162 FERC ¶ 61,040
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Public Utility District No. 1 of Okanogan County, Washington — Project No. 12569-015

ORDER DENYING REHEARING

(Issued January 18, 2018)

1. On September 20, 2017, the Commission issued an order granting Public Utility District No. 1 of Okanogan County's (Okanogan PUD) request for a two-year stay of the commencement and completion of construction deadlines in Article 301 of the license for the Enloe Hydroelectric Project No. 12569 (Enloe Project).[1] On October 20, 2017, Conservation Groups[2] filed a timely request for rehearing. We deny rehearing.

I. Background

2. On June 22, 2017, Okanogan PUD filed a request to stay the commencement and completion of construction deadlines contained in Article 301 of its license for the Enloe Project. The September 20 Order granted the request, stating that the ongoing litigation concerning the water rights entitlement for project prevented Okanogan PUD from moving forward with the project's design and construction.[3] The September 20 Order also denied several motions to intervene filed in the proceeding.[4] On October 20, 2017,

[1] *Public Utility District No. 1 of Okanogan County, Washington*, 160 FERC ¶ 61,094 (2017) (September 20 Order).

[2] The Conservation Groups are American Rivers, American Whitewater, Center for Environmental Law And Policy, Columbiana, Methow Valley Citizens Council, Sierra Club–Washington State Chapter, and Trout Unlimited.

[3] *Id.* P 21.

[4] *Id.* P 7.

Conservation Groups filed a timely request for rehearing, alleging that the September 20 Order: (1) wrongly denied Conservation Groups' motion to intervene; (2) failed to follow the Commission's regulations in approving the request for stay; (3) misapplied section 705 of the Administrative Procedure Act (APA); (4) failed to demonstrate that "justice so requires" the stay; and (5) failed to consider the environmental impacts of the request in violation of the National Environmental Policy Act (NEPA).

II. Discussion

A. Motion to Intervene

3. Conservation Groups argue that the September 20 Order wrongly denied its motion to intervene. Conservation Groups contend that the effect of the September 20 Order is to make a material amendment to Article 301 of the license, and therefore, an opportunity for parties to intervene and comment is required.[5] Conservation Groups note that section 13 of the Federal Power Act (FPA) limits the Commission's ability to extend the start of construction deadline, and therefore, the request for stay is an amendment to a license term that was not contemplated at the time of licensing.[6]

4. Conservation Groups further aver that public notice is appropriate here because the decision to stay the commencement and completion of construction deadline, rather than terminate the license, significantly affects the public interest. Conservation Groups note that there have been new developments regarding the need for project power, the project's impact on anadromous fish, and the overall finding that the project is in the public interest, and contend that by not providing an opportunity for comment and intervention, the Commission denied the public a full and fair opportunity to be heard on these matters. Last, Conservation Groups argue that the fact that the public had actual notice of the application for stay is inconsequential because, by not providing an opportunity to intervene, parties cannot seek rehearing and judicial review.

5. The Commission's longstanding policy and practice has been to provide notice and allow an opportunity for intervention and rehearing with respect to only certain, limited types of post-licensing compliance filings. Specifically, the filing must be one that entails a material change in the plan of project development or terms of the license, would adversely affect the rights of a property holder in a manner not contemplated by the license, or involves an appeal by an agency or entity specifically given a consultation

[5] Conservation Groups Request for Rehearing at 8 (citing section 6 of the FPA, 16 U.S.C. § 799, which requires thirty days' public notice for alterations to a license).

[6] *Id.* (citing 16 U.S.C. § 806 (2012)).

role by the license article under which the compliance filing is made.[7] In *City of Tacoma*, the Commission explained that "[t]his approach allows the Commission to act on numerous hydroelectric compliance matters in a manner that is both administratively efficient and consistent with the requirements of the FPA and due process."[8]

6. The Commission has previously explained what constitutes a material change. In *Erie Boulevard Hydropower, L.P.*, the Commission analyzed what types of changes would constitute a material change to a project's plans of development.[9] There, the Commission stated that "[e]very case where the Commission concluded that amendments to the applicant's plan of development were material involved significant changes to the project's physical features …, and changes that do not concern a project's physical features would seldom, if ever, rise to the level of a fundamental and significant change to the plans of development."[10] In that same vein, the Commission has held that requests for extensions of time of compliance deadlines contained in a license, including requests to extend the commencement and completion of construction deadlines, are not material changes to the license and do not require the issuance of public notice or an opportunity to intervene.[11]

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[7] *City of Tacoma, Washington*, 109 FERC ¶ 61,318, at PP 6-7 (2004) (*City of Tacoma*). *See also* 18 C.F.R. § 4.202(a) (2017) ("[i]f it is determined that approval of the application for amendment of license would constitute a significant alternation of license pursuant to section 6 of the [FPA], public notice of such application shall be given at least 30 days prior to action upon the application.").

[8] *City of Tacoma*, 109 FERC ¶ 61,318 at P 7; *see also Kings River Conservation District*, 36 FERC ¶ 61,365, at 61,882-84 (1986) (detailing the history of the Commission's interpretation of the notice requirement in section 6 of the FPA).

[9] *Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036, at PP 15-17 (2010), *aff'd, Green Island Power Authority v. FERC*, 497 Fed. Appx. 127 (2d Cir. 2012); *see also* 18 C.F.R. § 4.35(f)(1) (2017).

[10] *Id*. P 17.

[11] *See, e.g., Felts Mills Energy Partners, L.P.*, 87 FERC ¶ 61,094 (1999) (finding that extensions of a project's construction deadlines are not material changes in the project's development plans or license terms); *see also Central Maine Power*, 53 FERC ¶ 61,089 (1990) ("Extensions of time to file plans or studies do not constitute material changes in either the plan of project development or the terms or conditions of a license."); *Baldwin Hydroelectric Corporation*, 84 FERC ¶ 61,132 (1998) ("Extending

7. The same logic applies here. Okanogan PUD did not request to change any of the projects physical features. Nor did it effect (directly or indirectly) any material modification to the terms of the license, as the duration of the stay is limited, and the timing of commencement and completion of project construction were always subject to delay without triggering public notice requirements. Moreover, because Okanogan PUD's request for stay does not change the project's plan or development, it does not impact any property holder. Lastly, Conservation Groups are not a consulting party to any of the post-license compliance proceedings and have not demonstrated that they are uniquely affected by the request for stay, beyond their general arguments about the project, which were fully adjudicated in the licensing proceeding.

8. With respect to Conservation Groups' assertion that notice is required to allow parties to comment on circumstances that have changed since issuance of the license, as the September 20 Order stated, to the extent that the licensee did propose substantial changes to the plan of project development based on these changed circumstances, the licensee would have to file a request to amend its license to implement those changes. The Commission would provide notice and an opportunity to intervene in any such proceeding.[12] Thus, the public would have a full opportunity to be heard on matters related to any potential amendment.

9. For the reasons stated above, we deny rehearing of the September 20 Order's denial of Conservation Groups' motion to intervene. Because Conservation Groups are not a party to this proceeding, Conservation Groups cannot seek rehearing of the substantive issues in the September 20 Order. Nevertheless, we will address Conservation Groups' remaining arguments below.

B. Regulations for Amendment Applications

10. Conservation Groups contend that the Commission failed to follow its regulations in approving the request for stay. Conservation Groups state that the Commission's regulations require a licensee to file a request for an extension of time not less than three months before the deadline established in the license, but Okanogan PUD filed its request for stay just 17 days prior to the deadline to commence construction.[13] Additionally, Conservation Groups argue that the application filed by Okanogan PUD did not meet the

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the time to finish project construction makes no substantial or material change to the project, nor will it adversely affect any property holder's rights.").

[12] September 20 Order, 160 FERC ¶ 61,094 at P 26 n.40.

[13] Conservation Groups Request for Rehearing at 13-14 (citing 18 C.F.R. § 4.202(b) (2017)).

substantive requirements for amendment applications set forth in the Commission's regulations.[14] Thus, Conservation Groups conclude that the Commission was obligated to reject Okanogan PUD's request for stay.

11. The regulations cited by Conservation Groups pertain to license amendments and are not applicable in this proceeding. Okanogan PUD requested a stay of Article 301 of its license, and the Commission's regulations do not address the timing of, or the information required in, requests for stay. Rather, the Commission evaluates each request for stay on a case-by-case basis to determine whether the applicant has demonstrated that a stay should be issued.[15] Thus, the Commission's regulations do not require rejection of Okanogan PUD's request.

C. Section 705 of the APA

12. Conservation Groups argue that the Commission wrongly relied on section 705 of the APA when granting the request for stay. Specifically, Conservation Groups contend that (1) the Commission can only issue a stay pursuant to section 705 pending litigation; (2) section 705 of the APA does not permit a stay of a compliance deadline within a license; and (3) the Commission cannot stay a license that is already effective. Additionally, Conservation Groups assert that the Commission must apply the four-part preliminary injunction test in issuing stays pursuant to section 705 of the APA.[16]

13. Conservation Groups misinterpret the September 20 Order. Although we have cited to section 705 as a secondary basis for issuing a stay,[17] it is section 309 of the FPA that gives the Commission an independent basis for granting stays of a project license.[18]

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[14] *Id*. (citing 18 C.F.R. § 4.201 (2017)).

[15] However, in determining whether a stay should be issued, the Commission may take into account the timing of the filing.

[16] Conservation Groups Request for Rehearing at 20.

[17] *Long Lake*, 40 FERC ¶ 61,223 (1987) (Commission may exercise its authority under section 309 of the FPA and section 705 of the APA to stay a license); City *of Seattle, Washington, Department of Lighting*, 12 FERC ¶ 61,010, at 61,023 (1980) (the Commission's authority to stay a project license is derived not only from section 705 of the APA, but also from Section 309 of the Federal Power Act).

[18] 16 U.S.C. § 825h (2012); *see also Kings River Conservation District*, 30 FERC ¶ 61,151, at 61,320 (1985) ("The Commission's authority to issue a stay of a license order is derived primarily from Section 309 of the [FPA]"); *see also Keating v.* FERC,

Specifically, section 309 provides that "[t]he Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this [Act]."[19] Thus, the FPA provides the Commission with broad authority to take actions necessary to carry out the act, and we find that issuance of a stay of a project license under certain narrowly prescribed circumstances is well within this authority.[20] Because FPA section 309 is broadly applicable, the Commission has elected to utilize the standard set forth in section 705 of APA to determine whether a stay is justified.[21] But this does not change the fact that the Commission's underlying authority derives from FPA section 309.

569 F.3d 427, 429 (D.C. Cir. 2009) (noting that FERC has stayed the commencement of construction deadline pursuant to section 309 of the FPA).

[19] 16 U.S.C. § 825h (2012). *See c.f. Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967) (affirming Commission's authority to backdate a license effective date in the absence of explicit statutory authority with reference to FPA section 309).

[20] We also disagree with Conservation Groups contention that the Commission must apply the four-part preliminary injunction test when using the standard set forth in section 705 of the APA. Section 705 merely states that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it … ." 5 U.S.C. § 705 (2012). *See also California v. Bureau of Land Management*, 17-cv-03804-EDL, 2017 WL 4416409, at *13 (N.D. Cal. Oct. 4, 2017) ("the plain language of the statute leaves room to dispute whether such an analysis is required, and the legislative history provides limited and not entirely consistent evidence of Congress' intent.").

[21] Previously, the Commission has applied different standards than the one set forth in section 705 of the APA. *See, e.g., Monongahela Power Co.*, 7 FERC ¶ 61,054 (1979) ("we considered [the motions for stay] under the standards of *Virginia Jobbers Association v. Federal Power Commission*, 259 F.2d 291 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977)); *Nantahala Power & Light Co.*, 20 FERC ¶ 61,026 (1982) (finding that a stay pending rehearing is in the "public interest"); *Kings River Conservation District*, 27 FERC ¶ 61,098 (1984) ("[i]t is appropriate and in the public interest to stay the license issued in Project No. 2890 until completion of judicial review.").

D. Justice Requires the Stay

14. Conservation Groups contend that the September 20 Order failed to demonstrate that a stay is required in this proceeding. Conservation Groups state that the Commission has consistently denied stay requests where (1) the licensee had not settled on a final project design;[22] (2) the licensee filed an "eleventh-hour" application to substantially amend the approved project design;[23] and (3) the licensee sought extra time to reconsider the feasibility of its project.[24]

15. Conservation Groups aver that the September 20 Order erred in finding that Okanogan PUD can proceed with project design prior to completing an aesthetic flow study, which will determine the amount of water available for the project. Conservation Groups claim that Okanogan PUD's failure to conduct an aesthetic flow study is similar to *Truckee Donner Public Utility District*, where the Commission denied the licensee's request for stay because it failed to develop the information necessary to determine project design. Conservation Groups assert that even though the section 401 water quality certification allows Okanogan PUD to defer the aesthetic flow study until after project construction,[25] the study is necessary to develop the project design on the timetable ordered in the license.[26] Conservation Groups request that if rehearing is

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[22] Conservation Groups Request for Rehearing at 23 (citing *Town of Telluride, Colorado*, 75 FERC ¶ 61,296 (1996)).

[23] *Id.* (citing *City of Marion, Kentucky, and Smithland Hydroelectric Partners*, 85 FERC ¶ 61,401 (1998)).

[24] *Id*. at 24 (citing *East Bench Irrigation District*, 60 FERC ¶ 61,256 (1992)).

[25] On August 20, 2012, the Washington Department of Ecology issued a certification under section 401(a)(1) of the Clean Water Act for the Enloe Project. The water quality certification was challenged by several organizations, and on August 30, 2013, the Washington Pollution Control Hearings Board issued an order amending the 401 water quality certification by requiring an aesthetic flow study either by simulation or within three years of the completion of construction on the project using actual flows. *Ctr. for Envtl. Law & Policy, et al. v. Washington Dept. of Ecology, PUD No. 1 of Okanogan County*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law & Final Order (As Amended Upon Reconsideration)) (Aug. 30, 2013).

[26] Conservation Groups state that the Washington Court of Appeals noted the risk Okanogan PUD faces by moving forward with the project without first conducting the aesthetic flow study. Conservation Groups Request for Rehearing at 22 (citing *Ctr. for Envtl. Law & Policy v. Washington Dept. of Ecology*, 196 Wash. App. 360, 372 n.16 (2016) ("the [aesthetic flow] study may indicate that there is no flow level that is

denied, the Commission require Okanogan PUD to conduct a simulated aesthetic flow study prior to project design and construction to ensure that the public interest is protected.[27]

16. Next, Conservation Groups assert that the September 20 Order erred in stating that Okanogan PUD was in the final phases of project development, and was pursuing the project with due diligence. Conservation Groups contend that at a June 2016 Board of Commissioners meeting, Okanogan PUD expressed uncertainty regarding moving forward with the project and discussed a potential redesign. Conservation Groups also assert that a former Okanogan PUD Commissioner recently stated that the PUD was largely responsible for the delay in the project, admitting that it was not complete because the PUD Commissioners were "messing around with it and dragging our feet."[28] Furthermore, Conservation Groups allege that had Okanogan PUD been pursuing the project with due diligence, it would have initiated the process to perform an aesthetic flow study when the litigation pertaining to the water rights concluded.

17. Last, Conservation Groups assert that the September 20 Order wrongly stated that the project is needed for ancillary services. Conservation Groups state that nothing in the record supports this conclusion and the project may not be able to effectively provide such services given its small generating capacity and limited storage capacity. Conservation Groups further state that the Commission did not address concerns that the cost of providing power from the Enloe Project could be up to two to four times higher than the cost of power on the open market.

18. Conservation Groups repeat many of the arguments the Commission rejected in the September 20 Order. With respect to the aesthetic flow study, nothing in the license or the 401 water quality certification requires Okanogan PUD to conduct a simulated aesthetic flow study prior to the design and construction of the project. In fact, the 401 water quality certification specifically allows Okanogan PUD to conduct an actual flow study within three years following construction. Although future changes may be required as a result of any such study, Okanogan PUD can move forward with its project without the study at this time. We are not persuaded by Conservation Groups' attempt to

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protective of both the fishery resource and aesthetics, and Ecology may withdraw the water right permit")).

[27] Conservation Groups assert that ordering the study now would not weaken or conflict with the water quality certification, which is focused on ensuring that an aesthetic flow study is done.

[28] Conservation Groups Request for Rehearing at 22 (citing Okanogan PUD Board of Commissioner Meeting, October 9, 2017, public comment of Ernest Bolz).

relitigate issues related to the project that were fully addressed during licensing and the 401 water quality certification proceeding.[29] Previously, the Commission rejected American Whitewater's assertion that an aesthetic flow study should be conducted prior to construction, finding that "the license order reasonably provided a means for testing the proposed flow's effect on aesthetics and water quality after the project is constructed, while providing a framework for making improvements, if needed."[30] None of the circumstances related to the aesthetic flow study have changed since our order, and we find no reason to reopen the license to impose additional measures at this time.

19. We also do not find that the anecdotal evidence submitted by Conservation Groups demonstrates that Okanogan PUD has not diligently pursued the Enloe Project. Okanogan PUD was engaged in protracted litigation over the water rights at the project for nearly four years. Additionally, as stated in the September 20 Order, since the water rights litigation concluded, Okanogan PUD has received approval from the Washington State Capital Projects Review Committee, the state agency charged with reviewing alternative public works contracting procedures, to employ a design-build contracting model that Okanogan PUD states will result in a swifter start to construction. Further, since issuance of the September 20 Order, Okanogan PUD has filed its Dam Survey Program Plan and Schedule and its Annual Environmental Action Plan Status Report and Drill. Last, Okanogan PUD has not indicated that it plans to change its project development or will be using the additional time afforded by the stay to reevaluate the project's design or feasibility.

20. Conservation Groups also misstate our conclusions regarding the need for power. The September 20 Order merely noted the conclusions made in the licensing proceeding, and found that adjudication of issues related to the original license were beyond the scope of this proceeding. We reiterate that a stay proceeding is not the appropriate forum to relitigate such arguments.

[29] *Public Utility District No. 1 of Okanogan County, Washington*, 145 FERC ¶ 61,144 (2013) (denying American Whitewater's request for rehearing regarding a pre-construction aesthetic flow study and amending the license to incorporate the aesthetic flow study condition that was added to the project's water quality certification by the Washington Pollution Control Hearings Board after the issuance of the license order).

[30] *Id*. P 19.

E. NEPA Requirements

21. Conservation Groups argue that the Commission failed to consider the environmental impacts of the stay. Conservation Groups aver that under NEPA, the Commission must take a "hard look" at the potential environmental consequences of the proposed action.[31] Conservation Groups state that if there are changes to the project, or new circumstances or information that affects the Commission's analysis in the environmental assessment, the Commission's duty extends to preparing a supplemental environmental assessment, even after it has issued a license.[32]

22. Conservation Groups aver that there are new developments that affect the Commission's analysis and findings in the environmental assessment prepared for licensing. Specifically, Conservation Groups state that the need for project power has changed and that new information is available regarding the project's effect on certain fish species. Conservation Groups contend that because the Commission did not address how these new developments affected its environmental analysis and licensing decision prior to issuing the September 20 Order, the Commission is in violation of NEPA and its implementing regulations.

23. The Commission's regulations categorically exclude from review under NEPA certain types of actions which do not have a significant effect on the human environment.[33] Specifically, section 380.4(a)(1) of the Commission's regulations categorically excludes certain "procedural, ministerial, or internal" administrative decisions.[34] Approval of Okanogan PUD's request for stay is administrative in nature and does not approve any construction or changes to the project development. Therefore, an environmental analysis is not required. Should the changed circumstances cited by Conservation Groups require an amendment to Okanogan PUD's license,

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[31] Conservation Groups Request for Rehearing at 25 (citing *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011)).

[32] *Id*. (citing 40 C.F.R. § 1502.9 (2017)).

[33] 18 C.F.R. § 380.4 (2017). *See also Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir. 1996) ("An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious.").

[34] 18 C.F.R. § 380.4(a)(1) (2017).

Commission staff would prepare, if necessary, a NEPA document in the evaluation of any such proposal.

The Commission orders:

The request for rehearing filed by Conservation Groups on October 20, 2017, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.