention based upon a finding that neither the NYSDOS nor the NYSDEC have demonstrated good cause would block available administrative avenues for state agencies responsible for administering the CZMA and CWA to challenge the Commission's conditional order and to petition for injunctive relief. They assert that there is Commission precedent for allowing an agency, even a cooperating agency, to intervene out-of-time for the purposes of judicial review where that agency has a unique interest.<sup>13</sup>

### **Discussion**

9. We will deny rehearing. The petitioners have raised no arguments that were not fully considered in the September 4 Order.

10. We affirm our ruling that the NYSDOS' participation as a cooperating agency in this proceeding prohibits its request for party status. As explained in the September 4 Order, the rationale for this policy is that cooperating agency staff will necessarily engage in off-the-record communications with the Commission staff concerning the merits of issues in the proceeding, so that, if the agency is allowed to become an intervenor, it will then have access to information that is not available to other parties, in violation of the prohibition in the Administrative Procedures Act (APA) and our rule against *ex parte* communications.<sup>14</sup> The Commission's policy is not qualified as petitioners suggest. The prohibition does not end at some point in the proceeding (e.g., after the completion of the staff's environmental analysis) nor is it based on the nature of the issues proposed to be raised on rehearing. Rather the policy is broad and prohibits party status to a cooperating agency, here the NYSDOS, because of its participation in discussions with Commission

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<sup>13</sup> *Citing Southern California Edison Co.*, Notice Granting Motion to Intervene (unpublished notice issued on April 30, 1999 in Project Nos. 1390-005, *et al.*) (*Southern California*). Petitioners note that the notice was contested but never reversed.

<sup>14</sup> September 4 Order at P 11.

staff concerning the merits of issues in the proceeding.<sup>15</sup> In essence, petitioners request that the Commission modify its policy to allow intervenor status to the NYSDOS because it claims it will not base its rehearing request on off-the-record communications. However, the difficulty with this approach is that, because of the NYSDOS' participation as a cooperating agency, it has functioned as a decision maker in the proceeding, and no party has had notice of, or an opportunity to comment on, the many off-the-record communications that have occurred between the NYSDOS and Commission staff in the course of their preparation of the draft and final Environmental Impact Statements. Therefore, no party would have any basis for knowing whether or when NYSDOS might make use of information that the NYSDOS had gained as a result of its unrestricted communications with Commission staff. Thus, we conclude that allowing NYSDOS to serve both as a cooperating agency and an intervenor in this proceeding would violate our policies and the APA's prohibition against *ex parte* communications.

11. We also find that the NYSDOS' reliance on the Commission's action in its Regional RTO Order is inapposite. In that proceeding, the Commission modified the application of its *ex parte* rule (Rule 2201) to the RTO proceedings by treating what would otherwise be prohibited off-the-record communications with state commission parties as exempt off-the-record communications subject to disclosure and notice to the public. By placing communications in the record, the Commission found that parties would be apprised of any argument that had been presented privately, thereby maintaining the integrity of the process and curing any possible prejudice that the contacts might have caused in the case.<sup>16</sup> This is not the case here. None of the communications between the NYSDOS and the Commission staff have been disclosed.

12. We find that the petitioners' assertion that they could not have intervened in this proceeding prior to the Commission's issuance of its March 20 Order is without basis. As we stated in the September 4 Order, those entities with interests they intend to protect are not entitled to wait until the outcome of a proceeding and then file a motion to intervene once they discover the outcome conflicts with their interests. Rather, the Commission expects interested entities to intervene in a timely manner based on the reasonably foreseeable issues arising from applicants' filings and the Commission's notice of proceedings. As is the case here, often times a project applicant seeking

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<sup>15</sup> *See, e.g.*, Order No. 2002, FERC Stats. & Regs. ¶ 31,150, at P 295-300 (2003), *order on reh'g*, Order No. 2002-A, 106 FERC ¶ 61,037, at P 29-31 (2004); *Arizona Public Service Co.*, 94 FERC ¶ 61,076 (2001).

<sup>16</sup> 98 FERC ¶ 61,309 at 62,325.

authorizations under section 3 or section 7 of the NGA has to receive other necessary federal authorizations prior to construction, including those delegated to the states. The very nature of these NGA proceedings necessarily raises jurisdictional and timing issues related to the Commission's NGA authority in relation to the other federal authorizations needed by the project applicants. The issue of the timing of the Commission's decision in this proceeding in relation to the other federal authorizations Broadwater needs to obtain, including those under the CZMA and the CWA, has always been an issue in this proceeding. In fact, the Commission routinely authorizes projects under the NGA subject to the project sponsor obtaining other necessary federal permits including those under the CZMA and the CWA.<sup>17</sup> Therefore, the issuance of the March 20 Order prior to Broadwater obtaining a consistency determination and/or water quality certification from the respective state agencies is not unprecedented or unforeseeable. We have denied motions for late intervention under similar circumstances.<sup>18</sup> For these reasons, we find that petitioners have not provided any compelling reason why they could not have intervened earlier in the proceeding.

13. Finally, we find that petitioners' reliance on the notice granting late intervention in *Southern California* is misplaced. In that case, the Commission had determined in its order issuing a new license for the project that some of the conditions proffered by the Forest Service pursuant to section 4(e) of the Federal Power Act did not qualify for section 4(e) status.<sup>19</sup> The Secretary granted late intervention to allow the Forest Service to contest the Commission's decision on appeal, because no other party had standing to assert the issue. This is not the circumstance here. Several parties sought rehearing of the Commission's authorization of the Broadwater project prior to Broadwater receiving other federal determinations including those under the CZMA and CWA that were denied in the September 4 Order.<sup>20</sup> Additionally, petitioners fail to mention that the Commission did not act on the merits of the rehearing request contesting the grant of late

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<sup>17</sup> See, e.g., *Crown Landing LLC*, 117 FERC ¶ 61,209, at P 13-29 (2006); *Georgia Strait Crossing Pipeline LP*, 108 FERC ¶ 61,053, at P 14-18 (2004); *Millennium Pipeline Co., L.P.*, 100 FERC ¶ 61,277, at P 225-231 (2002).

<sup>18</sup> See, e.g., *Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at P 17-19 (2003).

<sup>19</sup> *Southern California Edison Co.*, 86 FERC ¶ 61,230, at 61,834 -5 (1999).

<sup>20</sup> September 4 Order at P 55-67.

intervention but dismissed the rehearing request as moot in light of the filing of a settlement in the proceeding.<sup>21</sup>

14. For these reasons, we deny the NYSDOS' and the NYSDEC's requests for rehearing of our denial of their requests for late intervention.

The Commission orders:

The requests for rehearing filed by the NYSDOS and the NYSDEC are denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>21</sup> *Southern California Edison Co.*, 121 FERC ¶ 61,154, at n.10 (2007).