

125 FERC ¶ 61,192
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.

Central Nebraska Public Power
and Irrigation District

Project No. 1417-229

ORDER DENYING REHEARING

(Issued November 20, 2008)

1. On July 9, 2008, Commission staff modified and approved an application filed by Central Nebraska Public Power and Irrigation District (licensee) to amend its Land and Shoreline Management Plan (shoreline plan) for the Kingsley Dam Project No. 1417, with regard to certain lands at Plum Creek Reservoir (reservoir).¹ On August 7, 2008, Ephriam and Barbara Hixson filed a late motion to intervene and request for rehearing of the July 9 Order. On September 5, 2008, the Commission Secretary denied the motion to intervene and rejected the request for rehearing.² The Hixsons filed a timely request for rehearing of the notice. For the reasons discussed below, we deny rehearing.

Background

2. As pertinent to this case, the project's approved shoreline plan classifies all project lands and lands adjacent to the project boundary into a number of land-use categories, one of which is residential.³ With a land classification of "residential," residents of

¹ *Central Nebraska Public Power and Irrigation District*, 124 FERC ¶ 62,020 (2008) (July 9 Order). The project is located on the North Platte and Platte Rivers in Keith, Adams, Gosper, Phelps, Kearney, Lincoln, and Dawson Counties, Nebraska. Plum Reservoir is one of 29 lakes associated with the project.

² *Central Nebraska Public Power and Irrigation District*, 124 FERC ¶ 61,228 (2008). Pursuant to section 313(a) of the Federal Power Act, 16 USC 825l(a) (2006), only parties to a proceeding may seek rehearing of an order issued in the proceeding.

³ *See Central Nebraska Public Power and Irrigation District*, 101 FERC ¶ 62,015 (2002). The approved shoreline plan was filed with the Commission on January 6, 2003.

adjacent lands are eligible to apply for permits to access the reservoir across project lands and to construct shoreline facilities.⁴ In exchange for these benefits, the licensee requires that these residents maintain a minimum setback of 50 feet from the normal high water mark for structures on their property.⁵

3. On February 12, 2007, the licensee filed an application to amend its shoreline plan to reclassify three areas around Plum Reservoir to residential. One of these areas is the Wightman residential subdivision, which consists of nine lots that abut the reservoir's shoreline on the south end of the reservoir.⁶ In addition to reclassifying the area to residential, the licensee proposed to reduce the setback requirement from 50 to 25 feet for certain structures (e.g., patios, retaining walls), noting in its application that the proposed setback would be consistent with the terms of a contract between the licensee and the subdivision's lot owners (Wightman contract).⁷

4. The Commission issued public notice of the amendment application, which established April 23, 2007, as the deadline for filing comments and motions to intervene. On April 20, 2007, the Hixsons, owners of one of the Wightman subdivision lots, filed comments, asking that the project's shoreline plan incorporate the terms of the Wightman contract.⁸ The Hixsons did not, however, seek to intervene.

5. Commission staff's July 9 Order approved the amendment application, except for the proposed reduction of the setback requirement.

⁴ See shoreline plan at 5.D.1 at 50.

⁵ The minimum setback is also a requirement for structures on project lands.

⁶ The project boundary generally runs along the high water mark in this area.

⁷ Application at 9. The Wightman contract was executed by the licensee and John and Janet Wightman, the original owners of the Wightman subdivision, on May 21, 2003, and allows, with the licensee's written permission, the abutting lot owners to construct recreation-related structures (such as docks, boathouses, or boat ramps) along the shoreline. It also allows lot owners to construct buildings or other structures up to 25 feet from the shoreline. Pursuant to the contract, lot owners' uses of the property shall occur in a manner that will protect the scenic, recreational, and environmental values of the project, and shall not be incompatible with the overall recreation use of the project, including the project's shoreline plan. The current lot owners are successors-in-interest to the Wightmans.

⁸ The Hixsons' comments expressed concern that the proposed amendment seemed to be more restrictive than the terms of their contract with the licensee.

6. The licensee filed a timely request for rehearing of the July 9 Order, asking that we reduce the setback requirement for the Wightman subdivision from 50 to 25 feet, as proposed in the application. The Hixsons filed a late motion to intervene and request for rehearing of the order, asking that the Commission modify the amendment to specifically adopt the terms of the Wightman contract.

7. To justify their late intervention, the Hixsons explained that they did not timely intervene because they believed that their interests would be adequately protected without the need for intervention. On September 5, 2008, the Commission Secretary denied the Hixsons' intervention request and rejected their request for rehearing. The Secretary explained that interested parties are not entitled to hold back awaiting the outcome of the proceeding, or to intervene only when events take a turn not to their liking,⁹ and concluded that the Hixsons did not meet the good cause standard required to support late intervention much less the greater burden required for intervention sought after the issuance of a dispositive order.¹⁰

8. On September 18, 2008, the Commission, in response to the licensee's request for rehearing, approved the reduction of the setback for certain structures as proposed in the amendment application.¹¹

9. On October 6, 2008, the Hixsons filed a timely request for rehearing of the Secretary's September 5, 2008 notice.

Discussion

10. The Commission's regulations dealing with motions for late intervention state that when a motion to intervene is filed after the end of any time period established, the person seeking to intervene must show good cause why the time limitation should be waived.¹² Once a dispositive order has been issued in a proceeding, an entity seeking to

⁹ The notice cited *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189, at P 31 (2006), citing *Summit Hydropower*, 58 FERC ¶ 61,360, at 62,199-200 (1992).

¹⁰ The notice cited *International Paper Company and Turner Falls Hydro LLC*, 99 FERC ¶ 61,066 (2002).

¹¹ *Central Nebraska Public Power and Irrigation District*, 124 FERC ¶ 61,256 (2008).

¹² 18 C.F.R. § 385.214(c)(3) (2008). For a full discussion of the Commission's intervention policy, see *California Department of Water Resources and the City of Los Angeles*, 122 FERC ¶ 61,150 (2008), and the cases cited therein.

intervene bears a greater burden to justify late intervention, as the prejudice to other parties and the burden on the Commission of granting late intervention are substantial.¹³

11. On rehearing, the Hixsons argue that the Commission Secretary erred in denying their motion to intervene. They state that in determining whether to grant late intervention, the key inquiry should be whether the circumstances warrant intervention.¹⁴ Here, the Hixsons allege, their late intervention is warranted because “rather than having ‘held back’ until ‘events took a turn to their liking,’” they “opted to not complicate the proceeding or create other ‘burdens,’ until it became clear to them that no one else involved in the proceedings was either willing or able to give fair consideration to either their interests or their claims.”¹⁵

12. The Commission expects parties to intervene in a timely manner based on the reasonably foreseeable issues arising from the applicant’s filings and the Commission’s notice of proceedings.¹⁶ One cannot hold back and intervene later when an unwelcome

¹³ See, e.g., *Central Vermont Public Service Corporation*, 113 FERC ¶ 61,167, at P 10 (2005).

¹⁴ They cite to no Commission precedent, but instead list a number of court cases that involve federal court intervention rules.

Three of the cases involved class action suits where similarly situated persons were allowed to step in when the original named members of the class stopped pursuing the claim. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961); *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); and *Elliott Industries, Ltd. Partnership v. BP America Production Co.*, 407 F.3d 1091 (10th Cir. 2005). Two cases involved an agency relationship where the agent stepped in to continue appeal when principle did not appeal. *Cuthill v. Ortman-Miller Mach. Co.*, 216 F.2d 336 (7th Cir. 1954); and *Tocher v. City of Santa Ana*, 219 F.3d 1040 (9th Cir. 2000). One case involved new information which prompted action by an outside interest. *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C.Cir. 2004). Two cases involved a party from a related matter stepping in to protect its interests or jurisdiction. *Alstom Caribe, Inc. v. Geo. P. Reinties Co.*, 484 F.3d 106 (1st Cir. 2007); and *Securities & Exchange Commission v. U.S. Realty & Improvement Co.*, 310 U.S. 434 (1940). None of these situations exist in the present case.

¹⁵ Request for rehearing at 4-5, quoting from September 5, 2008 notice.

¹⁶ See *Niagara Mohawk Power Corporation*, 100 FERC ¶ 61,247 (2002) (fact that intervenors thought that “either there appeared to be no disputes relevant to their interests, or . . . assumed that any disputes would be resolved without their intervention” not sufficient to justify late intervention).

result occurs. Here, contrary to their claim, the Hixsons did in fact hold back until events took a turn not to their liking. The Hixsons were aware at the time the licensee filed its application that the application did not ask the Commission to authorize the licensee to follow the terms of the Wightman contract. They received notice from the Commission soliciting interventions and comments and chose to file comments, but did not intervene or oppose the application. No other entity sought to intervene, so there was no expectation that another lot owner was positioned to argue the case for them. Nothing changed between the time the application was filed and the issuance of the order to justify their filing for intervention at such a late date. It was only after the order was issued, and they did not like the result, that they sought to intervene. These facts do not meet the good cause standard for granting late intervention, much less the higher standard required after the issuance of a dispositive order. We therefore affirm the denial of late intervention and the rejection of the rehearing of Commission staff's July 9 Order.

13. The only issue that the Hixsons may properly raise here is whether the Secretary's notice denying their motion for intervention and dismissing their request for rehearing was in error. As discussed above, we have found no error in the notice. Nevertheless, we note that the Hixsons's arguments as to the July 9 Order are without merit.

14. The Hixsons assert that that the licensee breached the Wightman contract by filing an amendment application that was not completely consistent with the contract,¹⁷ and that "the failure of the Commission to incorporate the terms of the Wightman Agreement, absent some compelling reason, amounts to a violation of the due process and just compensation clauses of the Fifth Amendment to the United States' Constitution."¹⁸ Allegations of a breach of contract by the licensee are between the Hixsons and the licensee and are not within our jurisdiction.¹⁹ The Commission itself is under no obligation with respect to the contract. The licensee's obligations, as determined by the Commission, are delineated in the license and in the shoreline plan. The shoreline plan approved by the Commission included provisions to "grandfather" existing contracts.²⁰ That being the case, we indeed are obliged to act consistently with the jurisdictional

¹⁷ Hixson's August 7 motion to intervene and request for rehearing at 4.

¹⁸ *Id.*

¹⁹ The questions of whether the Wightman contract obligated the licensee to seek effectuation of its terms and whether the amendment application in fact was consistent with the contract are matters for a tribunal with jurisdiction over contract claims, and not for the Commission. In any event, the Hixsons do not in any of their pleadings explain how, if at all, the application conflicts with the contract.

²⁰ Shoreline plan at 47-48

aspects of those contracts unless and until, following public notice and the opportunity for comment, we were to determine that the licensee's compliance with those contracts was no longer consistent with the public interest. The situation is different with respect to the Wightman contract. That contract was executed after issuance of the project license and our approval of the shoreline plan. Thus, if the contract were presented to us, we would examine whether it was consistent with the license and the management plan, and not the other way around. However, the licensee did not seek our approval prior to executing the contract, so that we never made such a consistency determination. Therefore, we are under no obligation to require the licensee to implement the contract's terms, nor does our requiring the licensee to comply with the license and the shoreline plan in any way violate the Constitution. To the extent that we find such a contract inconsistent with the obligations we have placed on the licensee, the consequences of such a decision rest on the licensee.

The Commission orders:

The request for rehearing filed by Ephriam and Barbara Hixson, on October 6, 2008, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.