128 FERC ¶ 61,216
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Bradwood Landing LLC — Docket No. CP06-365-003

NorthernStar Energy LLC — Docket Nos. CP06-366-003
CP06-376-003
CP06-377-003

ORDER DENYING REHEARING AND STAY

(Issued September 1, 2009)

1. On January 15, 2009, the Commission issued an order denying requests for rehearing[1] of the September 18, 2008 order granting Bradwood Landing LLC and NorthernStar Energy LLC,[2] respectively, the authority under sections 3 and 7 of the Natural Gas Act (NGA) to site, construct, and operate a liquefied natural gas (LNG) import terminal on the Columbia River at Bradwood in Clatsop County, Oregon and to construct and operate approximately 36.3 miles of pipeline from the terminal's outlet through Clatsop and Columbia Counties, Oregon and terminating in Cowlitz County, Washington (Bradwood project).[3]

2. The State of Oregon (Oregon)[4] filed a request for rehearing of the January 15, 2009 Order, as well as a request for a stay of the September 18, 2008 Order. Oregon

[1] *Bradwood Landing LLC and NorthernStar Energy LLC*, 126 FERC ¶ 61,035 (2009) (January 15, 2009 Order)

[2] Bradwood Landing LLC and NorthernStar Energy LLC will be referred to jointly as NorthernStar.

[3] *Bradwood Landing LLC and NorthernStar Energy LLC*, 124 FERC ¶ 61,257 (2008) (September 18, 2008 Order).

[4] Oregon states that it is acting by and through the Oregon Department of Energy, the Oregon Department of Environmental Quality and the Oregon Department of Land Conservation and Development.

alleges that the January 15, 2009 Order erroneously concluded that Oregon had abandoned an earlier request for stay of the September 18, 2008 Order.

3. The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) also filed a request for rehearing of the January 15, 2009 Order arguing that the Commission improperly denied its late motion to intervene in this proceeding.

4. For the reasons discussed below, we will deny the requests for rehearing and Oregon's request for a stay of the September 18, 2008 Order.

Oregon's Request for Rehearing and Motion for Stay

5. Oregon argues that the January 15, 2009 Order erred in concluding that Oregon had abandoned the request for a stay of the September 18, 2008 Order which it had included in its October 20, 2008 request for rehearing of the September 18, 2008 Order.

6. In its February 13, 2009 filing, Oregon requests a stay pending a decision by United States Court of Appeals for the Ninth Circuit on the merits of the Commission's orders in this proceeding. Oregon states that The Commission should stay the September 18, 2008 order because it does not comply with the Endangered Species Act (ESA),[5] and because a stay is necessary to preserve the *status quo* until the state issues necessary approvals under the Coastal Zone Management Act (CZMA),[6] Clean Water Act (CWA)[7] and Clean Air Act (CAA).[8] Oregon states that its interests are congruent with the public interest and that it will sustain irreparable harm in the absence of a stay. We will treat Oregon's request as a new motion for stay.

Commission Response

7. Although Oregon filed an October 20, 2008 motion for stay, it made no reference to that request in a subsequent response opposing a November 13, 2008 motion by Northwest to hold the proceeding in abeyance. Therefore, we assumed that Oregon was no longer pursuing its stay motion. However, we deal with its renewed motion for stay here.

[5] 16 U.S.C. § 1531 *et seq*. (2006).

[6] 16 U.S.C. § 1451 *et seq*. (2006).

[7] 33 U.S.C. § 1251 *et seq*. (2006).

[8] 42 U.S.C. § 7401 *et seq*. (2006).

8. In its consideration of motions for a stay, the Commission applies the standard set forth in section 705 of the Administrative Procedure Act (APA)[9] and has granted a stay "[w]hen…justice so requires."[10] In evaluating a request for a stay under this standard, the Commission considers: (1) whether the moving party will suffer irreparable harm in the absence of the stay; (2) whether issuing a stay may substantially harm other parties; and (3) whether a stay is in the public interest.[11] The Commission's general policy is to refrain from granting stays of its orders to assure definiteness and finality in Commission proceedings.[12] If the party requesting the stay is unable to demonstrate irreparable harm absent a stay, the Commission need not examine the other factors.[13]

9. Oregon alleges that without a stay it will have to expend additional time and money reviewing NorthernStar's mitigation plans and final designs and attending meetings. Oregon maintains that a stay would ensure that its scarce resources are not expended until there is certainty on any conditions that may be imposed on the Bradwood project by the Commission, other federal agencies, and Oregon. Oregon states further that absent a stay it may have to intervene in eminent domain proceedings initiated by NorthernStar to assert Oregon's statutory, common law, trust and constitutional interests and preserve any challenges it might have to NorthernStar's authorizations.

10. We find that Oregon has not met its burden to demonstrate that it will suffer irreparable harm absent the granting of a stay. The harm to itself that Oregon claims

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[9] 5 U.S.C. § 705 (2006); *see also Dominion Cove Point, LNG, LP*, 126 FERC ¶ 61,238, at P 15 (2009) (*Cove Point*); *Devon Power, LLC*, 119 FERC ¶ 61,150, at P 21 (2007); *Iroquois E. Pipeline Co*., 102 FERC ¶ 61,054, at P 32 (2003).

[10] *See, e.g., Clifton Power Corp*., 58 FERC ¶ 61,094 (1992); *United Gas Pipe Line Co*., 42 FERC ¶ 61,388 (1988); *Trinity River Authority of Texas*, 41 FERC ¶ 61,300 (1987); *City of Centralia, Washington*, 41 FERC ¶ 61,028 (1987).

[11] *See, e.g., Cove Point*, 126 FERC ¶ 61,238 at P 16 ; *CMS Midland, Inc., Midland Cogeneration Venture Limited Partnership*, 56 FERC ¶ 61,177, at 61,631 (1991), *aff'd sub nom. Michigan Municipal Cooperative Group v. FERC*, 301 U.S. App. D.C. 107, 990 F.2d 1377 (D.C. Cir.), *cert denied*, 510 U.S. 990, 114 S. Ct. 546, 126 L. Ed. 2d 448 (1993); *NE Hub Partners, L.P*.,85 FERC ¶ 61,105 (1998); *Boston Edison Co*., 81 FERC ¶ 61,102 (1997).

[12] *Id. See also Sea Robin Pipeline Co*., 92 FERC ¶ 61,217 (2000).

[13] *Id*.

relates only to economic and time expenditures. It is established that economic loss, in and of itself, does not constitute irreparable harm.[14]

11. Oregon also argues that a stay is necessary because allowing NorthernStar to proceed with its project before Oregon, federal agencies and the Ninth Circuit impose any future requirements on NorthernStar will have immediate and irreversible consequences on the environmental quality of the Columbia River and the health and safety of the people who live along it.

12. Oregon further contends that a stay is necessary to preserve the *status quo* until the state issues the necessary approvals under the CZMA, CWA and CAA. While we agree that it is in the public interest to ensure that this project is not constructed until all environmental conditions are met, we find that the public interest is protected, as stated in our prior orders, by the Commission's conditioned authorization of the Bradwood project which bars NorthernStar from beginning construction unless and until it receives the required environmental approvals from, among others, Oregon. Oregon's assertions of irreparable injury to the environment and the health and safety of the people who live along the Columbia River if NorthernStar is allowed to proceed with its project before Oregon and others impose final conditions on NorthernStar are unconvincing since the conditions precedent for starting any construction of the project are dependent on state and federal approvals that would contain any new conditions. The D.C. Circuit Court of Appeals' recent decision in *Crown Landing LLC* is instructive on the question of harm since it concerns the State of Delaware's appeal of Commission orders that approved the siting of an LNG terminal in the Delaware River conditioned upon the outcome of Delaware's environmental reviews under the CZMA and CAA. Even though Delaware denied the approvals, it continued to argue to the court that the Commission could not authorize the project, even conditionally, until the state had finished its review under the CZMA and CAA. The court agreed with the Commission that Delaware's appeal should be dismissed because it had suffered no injury worthy of giving it standing. Because the Commission's authorization explicitly recognized the state's veto rights under the CZMA and CAA, and the state exercised those rights and prevented Crown Landing from proceeding with the project, Delaware's claim of procedural or statutory injury was deemed insufficient.[15]

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[14] *See Islander East Pipeline Co.*, 102 FERC ¶ 61,054, at P 32 (2003).

[15] *See Crown Landing LLC*, 115 FERC ¶ 61,348 (2006), *reh'g denied and clarified*, 117 FERC ¶ 61,209 (2006), *appeal dismissed, Delaware Dept. of Natural Resources and Environmental Control v. FERC*, 558 F.3d 575 (D.C. Cir. 2009)(court is "unable to see how [the Commission's] allegedly illegal procedure causes Delaware any injury in light of [the Commission's] acknowledgment of Delaware's power to block the project…Delaware is essentially asking us to prevent it from changing its own mind.").

13. For all of these reasons, we will deny Oregon's request for a stay under the APA.

Oregon's Request for Stay Under the Endangered Species Act (ESA)

14. Oregon also argues that the Commission failed to comply with the substantive and procedural requirements of the ESA by not initiating formal consultation with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) before authorizing the Bradwood project and therefore has no choice but to grant Oregon's request for stay. Oregon maintains that the ESA imposes a duty on the Commission to consult with the FWS and the NMFS to allow those agencies to determine whether the Commission's action is likely to jeopardize the survival of a protected species or result in the destruction of its critical habitat, and if so, to identify reasonable and prudent alternatives that will avoid the action's unfavorable impacts.[16]

15. Oregon maintains that the traditional balance of interests test otherwise applicable to a request for stay does not apply to its request for stay pursuant to the ESA since "the balance has been struck in favor of affording endangered species the highest of priorities."[17]

Commission Response

16. The January 15, 2009 Order fully addressed Oregon's and others' arguments that the Commission erred by authorizing the Bradwood project before formal consultation under the ESA.[18] As we stated in that order and in the Final Environmental Impact Statement for the Bradwood project, informal consultations between Commission staff and representatives of the FWS and NMFS have been on-going since 2005 including meetings, conference calls, and correspondence all documented in the record for this proceeding. The Commission submitted a Biological Assessment/Essential Fish Habitat Assessment to the FWS and NMFS on March 19, 2007, and requested that formal consultation be initiated. Both the FWS and the NMFS responded that they needed more information before beginning formal consultation. On June 23, 2009, staff submitted the

[16] *Citing* 16 U.S.C. 1536(b)(3)(A). We note that the Commission consults with the NMFS under the Magnuson-Stevens Fishery Conservation and Management Act (MSA) (16 U.S.C. 1801**)** which requires federal agencies to consult with NMFS if their action may adversely affect essential fish habitat. Oregon raises no issues with respect to the MSA.

[17] Oregon's January 13, 2009 rehearing request at 4-5 quoting *TVA v. Hill*, 437 US 153, 194 (1978).

[18] January 15, 2009 Order, 126 FERC ¶ 61,035 at P 40-44.

Revised BA/EFH Assessment to the FWS and NMFS again requesting that formal consultation be initiated.

17. The January 15, 2009 Order also pointed out that environmental conditions contained in the September 18, 2008 Order specifically address ESA and Magnuson-Stevens Fishery Conservation and Management Act (MSA) concerns raised in the FWS and NMFS comments to the March 19, 2007 BA/EFH Assessment. Among them is condition 43a which states that NorthernStar "shall not begin construction activities at the LNG terminal and the pipeline until the staff completes formal consultation with NMFS and FWS." Further, if the completion of formal consultation results in a Biological Opinion finding of jeopardy or adverse modification to critical habitat, the project could not go forward unless mutually agreeable modifications are adopted. NorthernStar cannot begin construction on the Bradwood project until it receives a Notice to Proceed and the Commission will not issue that notice until NorthernStar receives all necessary authorizations from state and federal agencies including those required by the ESA and MSA. As we stated in the January 15, 2009 Order, because the September 18, 2008 Order authorizing the project is conditioned, it is the Notice to Proceed which represents the Commission's "final decision" in the context of the ESA and MSA.

18. As illustrated by this discussion and contrary to Oregon's allegations, the Commission is complying with both the procedural and substantive requirements of the ESA and any endangered species and their habitats possibly affected by the Bradwood project are receiving all the protections afforded under the ESA. Since there is no need to stay the September 18, 2008 Order to ensure compliance with the ESA, we will deny Oregon's request for stay on those grounds.

The CTUIR's Request for Rehearing

19. The CTUIR argues that the January 15, 2009 Order improperly denied its motion to intervene out-of-time because the order did not correctly apply the Commission's standard for late interventions to the CTUIR's motion. The CTUIR notes that the order states the standard as follows: "the Commission liberally allows late interventions at the early stages [of natural gas certificate proceedings] and is more restrictive as the proceedings near their conclusion. When late intervention is sought after the issuance of a dispositive order, burdens on the other parties may be substantial and the movants bear a higher burden to demonstrate good cause for granting such late intervention."[19]

20. The CTUIR notes that the January 15, 2009 Order states in footnote 6 that the CTUIR filed its late motion after issuance of the September 18, 2008 Order when, in fact, the CTUIR filed its late motion on September 17, 2008, one day before the order was

[19] January 15, 2009 Order, 126 FERC ¶ 61,035 at P 14.

issued. Maintaining that the Commission denied the CTUIR's late motion based on the erroneous rationale that it filed the motion after the September 18, 2008 dispositive order, the CTUIR requests that the Commission grant its request to intervene out-of-time.

Commission Response

21. The CTUIR accurately states that it filed its motion to intervene out-of-time one day before issuance of the September 18, 2008 Order, not after issuance as the January 15, 2009 Order erroneously states. However, the CTUIR's motion was more than two years after the July 6, 2006 deadline for the filing of timely interventions in this proceeding.[20] Although, as the CTUIR notes, the January 15, 2009 Order states that the Commission liberally allows late interventions at the early stages of a proceeding, the order also points out that the Commission is more restrictive in granting late intervention as a proceeding nears its conclusion. More than two years into a proceeding cannot be considered as part of the proceeding's early stages and those seeking intervention at such a late date have a higher burden to demonstrate good cause than those seeking late intervention in the early stages of a proceeding.

22. On rehearing, the CTUIR argues that it meets the higher burden for seeking intervention so late in the proceeding. As noted in the January 15, 2009 Order, the CTUIR sought late intervention in September 2008 because, it stated, it had only recently recognized that the Bradwood project might adversely affect its tribal treaty rights and interests based on submissions made to the Commission after the Final Environmental Impact Statement. However, as we stated in the January 15, 2009 Order, interested parties in a proceeding such as the CTUIR "are not entitled to hold back awaiting the outcome of the proceeding, or to intervene when events take a turn not to their liking" as the CTUIR did.[21] In this case, the CTUIR was fully aware of the Bradwood proceeding from its inception as evidenced by its statements of its full participation in monitoring the proceeding, attending multiple meetings, and communicating with NorthernStar, yet did not seek intervention until more than two years after motions to intervene were due.[22] Therefore, the CTUIR has not met the higher burden necessary to grant its late motion to intervene. For all of these reasons, we will deny the CTUIR's request for rehearing.

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[20] *See* Notice of Application, 71 Fed. Reg. 35880 (June 22, 2006).

[21] January 15, 2009 Order, 126 FERC ¶ 61,035 at P 15 (citing *Summit Hydropower*, 58 FERC ¶ 61,360, at 62,199-2000 (1992)).

[22] We note that the CTUIR is a member of the Columbia River Inter-Tribal Fish Commission which is a party to this proceeding.

The Commission orders:

(A) Oregon's and the CTUIR's requests for rehearing are denied.

(B) Oregon's request for stay is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.