

153 FERC ¶ 61, 217  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Cheryl A. LaFleur, Tony Clark,  
and Colette D. Honorable.

Confederated Salish and Kootenai Tribes  
Energy Keepers, Incorporated

Project No. 5-101

ORDER DENYING REHEARING

(Issued November 19, 2015)

1. On September 30, 2015, the Montana Land and Water Alliance (Alliance), and on October 1, 2015, Senators Verdell Jackson and Bob Keenan (Senators Jackson and Keenan) and the Montana Public Service Commission (Montana Commission) filed requests for rehearing of Commission staff's September 1, 2015 order approving a partial transfer of the license for the 189-megawatt Séliš Ksanka QÍispé Project No. 5 (the project),<sup>1</sup> located on the Flathead River in Flathead and Lake Counties, Montana.<sup>2</sup> For the reasons discussed below, we deny rehearing.

**I. Background**

2. On July 17, 1985, the Commission issued a new 50-year license jointly to Montana Power Company (Montana Power) and the Confederated Salish and Kootenai Tribes of the Flathead Reservation (Tribes), as co-licensees.<sup>3</sup> The 1985 license order, which approved a settlement agreement by various parties, including the Flathead, Mission, and Jocko Valley Irrigation Districts, the Department of the Interior, and the

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<sup>1</sup> The project was previously named the Kerr Hydroelectric Project. On November 9, 2015, the Commission approved the Tribes and Energy Keepers' request to change the project name. *See* 153 FERC ¶ 62,092 (2015).

<sup>2</sup> *Confederated Salish and Kootenai Tribes, et al.*, 152 FERC ¶ 62,140 (2015).

<sup>3</sup> *The Montana Power Company, et al.*, 32 FERC ¶ 61,070 (1985).

Tribes, provided that Montana Power would own and operate the project for the first 30 years of the license term, after which the Tribes, upon payment to the co-licensee of a specified sum, would become the owner and sole licensee of the project.<sup>4</sup> Article C(1) of the 1985 license in pertinent part states:

On the Conveyance Date, upon receipt by [Montana Power] from the Tribes of the Estimated Conveyance Price (as hereafter defined) in effect on such date, all of [Montana Power]'s interest in the project, free of any mortgages, liens, or encumbrances, *shall, without any further action on the part of [Montana Power], the Commission, or any other entity, vest in the Tribes.* Thereafter, for the remainder of the term of this license, and any immediately following annual licenses, the Tribes will control, operate, maintain and have exclusive right to, and interest in, the project, and will have all of the rights and obligations of the licensee under this license, including right to any payment by any successor licensee or by the United States on takeover of the project.<sup>5</sup>

3. Montana Power's interest in the license was transferred to PPL Montana, LLC on July 7, 1999,<sup>6</sup> and was subsequently transferred to NorthWestern Corporation (NorthWestern) on July 24, 2014.<sup>7</sup>

4. By application filed April 14, 2015, the Tribes and NorthWestern sought to add Energy Keepers, Incorporated (Energy Keepers) as a co-licensee for the project and, thus, partially transfer the license. The purpose for the partial transfer was to make Energy Keepers, a corporation wholly owned by the Tribes, a co-licensee in order to allow the Tribes to enter into sales and generation agreements with respect to the project. The September 1, 2015 order approved the partial transfer of the license, granted motions to intervene,<sup>8</sup> and denied requests for public hearings.

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<sup>4</sup> *See id.* at 61,177.

<sup>5</sup> *Id.* at 61,181 (emphasis added).

<sup>6</sup> *Montana Power Company, et al.*, 88 FERC ¶ 62,010 (1999).

<sup>7</sup> *PPL Montana, LLC and NorthWestern Corp.*, 148 FERC ¶ 62,072 (2014).

<sup>8</sup> The Alliance's motion to intervene was inadvertently omitted in Ordering Paragraph (B) of the transfer order. But, as stated in footnote 7 of that order, since no answers were filed in opposition to the timely motion to intervene, the Alliance became a party at the end of the 15 day period. 18 C.F.R. § 385.214 (2015).

5. Upon payment of the Estimated Conveyance Price, the project was conveyed to the Tribes on September 5, 2015. As a result of this action, all of NorthWestern's interest in the project vested in the Tribes. Accordingly, NorthWestern is no longer a licensee of the project.

6. On September 30, 2015, the Alliance and, on October 1, 2015, Senators Keenan and Jackson and the Montana Commission filed requests for rehearing of the September 1, 2015 order. On October 15, 2015, the Tribes and Energy Keepers filed a motion for leave to file an answer to the Montana Commission's request for rehearing.<sup>9</sup>

## II. Discussion

7. Section 313(a) of the Federal Power Act (FPA) provides that a party "aggrieved by an order issued by the Commission . . . may apply for a rehearing . . . of such order."<sup>10</sup> To be aggrieved, a party must establish a concrete injury arising from the Commission's underlying action. In their requests for rehearing, Senators Jackson and Keenan, the Alliance, and the Montana Commission fail to show how they were aggrieved by the September 1, 2015 order. Rather, the intervenors raise issues mainly related to the final 1985 license.

8. The arguments in the requests for rehearing, which in the main raise questions about the Tribes' fitness to be a licensee, largely relate to the conveyance of the license to the Tribes and the possible consequences thereof. The 1985 order both made the Tribes a co-licensee and made the license conveyance self-executing. No entity sought rehearing of that order, which is long-since final and cannot properly be made the subject of collateral attacks, as the current requests for rehearing attempt to do.<sup>11</sup> Further, the September 1, 2015 transfer order, which simply makes a corporate entity that is wholly owned by the Tribes a co-licensee, did not raise new issues regarding these matters. Accordingly, we deny rehearing.

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<sup>9</sup> Answers to requests for rehearing are generally prohibited pursuant to the Commission's regulations. 18 C.F.R. § 385.213(a)(2) (2015). However, because some of the issues in the Montana Commission's request for rehearing are being raised for the first time and the Tribes and Energy Keepers have not had the opportunity to address them, we will grant the Tribes and Energy Keepers' motion.

<sup>10</sup> 16 U.S.C. § 825l(a) (2012).

<sup>11</sup> See, e.g., *Pacific Gas & Electric Co. v. FERC*, 533 F.3d 820 (D.C. Cir. 2008) (holding that the court does not have jurisdiction over collateral attacks of final Commission orders); see also, *City of Nephi, Utah v. FERC*, 147 F.3d 929, 934 (D.C. Cir. 1998).

9. The intervenors also make assertions concerning the need for a public hearing, the standard for transfers, Part II of the FPA, compliance with state law, and national security. Many of these issues are collateral attacks on earlier, now final Commission orders. Others are incorrect or are not relevant to the transfer order. We nonetheless discuss them all below, for purposes of clarity.

#### Need for a Public Hearing

10. The September 1, 2015 order denied requests for a public hearing in Montana, finding that the written record was sufficient to resolve the relevant issues. In their requests for rehearing, Senators Jackson and Keenan, the Alliance, and the Montana Commission maintain that the Commission should hold a public hearing on the issue of whether the partial transfer to Energy Keepers is in the public interest.

11. As Commission staff stated in the transfer order, the Commission may conclude that when it is appropriate to set a hydropower matter for hearing, the hearing can be based on the written record.<sup>12</sup> Here, there are no issues of material fact that were not resolved based upon the record before us.

12. Senators Jackson and Keenan argue that a public hearing is needed “so that the Montana public can determine whether the license transfer is in the public interest of the state.”<sup>13</sup> Under the FPA, the Commission has the sole authority to approve license transfers.<sup>14</sup> Although states and members of the public may alert the Commission to any concerns they have, the statute does not require that a hearing be held to allow the public to decide whether they support a proposed transfer, as the Senators suggest.

13. The Montana Commission asserts that the failure to hold a public hearing unfairly denied due process to the Montana Commission, other Montana entities, and Montana citizens. In support of this claim, the Montana Commission notes that “the only opportunity for public input on the conveyance of the Kerr Project to [the Tribes] occurred three decades ago during the 1985 Commission relicensing proceeding.”<sup>15</sup> The

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<sup>12</sup> *Confederated Salish and Kootenai Tribes, et al.*, 152 FERC ¶ 62,140 at P 13.

<sup>13</sup> Senators Jackson and Keenan’s Request for Rehearing at P 17.

<sup>14</sup> Section 8 of the FPA specifically gives the Commission the power to grant license transfers. *See* 16 U.S.C. § 801 (2012) (“That no voluntary transfer of any license, or of the rights thereunder granted, shall be made without the written approval of the commission . . .”).

<sup>15</sup> Montana Commission’s Request for Rehearing at 4.

Montana Commission goes on to state that since that time, new residents have moved into the area and that there are new interests in the proceeding. First, we note that the issues relating to the conveyance established in the 1985 order are not germane to the partial transfer to Energy Keepers and thus, are not relevant to consideration of the transfer request. As noted above, the transfer to the Tribes is final and not subject to attack here. Moreover, it is not unusual that communities surrounding licensed projects will change over the course of a license term. This is not a sufficient reason for holding a public hearing 30 years into a license term. The public was given an opportunity to provide input on the transfer in the form of written comments, and no issues were raised that we could not resolve on the written record.

### Standard for Transfers

14. In their request for rehearing, Senators Jackson and Keenan argue that the Commission has failed to develop standards for approving a transfer, and that “since the law provides no guidance, the Commission is unable to act . . . .”<sup>16</sup> However, this is mistaken. In the September 1, 2015 order, the Commission explained that Section 8 of the FPA,<sup>17</sup> which governs license transfers, does not articulate a standard for approving a transfer application. The order goes on to explain, however, that the Commission has developed a standard for approving license transfers, and that the partial transfer to Energy Keepers meets that standard.

15. The Commission has held that a transfer may be approved on a showing that the transferee is qualified to hold the license and operate the project, and that a transfer is in the public interest.<sup>18</sup> The partial transfer to Energy Keepers is in the public interest because Energy Keepers is a properly-formed corporation,<sup>19</sup> through which the Tribes can enter into power purchase agreements, generation interconnection agreements, and coordination agreements necessary for generation and sale of electricity at the project. Energy Keepers has agreed to accept all of the terms and conditions of the license and to be bound by the license as if it were the original licensee. In addition, the Tribes, who

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<sup>16</sup> Senators Jackson and Keenan’s Request for Rehearing at P 14.

<sup>17</sup> 16 U.S.C. § 801 (2012).

<sup>18</sup> See, e.g., *Gallia Hydro Partners and Rathgar Development Associates, LLC*, 110 FERC 61,237 (2005); 18 C.F.R. pt. 9.3 (2015).

<sup>19</sup> Energy Keepers is a corporation that is chartered by the U.S. Department of the Interior pursuant to section 17 of the Indian Reorganization Act, 25 U.S.C. § 477 (2012).

have been a co-licensee on the project for the last 30 years, remain a co-licensee and are jointly and severally liable for compliance with all license obligations.<sup>20</sup>

16. The Montana Commission argues that the transfer is not in the public interest because there may not be sufficient financial transparency by Energy Keepers. However, there is nothing in the transfer application that raises doubt about Energy Keepers' ability to comply with the terms of the project license, which is the only relevant inquiry here. Furthermore, as set forth in every license, both Energy Keepers and the Tribes are required to maintain an account for the licensed project under the Commission's Uniform System of Accounts,<sup>21</sup> to the extent necessary to carry out their responsibilities under Part I of the FPA.<sup>22</sup> Energy Keepers and the Tribes will be required to undertake a regular and open accounting of their operations, as do all licensees. The Montana Commission does not raise any specific concerns that cause us to question whether there are any financial issues that will prevent the Tribes and Energy Keepers from complying with the terms of the project license. Nonetheless, we note that Commission staff will ensure that the co-licensees remain in compliance with their license, as it does with all licensees.

#### Part II of the FPA

17. The Montana Commission further asserts that Energy Keepers' financial transparency is a concern because the Commission issued a declaratory order in December 2014 exempting Energy Keepers from most requirements of Part II of the FPA.<sup>23</sup> The Montana Commission states that because of the decision in the December 2014 order, there will now be less financial information available than there was under the previous owners of the project. Any concerns the Montana Commission has regarding the Tribes and Energy Keepers' exempted status should have been raised

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<sup>20</sup> See, e.g., *New York Irrigation District, et al.*, 46 FERC ¶ 61,379, at 62,183 (2003).

<sup>21</sup> 18 C.F.R. Part 101 (2015).

<sup>22</sup> Under General Instruction 16 (Separate Accounts or Records for Each Licensed Project), the accounts of each licensee shall show the following: (a) the actual legitimate original cost of the project, (b) the charges for operation and maintenance of the project property, (c) the credits and debits to the depreciation and amortization accounts and (d) the credits and debits to operating revenue, income and retained earnings. 18 C.F.R. Part 101.

<sup>23</sup> *Confederated Salish and Kootenai Tribes of the Flathead Reservation, et al.*, 149 FERC ¶ 61,216 (2014).

in the proceeding that granted that status. On August 25, 2014, the Commission issued a public notice of the Tribes and Energy Keepers' petition for a declaratory order finding them exempt under section 201(f) of Part II of the FPA.<sup>24</sup> The Montana Commission did not intervene or comment in that proceeding,<sup>25</sup> nor did it or any other entity seek rehearing of that order. The Montana Commission now asks that we "reconsider" the December 2014 order in this proceeding. Collateral attacks on the now-final December 2014 order cannot be made here.

18. In any case, section 201(f) of the FPA provides exemptions from the Commission's authority under most provisions of Part II of the FPA for "the United States, a State or any political subdivision of a State, . . . , or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing. . . ."<sup>26</sup> The Commission's December 2014 order found the Tribes and Energy Keepers to be exempt under section 201(f). The Montana Commission's request that the Commission now reverse that decision and treat the Tribes and Energy Keepers just like "the majority of other Commission regulated hydroelectric owners" is improper. The Tribes and Energy Keepers have rightly been deemed exempt public utilities and, thus, their accounting requirements are consistent with that decision.

19. Nonetheless, we note that a licensee's exempted status under section 201(f) does not exempt it from its accounting responsibilities as a licensee under Part I of the FPA.<sup>27</sup> The declaratory order does not affect the requirements of the licensee under Part

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<sup>24</sup> 79 Fed. Reg. 52,000 (Sept. 2, 2014).

<sup>25</sup> While that proceeding took place before the partial transfer application was filed, it occurred after the Tribes had given formal notice regarding the date for conveyance. In fact in their petition, the Tribes and Energy Keepers explained that they were seeking an exempted status "in anticipation of and preparation for the Conveyance Date." The Tribes and Energy Keeper's Petition for a Declaratory Order, Docket No. EL14-92-000, at 3 (filed August 20, 2014). Thus, any issues surrounding a change in financial transparency following the conveyance could and should have been raised in that proceeding.

<sup>26</sup> 16 U.S.C. § 824(f) (2012).

<sup>27</sup> See *Seneca Generation, LLC, et al.*, 145 FERC ¶ 61,096, at P 23 n.20 (2013) (citing *Trafalgar Power, Inc.*, 87 FERC ¶ 61,207, at 61,798 (1999) (noting that "all licensees are required to comply with the requirements of the Uniform System of Accounts to the extent necessary to carry out their responsibilities under [s]ections 4(b), 10(d) and 14 of the FPA"))).

I of the FPA.<sup>28</sup> Thus, Energy Keepers and the Tribes will still be required to undertake a regular and open accounting of their operations pursuant to Part I of the FPA.

#### Oversight and Compliance with State Laws

20. The Alliance and Senators Jackson and Keenan express concerns that the Tribes and Energy Keepers will evade state law by virtue of their corporate structure. Regardless of their corporate structure, the Tribes and Energy Keepers still must abide by the license conditions and comply with the FPA.<sup>29</sup> Questions concerning the Tribes fitness or governmental status are beyond the scope of this partial transfer proceeding, since they should have been raised on rehearing of the 1985 license order, which made them a co-licensee. Such arguments are collateral attacks on the 1985 order. As to Energy Keepers, nothing in the transfer application or subsequent pleadings raises doubt about its ability to comply with the terms of the project license, which is the only relevant inquiry here. Moreover, the Tribes and Energy Keepers, as co-licensees, are jointly and severally liable for compliance with all license obligations. With respect to the impact of the licensees' corporate structures, the Tribe is a sovereign entity recognized by the United States pursuant to the Indian Reorganization Act and Energy Keepers was chartered by the Department of the Interior pursuant to that act.<sup>30</sup> Given that the Commission had no jurisdiction over the establishment of either of these entities, any justiciable issues regarding the propriety of the licensees' form of organization must be raised in another forum.

21. The Alliance also raises concerns about the Tribes and Energy Keepers not being subject to state taxes. The Alliance argues that the Tribes and Energy Keepers should be

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<sup>28</sup> In their petition for a declaratory order, filed on August 20, 2104, the Tribes and Energy Keepers correctly stated in footnote 3:

As a licensee under Part I of the FPA, [the Tribes] and [Energy Keepers] are not seeking special treatment and acknowledge and submit that this Petition requesting a finding that Petitioners are exempt public utilities under Part II of the FPA, in no way affects the Commission's jurisdiction over [the Tribes] or [Energy Keepers] under Part I or [the Tribes] and [Energy Keeper]'s obligations under Part I.

<sup>29</sup> Section 8 of the FPA states, in part, that a transferee "shall be subject to all the conditions of the license . . . and also subject to all the provisions and conditions of [the FPA] to the same extent as though [the transferee] were the original licensee . . . ." 16 U.S.C. § 801 (2012).

<sup>30</sup> See Application for Partial Transfer at 3.

required to make payments in lieu of taxes to make up for the reduction in state tax revenue from the project. However, the Commission is not a taxing authority and the tax impacts of projects are not within our jurisdiction.<sup>31</sup>

22. The Montana Commission requests that we require Energy Keepers to agree to a full and open accounting of its operations and grant the Commission full access to the books and records of its operations. As discussed above, Energy Keepers and the Tribes will be required to undertake a regular and open accounting of its operations, as do all licensees.

#### National Security Concerns

23. Senators Jackson and Keenan also raise concerns about national security. They claim that the project is a “black start” dam, which is critical to the nation in the case of emergency. However, Senators Jackson and Keenan do not explain how this claim relates to the partial transfer to Energy Keepers. As we have stated above, the conveyance to the Tribes was self-executing and is not germane to this proceeding. We do not see how adding Energy Keepers as a co-licensee on the project will have national security implications.

#### The Commission orders:

(A) The requests for rehearing filed by the Montana Land and Water Alliance, Senators Jackson and Keenan, and the Montana Public Service Commission are denied.

(B) The motion for leave to file an answer filed by the Tribes and Energy Keepers is granted.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>31</sup> *New York Power Authority*, 118 FERC ¶ 61,206, at P 87 (2007) (“[T]he tax impacts of a hydroelectric project are a matter of state law, and not within our jurisdiction.”), *reh’g denied*, 120 FERC ¶ 61,266, at P 33 (2007) (“The Commission is not a taxing authority. . . . The Commission will not . . . establish a tax regime in addition to those provided for by state and federal law.”).