

**BEFORE THE UNITED STATES  
FEDERAL ENERGY REGULATORY COMMISSION**

**Denver Board of Water Commissioners                    )**  
**Amendment Application for                                ) FERC Project No. 2035-0999**  
**Gross Reservoir Hydroelectric Project                )**

**SAVE THE COLORADO PETITION FOR REHEARING OF COMMISSION ORDER  
DENYING LATE INTERVENTION**

Pursuant to Rule 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. §385.713, Save the Colorado timely files this Petition for Rehearing of the Commission Notice Denying Motion for Late Intervention issued on August 1, 2018. As discussed herein, Save the Colorado’s motion to intervene was filed within the deadline for comments on the Commission’s supplement to the Environmental Impact Statement which the Commission prepared as a cooperating agency and therefore was timely under 18 C.F.R. §380.10(a). Moreover, even if the Commission persists in erroneously treating Save the Colorado’s Motion to Intervene as untimely -- which it was not -- the motion should have nevertheless been granted because it was supported by good cause and would not delay or disrupt the proceedings. *See* 18 C.F.R. §385.214.

**CONCISE STATEMENT OF ISSUES**

- 1. Did the Commission err by finding that Save the Colorado’s Motion to Intervene was untimely, and in so doing, deprive Save the Colorado of its opportunity to challenge the EIS for the project?**

Yes. Under Section 380.10(a) of the Commission regulations, a motion to intervene that is filed within the comment period for a draft environmental impact statement is deemed timely. Here, the Commission acted as a cooperating party on an environmental impact statement for the project and subsequently, issued a supplemental environmental review document to address deficiencies in the original EIS. Because the Commission's supplemental environmental process is essentially an extension of the original EIS, and represents the only point during the Commission's review where a NEPA analysis was conducted, Save the Colorado's motion to intervene, which was filed before the deadline for comments on the supplemental environmental document, is timely under Section 380.10. Although the Commission was a cooperating party on the EIS, the Commission never invited parties to intervene in the proceeding at that time as required under Section 380.10. Now the Commission says that Save the Colorado's intervention in response to a supplement to the EIS comes too late. The Commission cannot have it both ways. By denying Save the Colorado's motion to intervene at this juncture, the Commission has now blocked Save the Colorado's ability to challenge the environmental findings related to the project under NEPA and deprived Save the Colorado of its rights to intervene later in the environmental review process under Section 380.10.

**2. In the alternative, if Save the Colorado's Motion to Intervene was untimely, was the Commission arbitrary and capricious in rejecting the motion to intervene because it was unsupported by good cause?**

Yes. Under Rule 214, good cause is not the sole factor that the Commission must consider in ruling on a late motion to intervene. The Commission must also examine whether the late intervention will disrupt the proceedings or unduly prejudice the other parties. *See* 18

C.F.R. §385.214 (listing factors); *Covelo v. Indian Cmty. v. FERC*, 895 F.2d 581 (D.C. Cir. 1990)(citing requirements or Rule 214). The Commission did not take these factors into account and further, improperly ignored Save the Colorado’s justification for its timing.

## **BACKGROUND**

### **I. SAVE THE COLORADO’S MOTION TO INTERVENE**

This proceeding arises out of the proposal by the Denver Board of Water Commissioners (Denver Water) to expand the Moffat Collection System which provides a portion of the water supply for Denver and the surrounding area. The expansion of the Moffat Collection System was originally proposed in 2003, and would include raising Gross Dam and enlarging Gross Reservoir. On April 25, 2014, the United States Army Corps of Engineers (Corps), acting as lead agency for the federal environmental review of the proposed project, released a Final environmental impact statement (EIS) on Denver Water Board’s expansion of the Moffat Collection System. Because enlargement of Gross Reservoir was one of the alternatives considered in the Corps’ Final EIS, and enlargement of the reservoir would require an amendment to the license for the Gross Reservoir Hydroelectric Project (FERC Project No. P-2035), the Commission acted as a cooperating agency in the Corps’ preparation of the Final EIS.<sup>1</sup> Significantly, during its participation as a cooperating agency in preparing the EIS during

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<sup>1</sup> See Commission Supplemental Environmental Assessment (February 6, 2018) at 3.

the 2014 time frame, the Commission never opened a formal docket<sup>2</sup> or invited the parties to intervene before the Commission.

On November 26, 2016, Denver Water filed with the Commission the final application to amend the project license for the Gross Reservoir Hydroelectric. On February 1, 2017, the Commission issued public notice of Denver Water's amendment application and invited parties to intervene in the proceeding.<sup>3</sup> The Commission's February 2017 Notice did not mention that the Gross Reservoir expansion had been the subject of the Corps' FEIS in which the Commission had been a cooperating agency, or otherwise discuss whether any additional independent environmental review by the Commission would follow. Because Save the Colorado was focused on the Corps' EIS for the enlargement of the entire Moffat Collection System, it saw no reason at this time to intervene or otherwise participate in the Commission proceeding which it viewed as separate from the Corps' NEPA process. On July 6, 2017, the Corps issued its Record of Decision for the proposed project.

On February 6, 2018, the Commission released the 142-page Supplemental Environmental Assessment for Amendment of Hydropower License for the Gross Reservoir Hydroelectric Project ("Supplemental EA"), and on February 27, 2018, extended the deadline for comments on the Supplemental EA to April 9, 2018. The Supplemental EA contains extensive new technical information about many aspects of the project which were not disclosed in the

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<sup>2</sup> Although the preliminary application document for the license amendment was filed in June 2008, parties do not have an opportunity to intervene in the preliminary proceeding because it is not a formal docket.

<sup>3</sup> See February 1, 2017 Notice to Intervene, FERC Access No. 20170201-3012.

2014 Corp's FEIS, or included in the Corps' Record of Decision issued in July 2017. As the Supplemental EA at 3 states:

At the time the Final EIS was produced, not all aspects for enlarging Gross Reservoir had been completed and not all aspects of the proposed license amendment had been finalized. The Supplemental EA examines the effects of the proposed action before the Commission not addressed in the Final EIS.

In short, the Commission's Supplemental EA is an extension of the Corps' EIS process. The Supplemental EA effectively acknowledged the inadequacy of the Corps' EIS - on which the Commission had been a cooperating agency - and bolstered or finalized many of the findings in the FEIS. Additionally, the Supplemental EA is the only NEPA-required review conducted by the Commission. Recognizing that the Commission's Supplemental EA had effectively reopened and extended the NEPA review process, Save the Colorado, on March 26, 2018, sought to intervene to preserve its ability to challenge the Supplemental EA findings modifying the Corps' FEIS. Save the Colorado's Motion for Intervention was timely filed before April 9, 2018, the deadline for filing comments on the Supplemental EA.

## **II. COMMISSION DENIAL OF MOTION TO INTERVENE**

On August 1, 2018, the Commission denied Save the Colorado's Motion to Intervene finding that Save the Colorado had not presented good cause for not previously filing a motion to intervene. Although the Commission admitted that the Supplemental EA was an extension of the Corps' original FEIS process and explained that the Supplement addressed only those issues that "were not addressed in the Army Corps' April 25, 2014 Final Environmental Impact Statement," (*See Notice*), the Commission incorrectly found that this new information did not justify the untimely intervention. The Commission never discussed that Save the Colorado's intervention would not disrupt the proceeding, nor that the denial of Save the Colorado's

motion would cause the organization great prejudice because absent intervention, the new analysis could not be challenged by Save the Colorado on judicial review. This petition for rehearing followed.

## **ARGUMENT**

### **I. SAVE THE COLORADO'S MOTION TO INTERVENE WAS NOT UNTIMELY**

Section 380.10 of the Commission's regulations, 18 C.F.R. §380.10 provides in relevant part that:

Any person who files a motion to intervene on the basis of a draft environmental impact statement will be deemed to have filed a timely motion, in accordance with § 385.214, as long as the motion is filed within the comment period for the draft environmental impact statement.

The deadline for comments on the DEIS prepared by the Corps with the Commission as a cooperating agency was March 17, 2010. At that time, however, the Commission had not invited motions to intervene and therefore, Save the Colorado could not have before that deadline.

The Commission's supplemental EA -- by its own admission - extended the NEPA process. The supplemental EA addressed new information unknown at the time that the DEIS and FEIS were prepared and the Corp's ROD was issued, and offered additional technical analysis and mitigation measures to fill the holes in the original NEPA analysis. In other words, the supplemental EA is part and parcel of the original EIS and represents the only NEPA analysis that occurred after the final license amendment was filed. As such, under Section 380.10 the deadline for timely intervention runs through the deadline for comments on the EA. Here, Save the Colorado filed a motion to intervene on March 26, 2018, and the

deadline for comments on the EA was extended through April 9, 2018. Thus, Save the Colorado's Motion to Intervene was timely, and should not have been denied.

Denying Save the Colorado's motion to intervene deprives it of rights accorded to other parties participating in the Commission's NEPA process. As discussed, under Section 380.10 of the Commission's regulations, interventions are considered timely if filed before the deadline for comments on the DEIS. Had the Commission prepared its own DEIS instead of cooperating with the Corps, Save the Colorado's motion to intervene would have been deemed timely. But instead, the Commission bifurcated the environmental review process, first, participating as a cooperating agency on the EIS at a time when Save the Colorado could not have intervened and subsequently by initiating a supplemental environmental review proceeding that the Commission now claims Save the Colorado is time-barred from participating in as a party. Because the Commission's ruling deprives Save the Colorado of the same rights accorded to other parties under Section 380.10 of its regulations, the Commission must reverse its earlier notice denying intervention.

**II. THE COMMISSION WAS ARBITRARY AND CAPRICIOUS IN DENYING SAVE THE COLORADO'S MOTION TO INTERVENE BECAUSE GOOD CAUSE EXISTED TO SUPPORT THE REQUEST AND INTERVENTION WOULD NOT DISRUPT THE PROCEEDING OR PREJUDICE OTHER PARTIES.**

As argued above, Save the Colorado's Motion to Intervene is timely and should not have been denied. That said, should the Commission erroneously continue to characterize the motion as out of time, the Commission must nevertheless reverse its denial because Save the Colorado's request was supported by good cause and would not disrupt the proceedings or prejudice the other parties.

The Commission's regulations on intervention out of time state that the Commission may consider whether:

- (i) The movant had good cause for failing to file the motion within the time prescribed;
- (ii) Any disruption of the proceeding might result from permitting intervention;
- (iii) The movant's interest is not adequately represented by other parties in the proceeding;
- (iv) Any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention...

18 C.F.R. §385.214(d).

“Under FERC’s regulations, “good cause” for failing to file a timely motion to intervene was only one of three factors to be weighed when considering whether later intervention should be allowed. The agency additionally [must] consider whether later intervention would disrupt the proceedings and cause undue prejudice or burden to existing parties.” *Covelo v. Indian Cmty. v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990); *see also City of Orrville v. FERC*, 147 F.3d 979, 987 (D.C. Cir. 1998)(citing *Covelo*).

The Commission’s analysis fell short of what is required by its own regulations. Save the Colorado’s late motion to intervene neither disrupted the proceedings nor caused prejudice to existing parties. Save the Colorado did not seek additional delays to accommodate its participation in the proceeding but instead filed its extensive comments on the Commission’s Supplemental EA in a timely fashion. Moreover, because Save the Colorado retained the right to file comments on the Supplemental EA whether or not it could intervene, it is difficult to see

how its comments criticizing the Supplemental EA could cause prejudice to Denver Water which opposed Save the Colorado's motion.

The Commission assumed without any support in the record that Save the Colorado had slept on its rights. But as Save the Colorado explained, back in February 2017, when the Commission published notice of the Denver Board's amendment application, Save the Colorado did not and could not anticipate that the Commission would primarily rely on the Corps' EIS to evaluate the impacts of the license amendment or subsequently take the unusual step of using a Supplemental EA to backfill the deficiencies in the earlier Corps' EIS. Indeed, the February 2017 notice of the license amendment did not make any mention of the relationship between the Corps' EIS for the Moffat Water Collection System permits and the license amendment before the Commission. Had the Commission stated in the February 2017 notice that it intended to rely on the Corps' NEPA analysis and only prepare an EA for the project that would supplement the Corps' EIS, Save the Colorado could have understood the need to intervene immediately as it was well aware of the deficiencies in the Corps' analysis. But lacking public disclosure of this approach to the NEPA review, Save the Colorado had no reason at the time to intervene in the Commission process.

For that reason, the Save the Colorado has been severely prejudiced by the Commission's denial of its motion to intervene. Without intervenor-status, Save the Colorado cannot challenge the Commission's deficient Supplemental EA analysis, thus shielding those findings from rehearing or judicial review. Because the Commission's EA modifies and updates the underlying Final EIS, Save the Colorado is further concerned that the Corps will attempt to rely on the Commission's Supplemental EA to defend the Corps' flawed Final EIS. Lack of

intervenor status thus also potentially compromises Save the Colorado's ability to challenge the Corps' Final EIS. For all of these reasons, good cause exists to warrant late intervention.

**CONCLUSION**

WHEREFORE for the foregoing reasons, Save the Colorado respectfully requests that the Commission GRANT its motion to intervene.

Respectfully submitted,

*/s/Carolyn Elefant*

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