UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMMISSION

Confederated Salish and Kootenai Tribes Energy Keepers, Incorporated	))	Docket No. P-5-100

MOTION OF TED HEIN, DEAN BROCKWAY, BUFFALO WALLOW LLC, WESTERN WATER USERS ASSOCIATION LLC, SCOTT and LINDA AMBO, GARY and SANDY BAERTSCH, GENE ERB, JR., PAUL A. and BARBARA GRIECO, CHARLEY and CAROL LYONS, MARY K. MATHEIDAS, ROBERT and ERLENE ROBINSON, RAY L. and E. ANNE SWENSON, R. ROY and SHEILA M. C. VALLEJO FOR LEAVE TO FILE A MOTION TO INTERVENE IN THE ARTICLE 40(C) HEARING OF THE KERR HYDROELECTRIC PROJECT LICENSE AND TO PARTICIPATE IN THE SETTLEMENT JUDGE PROCEDURES ORDERED BY THE CHIEF ADMINISTRATIVE JUDGE WHILE THE ARTICLE 40(C) HEARING IS HELD IN ABEYANCE

1. Ted Hein, Dean Brockway, Buffalo Wallow LLC, Western Water Users Association LLC, Scott and Linda Ambo, Gary and Sandy Baertsch, Gene Erb, Jr., Paul A. and Barbara Grieco, Charley and Carol Lyons, Mary K. Matheidas, Robert and Erlene Robinson, Ray L. and E. Anne Swenson, and R. Roy and Sheila M.C. Vallejo, by their undersigned counsel, have a direct interest in the disposition of the above Kerr Hydroelectric Project License Article 40(c) proceedings scheduled, and hereby move for leave to file a motion to intervene in said proceedings, pursuant to Rules 212 and 214 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure (18 C.F.R. §§ 385.212 and 385.214).

I. BACKGROUND

2. On May 28, 2015, the Flathead, Mission and Jocko Valley Irrigation Districts ("the Districts") and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts ("FJBC") (hereinafter collectively referred to as "FJBC/Districts") intervened and

requested the mandatory hearing set forth in Article 40(c) of the Kerr Hydroelectric Project License the Commission issued on July 17, 1985, and the opportunity to submit comments during said hearing about the partial transfer of the 1985 license to the Energy Keepers, Inc. subsidiary of the Confederated Salish and Kootenai Tribes ("CSKT" or "Tribes"). The 1985 license had approved and incorporated a settlement agreement previously reached *inter alia* between the Montana Power Company (the prior licensee), the Districts, the Department of Interior ("Interior"), and CSKT. The 1985 license contains terms and conditions that specially protect the rights of all residents of the Flathead Indian Reservation, including irrigators who are members of the Districts whose interests are supposed to be represented by the FJBC/Districts, to secure output of the Kerr Hydroelectric Project, and such protections require that the Districts retain their low-cost hydropower rights until such time as CSKT becomes the sole licensee of the project. Pursuant to the terms of the 1985 license, the project was to be transferred to CSKT thirty years following its issuance, which transfer took place on September 5, 2015 upon CSKT's payment of the costs of the project. Article 40(c) of the 1985 license explicitly did not cover or resolve whether (i) CSKT (and its subsidiary Energy Keepers, Inc. ("EKI")') must make any part of the projects' output available to the United States, for and on behalf of the Flathead Irrigation Project ("FIP") or the Districts (including the continuation of the provision of low-cost power to the Districts), or (ii) *whether the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation*. Rather, it directed the Commission, upon receipt of a request filed by the Tribes, the Interior Secretary or the Districts, to set such matters for hearing within twelve months thereof.

3. On June 9, 2015, the Tribes and EKI filed a response arguing that the motion for hearing does not raise any issues germane to the transfer proceeding, and that said proceeding was not

the appropriate forum to request an Article 40(c) hearing, which the FJBC/Districts rejected in their response of June 24, 2015.

4. On September 17, 2015, the Commission issued an "Order Establishing Hearing and Settlement Judge Procedures," thereby granting FJBC/Districts' request for a hearing (152 FERC ¶ 61,207, para. 9). The Commission reasoned that, although the Tribes had argued that the recently negotiated CSKT Water Compact ratified by the state of Montana ensured that "the irrigators will continue to receive [from the Tribes and EKI] the irrigation portion of the low-cost block of power described in [1985 license] Article 40(a) […] in the same manner that NorthWestern has been providing this power [,…] there is no guarantee that this will occur" (*Id*., at para. 10). While the Commission set the matter for trial-type evidentiary hearing procedures it, nevertheless, "encourage[d] the parties to make every effort to settle their disputes before hearing procedures are commenced." In an effort to assist the parties in settling their differences the Commission decided to "hold the hearing in abeyance," and it directed that a settlement judge be appointed pursuant to Rule 603 of the Commission's Rules of Practice and Procedure" (*Id*., para. 11).

5. On September 24, 2015, the FERC's Chief Administrative Law Judge "designate[d] Judge Michael Haubner as the Settlement Judge in this case to convene a settlement conference, explore the possibility of settlement, discuss the differences between the parties, and in general conduct the settlement negotiations." (*See* "Order of Chief Judge Designating Settlement Judge and Scheduling Settlement Conference," at para. 2). The Chief Administrative Law Judge also scheduled a settlement conference with Judge Haubner to be convened at 10:00 a.m. on October 21, 2015, at FERC headquarters in Washington, D.C. (*Id*., at para. 3).

6. On September 25, 2015, Settlement Judge Haubner ordered each of the parties to exchange, by 12:00 p.m., October 20, 2015, a written settlement proposal, preferably, less than one page in length, setting forth a demand that could satisfy their respective "clients' needs based upon currently available information," a copy of which was to be filed with the settlement judge (*See* "Order Setting Settlement Conference Procedure," at para. 3, fn 1). Among other procedures, the settlement judge noted that, "Parties with full and complete settlement authority are […] required to personally attend all conferences," and he encouraged them "to be frank and open in their discussions." (*Id*., at paras. 4-5).

7. On October 1, 2015, Settlement Judge Haubner rescheduled the October 21, 2015 settlement conference for October 26, 2015, but admonished the parties to ensure that their written settlement proposals were submitted by 12:00 p.m. on October 20, 2015 (*See* "Order Rescheduling Settlement Conference," at para. 1).

II. MOTION TO INTERVENE

8. Movants hereby submit this motion for leave to file an intervention out-of-time regarding the Kerr Hydroelectric Project License Article 40(c) proceedings, pursuant to Rules 212 and 214 of FERC Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 385.214. Pursuant to Rule 214(b)(1)-(3), 18 C.F.R. § 385.214(b)(1)-(3), Movants are entitled to intervene if they can demonstrate (1) that they have a right to participate conferred by rule or statute, (2) that they have or represent "an interest which may be directly affected by the outcome of the proceeding[,]" and (3) that their participation is in the public interest. Movants satisfy each of these conditions as follows.

9. First, consistent with 18 C.F.R. § 385.214(b)(2)(i), each of the Movants identified below has a right to participate as a party. They each are either members of the very same irrigation

districts (the Jocko, Mission and Flathead Irrigation Districts) which the FJBC is charged by State law with representing,[1] and thus, are persons toward which the Commission's Order of September 17, 2015 was specifically directed (i.e., to the "Districts and the Flathead Board," and their members), or are otherwise residents of the Flathead Reservation entitled to low-cost power. Ted Hein operates and manages a ranch/farm located at 64 Red Barn Road, Hot Springs, MT 59845-9327, and is a Mission Irrigation District member. Dean Brockway operates and manages a ranch/farm located at 25900 Gray Wolf Dr., Arlee, MT 59821, and is a Jocko Irrigation District member. Buffalo Wallow, LLC operates a ranch located at 34373 Repass Trail, Saint Ignatius, MT 59865, and is a Mission Irrigation District member. Western Water Users Association, LLC operates a farm located at P.O. Box 1042, St. Ignatius, MT 59865, and is a Mission Irrigation District member. Scott and Linda Ambo operate a ranch located at 195 Patton Road, Lonepine, MT 59848, and are Flathead Irrigation District members. Gary and Sandy Baertsch operate a ranch/farm located at 49445 Valley View Road, Ronan, MT 59864, and are Flathead Irrigation District members. Gene Erb, Jr. operates a ranch/farm located at 78185 U.S. Hwy 93, St. Ignatius, MT 59865, and is a Mission Irrigation District member. Paul and Barbara Grieco operate a ranch/farm located at 63 Roosma Road, Hot Springs, MT 59845, and are Flathead Irrigation District members. Charlie and Carol Lyons operate a farm located at 33875 St. Ignatius Airport Road, St. Ignatius, MT 59865, and are Mission Irrigation District members. Mary Matheidas operates a farm located at 75 Managhan Road, Lonepine, MT 59848, and is a Flathead Irrigation District member. Robert and Erlene Robinson operate a ranch at 32417 N. Finley Point Rd., Polson, MT 59860, located on the Flathead Reservation but beyond the irrigation districts. Ray L. and E. Anne Swenson operate a ranch/farm located at 33305

[1] *See* 152 FERC ¶ 61,207, at par. 3 ("Reservation. The Districts, which are local Montana governmental entities, [are supposed to] represent landowners who receive water and power from the Irrigation Project.")

Redhorn Road, St. Ignatius, MT 59865, and are Mission Irrigation District members. R. Roy and Sheila M. C. Vallejo operate a farm located at 76398 U.S. Hwy 93 North, St. Ignatius, MT 59865, and are Mission Irrigation District members.

10. Second, consistent with 18 C.F.R. § 385.214(b)(2)(ii), each of the Movants has or represents "an interest which may be directly affected by the outcome of the proceedings. Movants are irrigators engaged in the businesses of ranching and/or farming on the Flathead Indian Reservation and/or also reside there, and consequently, they are consumers of the electricity CSKT/EKI generates through operation of the Kerr Hydroelectric Project, as well as customers of the Mission Valley Power Company ("MVP")[2] which purchases that electricity directly from CSKT/EKI at wholesale prices for resale to Movants at retail prices. Movants also are holders of legally valid water rights that the CSKT/EKI and the U.S. government via the Interior Secretary have used and will continue to use to generate electricity, for which compensation is plainly due, either directly in the form of outright payments to each Movant or indirectly in the form of reduced electricity rates charged to Movants. Consequently, Movants have a right to intervene as parties because they have valuable interests that will be affected by the outcome of these proceedings.

11. Third, consistent with 18 C.F.R. § 385.214(b)(2)(iii), Movants' participation in the Kerr Hydroelectric Project license Article 40(c) proceedings is in the public interest. Movants support these settlement conference proceedings and seek status as parties to them in order to ensure that the public benefits associated with the low-cost power block to which all irrigators, residents and

[2] MVP is owned by the U.S. Department of Interior's Bureau of Indian Affairs ("BIA") and operated and managed by the CSKT pursuant to a '638' contract. *See* United States Department of Interior Office of Solicitor General, *Correspondence from Edith R Blackwell, Deputy Associate Solicitor Division of Indian Affairs to James Steele, Jr., Chairman Confederated Salish and Kootenai Tribes* (Dec. 21, 2007) at p. 6 ("In 1988, the Bureau of Indian Affairs issued a self-determination contract for the operation and management of the power distribution system now known as Mission Valley Power.")

businesses located on the Flathead Indian Reservation are entitled, including those not party to these proceedings, are fully addressed and provided for in the parties' implementation of the 1985 license agreement during the remaining twenty years of the license term and thereafter. However, as discussed below, the FJBC/Districts' proposed negotiating position does not adequately represent Movants' or the public's interests in these proceedings. Although Movants are other than nonprofit public interest organizations they, nevertheless, represent several classes of persons that comprise a significant subset of the population that currently lives and works on the Reservation. In other words, Movants' interests in these proceedings, as described above, are largely representative of and similar to those of many of the irrigators and residents living and working on the Reservation, and therefore, in the public interest. Consequently, if the Commission does not grant Movants' motion for leave to file this late intervention, and denies Movants the opportunity to participate in these proceedings as parties, the interests of many members of the Reservation public-at-large will be affected by the outcome of these proceedings without having been adequately represented.

III. MOTION FOR LEAVE TO INTERVENE

12. Pursuant to Rule 214(d)(1)-(4), 18 C.F.R. § 385.214(d)(1)-(4), the Commission retains the discretion to consider a variety of factors in determining whether to grant a late intervention. These factors include: 1) whether good cause to intervene late exists; 2) whether any disruption of the proceeding may result from permitting the intervention; 3) whether the movant's interest is adequately represented by other parties in the proceeding; and 4) whether any prejudice or additional burden would exist for existing parties by granting the intervention. These factors are discretionary, and a movant is not required to satisfy all of the factors. *See, e.g. Producer-Suppliers of Transco Gas Supply Co.*, 25 FERC 61,085, at 61,293 (1983) ("(T)he Commission

does retain discretion regarding its decision to permit late intervention.") *See also City of Orrville v. FERC*, 147 F.3d 979, 991 (D.C. Cir. 1998) (holding that this regulation "does not compel consideration of each of the factors; it merely states that the Commission 'may consider' them").

13. First, Movants can show that good cause to intervene exists, consistent with18 C.F.R. § 385.214(d)(1)(i). On September 17, 2015, the Commission issued an order granting the FJBC/Districts' request for a public evidentiary hearing to convene Kerr Hydroelectric Project License Article 40(c) proceedings and directing FERC's Chief Administrative Judge to appoint a settlement judge to schedule settlement conference procedures. FERC issued this order eight days after the FJBC/Districts had convened their regularly scheduled monthly meeting on September 9, 2015. Movant Hein, a member of the Executive Committee of the FJBC, was first informed of the Commission's September 17, 2015 order and the settlement judge's subsequent September 24-25, 2015 and October 1, 2015 orders on October 11, 2014, at a specially convened FJBC Executive Committee meeting at which the FJBC/Districts' proposed negotiating position was distributed among Executive Committee members on a strictly "confidential" basis. Movant Hein thereafter raised questions challenging this position during a FJBC Executive Committee telephone conference call convened on October 15, 2015 that gave rise to a disagreement with the FJBC/Districts' FERC counsel over whether the FJBC/Districts' entitlement to the low-cost power block and its proposed negotiating position should include reference to water rights. Other Movants were not apprised of the Commission's September 17, 2015 order and the settlement judge's subsequent September 24th and 25th orders calling for the scheduling of settlement conference negotiations and the parties' exchange and filing of negotiating positions until October 14, 2015, at the earliest. Such other Movants were

introduced to the issue in cursory fashion on October 12, 2015, when the FJBC/Districts released the agenda to "All Irrigators of the Flathead, Mission and Jocko Valley Irrigation District and Interest Public" for the next regularly scheduled FJBC/District monthly meeting convened on October 14, 2015. The FJBC/Districts' meeting agenda had designated the "FERC Settlement Conference and Appointment of Board Representative" as an item of "New Business" for "Discussion and Possible Action." However, it was not until October 14, 2015, one week prior to the filing of this motion for leave, that the matter was discussed at all by FJBC/District members. In other words, the FJBC/Districts failed to call a special meeting for District members other than FJBC Executive Committee members at any time soon following the issuance by the Commission and the settlement judge of any one of their respective orders of September 17, 24 and 25, 2015 and October 1, 2015, that would have afforded them the opportunity, prior to October 12 or 14, 2015, to learn about and to review said orders and the proposed negotiating position the FJBC/Districts had developed in response thereto. Thus, it would appear that the FJBC/Districts intentionally denied Movants other than Hein sufficient time to digest such information, to review the FJBC/District's proposed negotiating proposal and to effectively formulate an informed opinion regarding whether that position adequately represented their interests.

14. Good cause also exists for the Commission to grant Movants' motion for leave because this motion is being filed no later than the thirty-fourth day following the Commission's September 17, 2015 order,[3] no later than the twenty-sixth day following Judge Haubner's September 25, 2015 order describing the settlement conference procedures to which the FJBC/Districts would be subject, and no more than seven days following the FJBC/Districts'

[3] The FERC order in question, 152 FERC ¶ 61,207, was issued on Thursday, September 17, 2015. Since the thirtieth day thereafter (October 17, 2015) fell on a Saturday, the thirty day period did not end until Monday, October 19, 2015. *See* 18 C.F.R. §385.2007(a)(2).

most recent regularly scheduled October 14, 2015 meeting. Good cause exists, furthermore, because this motion to intervene is being filed only four days after counsel first received and thoroughly reviewed a copy of the proposed negotiating position the FJBC/Districts had crafted pursuant to the settlement conference procedures set forth in Judge Haubner's September 25, 2015 order.

15. Second, Movant can show, consistent with 18 C.F.R. § 385.214(d)(1)(ii), that no disruption of the proceeding may result from permitting their late intervention. Judge Haubner's September 25, 2015 order required the parties to exchange and file with the judge their proposed negotiating positions by no later than 12:00 p.m., October 20, 2015. Movant Hein provided counsel's legal review of the FJBC/District's proposed negotiating position electronically to the FJBC/Districts for their consideration during the early a.m. hours (approximately 3:00 am) of October 20, 2015, shortly after it had been made available to him. The FJBC/Districts, therefore, arguably had sufficient time (up to six hours), prior to the 12:00 p.m. October 20, 2015 deadline, to consider Movants' concerns as expressed therein, to confer with the FJBC/Districts' counsels, and to incorporate any one or more of the suggestions contained therein as part of the FJBC/Districts' proposed negotiating position. As of the time of this filing, Movants still have not received any response from the FJBC/Districts, and Movants' counsel has not yet been contacted by FJBC/Districts' counsel regarding Movants' concerns. As the result of the FJBC/Districts' and their counsel's silence on these matters, Movants remain unaware and uninformed regarding whether their legitimate concerns have been adequately addressed in the proposed negotiating position that the FJBC/Districts exchanged with the CSKT/EKI and filed with Judge Haubner. Nevertheless, upon contacting Judge Haubner's law clerk, Veronica Bradley, at approximately 9:32 a.m. EST today, October 21, 2015, counsel was informed that the

FJBC/Districts had exchanged and filed their proposed negotiating position in a timely manner. Moreover, the first settlement conference meeting scheduled for October 26, 2015, has yet to take place, and thus, it is still possible for the FJBC/Districts to amend their proposed negotiating position prior to said meeting to reflect Movants' concerns. Since these settlement conference proceedings have only just begun, the Commission's decision to permit Movants' late filing of this intervention will not disrupt them.

16. Third, Movants can show, consistent with 18 C.F.R. § 385.214(d)(1)(iii), that the FJBC/Districts' proposed negotiating position does not adequately represent their interests in these proceedings. However, to do so, Movants must reveal privileged and confidential information to show why the FJBC/Districts' proposed negotiating position and refusal to modify it is inadequate.

17. Movants hereby invoke the provisions of 18 C.F.R. § 388.112(a)-(b) to secure privileged and confidential treatment of the following nonpublic information contained in paragraphs 18 through 23 submitted as part of this Commission filing. Failure to accord such information privileged or confidential treatment will compromise the FJBC/Districts' proposed negotiating position and undermine the objectives of the scheduled settlement conference procedures the Commission had previously ordered.

PARAGRAPHS 18 THROUGH 23 HAVE BEEN REDACTED BECAUSE THEY CONTAIN PRIVILEGED AND CONFIDENTIAL INFORMATION

24. For all of the reasons stated in paragraphs 18 through 23, which contain privileged and confidential nonpublic information subject to special treatment under 18 C.F.R. § 388.112(a)-(b), Movants can show, consistent with 18 C.F.R. § 385.214(d)(1)(iii), that the FJBC/Districts' proposed negotiating position does not adequately represent their interests in these proceedings.

25. Fourth, Movants can show, consistent with 18 C.F.R. § 385.214(d)(1)(iv), that permitting their intervention will not cause any prejudice to, or additional burden upon, any party. The current Kerr Hydroelectric Project License Article 40(c) settlement conference proceedings have just begun, with each of the parties exchanging and filing with the settlement judge their initial proposed settlement positions only one day ago (i.e., by 12:00 noon, October 20, 2015). And, the first settlement conference meeting is scheduled to take place on October 26, 2015. In addition, counsel has been informed[4] that the Interior Secretary already filed an intervention in these proceedings. This strongly suggests that all parties, including the Interior Secretary and the Commission, are likely familiar with the 1985 license agreement Article 40(c)(ii) issues (inclusive of reserved water rights) that Movants seek to include in the settlement conference discussions. Consequently, the Commission's grant of Movants' request for late intervention will not prolong these proceedings or impose additional burdens upon the parties. *See American Electric Power Service Corp.*, 48 FERC ¶ 61,225 (1989). Furthermore, no record subject to discovery or admissible at a hearing or trial[5] has emerged from these proceedings; nor has the settlement judge or the Commission yet issued an order disposing of them. Consequently, none of the parties to the current settlement conference proceedings will be prejudiced or subject to additional burdens as the result of the Commission permitting Movants to intervene at this point.[6] Accordingly, Movants respectfully request that their motion to intervene out-of-time be granted. *See, e.g.*, *Stingray Pipeline Company, LLC*, 135 FERC 61,099, at 61,588 (2011)

[4] Counsel was informed of the Interior Secretary's intervention earlier today, October 21, 2015, at approximately 9:32 a.m. EST, by Judge Haubner's law clerk, Veronica Bradley.

[5] *See* "Order Setting Settlement Conference Procedure" (Sept. 25, 2015), *supra* at para. 5 ("Parties are encouraged to be frank and open in their discussions. As a result, statements made by any party during the settlement conference process shall not be used in discovery and shall not be admissible at hearing or trial.")

[6] *Cf. Central Vermont*, 53 F.E.R.C. ¶ 61,204 (1990), at 61,817-18 ("The potential for prejudice to the other parties, and the burden on the Commission, are substantial when late intervention is sought after issuance of an order disposing of a proceeding.")

("Granting late intervention at this stage of the proceeding will not disrupt this proceeding or place additional burdens on existing parties.")[7]

IV. CONCLUSION

Wherefore, for the foregoing reasons, Movants respectfully request that they each be permitted to intervene in, and be made a party to, the subject proceedings, with all rights attendant thereto.

Respectfully submitted

October 21, 2015

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[7] The situation in the current proceedings contrasts substantially with that which FERC had reviewed in *Public Utilities Commission of the State of California*, 141 FERC ¶ 61,092 (2012). In that case, the Commission had found that "the potential disruption to the [settlement] proceeding and potential burden on the existing parties weigh[ed] heavily against" movants' request for late intervention." *Id*., at 11. It reached this conclusion because of the protracted ten-year history of the proceedings, the costliness of the litigation due to opposing parties' zealous advocacy, and the substantial delay late intervention in the settlement proceedings would have caused. *Id*.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document upon the participants, to date, in this proceeding in accordance with the requirements of Rule 2010 (18 C.F.R. § 385.2010) of the Commission's Rules of Practice and Procedure.

New York, NY
October 21, 2015

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