

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

California Department of Water Resources

Project No. 2100-139

ORDER REJECTING AMENDMENT TO MOTION TO INTERVENE

(Issued February 17, 2006)

1. On December 16, 2005, the Anglers Committee, the Baiocchi Family, Butte Sailing Club, Butte County Taxpayers Association, and the Lake Oroville Fish Enhancement Committee (Intervening Parties) filed a timely, joint motion to intervene in the relicensing proceeding concerning the California Department of Water Resources' Lake Oroville Project No. 2100.¹
2. On January 3, 2006, the Intervening Parties filed a pleading styled "Amendment to Motion to Intervene." The pleading stated that it was being filed "to prevent the Licensee, the Commission, and its staff from rejecting our motion on unreasonable grounds that the motion did not state 'Statement of Issues.'"² The motion then went on to allege that a member of the Commission's staff had engaged in *ex parte* communications, and asked that the employee be removed from several ongoing California hydropower licensing proceedings.³ Because the January 3, 2006, pleading is unsupported, inappropriate, and unnecessary, we will reject it.

¹ By notice issued September 12, 2005, the Commission set January 30, 2006, as the deadline for filing motions to intervene and protests, comments, and final recommendations, terms and conditions, and prescriptions in the proceeding.

² January 3, 2006 motion at 1.

³ *Id.* 2-4.

3. As an initial matter, we note that the January 3, 2006, motion is moot. The December 16, 2005, motion to intervene was timely and was not opposed. Therefore, pursuant to our regulations, it was automatically granted, and the Intervening Parties are party to this proceeding.⁴ In addition, the motion did not, as it asserted, provide a statement of issues, but rather consisted of allegations regarding actions by Commission staff. The pleading therefore did not meet its stated purpose.

4. In any event, the claims by the Intervening Parties have no basis. The Intervening Parties recognize that the employee in question was designated as non-decisional for the proceeding at hand.⁵ They then go on to claim that the employee engaged in *ex parte* communications. This assertion shows a fundamental misunderstanding of our rule regarding off-the-record (*ex parte*) communications. Our regulations provide that off-the-record communications regarding the merits of contested, on-the-record proceedings may not be made by or to decisional employees.⁶ The regulations specifically provide that a decisional employee “does not include . . . an employee designated as being non-decisional in a proceeding.”⁷

5. Where, as here, we grant the request of parties involved in settlement negotiations to assign one of our staff to assist them in those discussions, the staff member is designated non-decisional. This means that the staff member is free, as is any party, to discuss the proceeding with the participants either jointly or separately, as the employee deems appropriate. Because the employee is non-decisional, the employee’s communications with parties to the case cannot, by definition, be *ex parte*. Given that a non-decisional employee is party to off-the-record information, the employee is barred by our separation-of functions rule⁸ from participating in the Commission’s deliberations with respect to the proceeding. The employee involved here has not so participated. In sum, the employee in question having been designated as non-decisional in this proceeding, the *ex parte* rule does not apply to the employee’s actions with respect to other parties to the proceeding, and the employee thus could not have violated it.

⁴ See 18 C.F.R. § 385.214(c) (2005).

⁵ January 3 motion at 2.

⁶ See 18 C.F.R. § 385.2201(b) (2005).

⁷ 18 C.F.R. § 385.2201(c)(3) (2005).

⁸ 18 C.F.R. § 385.2202 (2005).

6. We also feel obliged to address the bulk of the Intervening Parties' "new statement of issue," which is little more than unsupported allegations that the Commission employee is "seeking to influence" certain parties, has discriminated against the Intervening Parties by not consulting with them and has "a conflict of interest against the people and the people's salmon and steelhead."⁹ The Intervening Parties go on to request an investigation of the employee.

7. The Intervening Parties provide no support for their allegations, which, as discussed above, are premised in significant part on their misunderstanding of our regulations. We have no reason to believe that the employee in question has behaved in anything but an upstanding manner.

8. American Rivers, which is a party to the relicensing proceeding, felt compelled to respond to the Intervening Parties' allegations, to ask that the Commission deny the relief requested by the Intervening Parties, and to state that the employee's conduct has demonstrated "the highest level of professionalism and integrity . . ."¹⁰ Another party, the State Water Contractors, also requests that we deny the requested relief, praises the employee's efforts, and states that the employee has been "extraordinarily helpful and accessible with respect to assisting the parties in reaching a settlement. . . . In our view, [the employee] has been above-board and fair to all involved."¹¹ A third stakeholder, Lyle Wright, noted that the employee has acted "in a very professional manner"¹²

⁹ January 3, 2006 motion to intervene at 3-4.

¹⁰ See letter from Steve Rotherth (American Rivers) to Magalie Roman Salas (Commission Secretary) (filed January 20, 2006). On February 7, 2006, the Intervening Parties filed a "rebuttal" alleging that American Rivers' pleading was "a political attempt to influence any and all decisions made by the Commission" The rebuttal represents another inappropriate personal attack and is, moreover, confusing in its allegations regarding attempted influence, given that American Rivers and the Intervening Parties are both non-governmental organizations that tend to be generally aligned in urging the Commission to provide increased environmental protection for aquatic resources.

¹¹ See January 13, 2006, letter from Terry L. Erlewine (State Water Contractors) to Magalie Roman Salas (filed January 26, 2006).

¹² See Lyle Wright comments filed January 26, 2006.

9. As we have had occasion to do in another recent case,¹³ we alert the Intervening Parties that, while they are free to advocate their positions on the issues as vigorously as possible, we will not permit *ad hominem* attacks upon our staff.¹⁴ Failure to comply with the standards we expect of those appearing before us can result in suspension of the privilege to do so.¹⁵

¹³ See *Union Electric Company d/b/a/ Ameren UE*, 114 FERC ¶ 61,038 at P 9 (2006).

¹⁴ As the Intervening Parties note, January 3, 2005, motion, at 3, Mr. Robert Baiocchi, who signed the pleading at issue here, previously filed a complaint regarding our employee's actions in this proceeding. They fail to note, however, that, after investigation, the Commission's Designated Agency Ethics Official found no evidence of bias or other improper action on the employee's part. The repetition of false charges does not increase their veracity.

¹⁵ On January 30, 2006, Mr. Baiocchi made another unsupported, inappropriate filing, in the form of a letter to the Commission, enclosing a letter to the Commission employee. In the cover document, he asserts that "the Commissioners and its staff [sic] are not paying attention to the public . . . and consequently are discriminating against the public in matters (motion et al) before the Commission." In the attached letter to our employee, Mr. Baiocchi alleges, with a telling lack of specificity, that an unnamed federal official has informed him that the employee stated that Mr. Baiocchi "do[es] not have any credibility with the Commissioners." He concludes on this basis that "the Commissioners are discriminating against the people I represent and myself." As noted above, the Commission employee is non-decisional in this proceeding and has not and will not advise us on the merits of this matter. In any event, notwithstanding the fact that this filing represents a further wholly unsubstantiated attack on the Commission and its staff, we will fully consider the merits of any properly-filed, relevant pleading by Mr. Baiocchi or by the Intervening Parties, just as we would with respect to filings by any other entity. On February 13, 2005, Mr. Baiocchi filed a further pleading, to which he attaches a letter to our employee (dated February 6, 2006) asserting that the employee's actions in the settlement proceedings involving Project No. 2100 violate 18 U.S.C. § 1913 (2000). As with the previous pleadings we have discussed, this one is also completely unfounded, and displays Mr. Baiocchi's unseemly personal animus against our employee. The statute Mr. Baiocchi references is a bar against the use of federal funds to lobby Congress or federal officials with respect to legislative matters, and has no applicability to the proceedings here.

The Commission orders:

The amendment to motion to intervene, filed on January 3, 2006, by the Anglers Committee, the Baiocchi Family, Butte Sailing Club, Butte County Taxpayers Association, and the Lake Oroville Fish Enhancement Committee, is rejected.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.