IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 07-73664, *et al*.

CALIFORNIA TROUT, *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

CYNTHIA A. MARLETTE
GENERAL COUNSEL

ROBERT H. SOLOMON
SOLICITOR

HOLLY E. CAFER
ATTORNEY

FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, D.C. 20426

AUGUST 13, 2008

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

COURT CASES:

TABLE OF AUTHORITIES

PAGE

COURT CASES:

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

PAGE

ADMINISTRATIVE CASES:

TABLE OF AUTHORITIES

PAGE

TABLE OF AUTHORITIES

PAGE

REGULATIONS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 07-73664, *et al.*

CALIFORNIA TROUT, *ET AL.*,
PETITIONERS,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENT.

ON PETITIONS FOR REVIEW OF ORDERS OF THE
FEDERAL ENERGY REGULATORY COMMISSION

BRIEF FOR RESPONDENT FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF THE ISSUE

Whether the Federal Energy Regulatory Commission ("Commission" or "FERC") properly exercised its broad discretion under the Federal Power Act and its procedural regulations when it denied motions to intervene filed nearly two years late by Petitioners California Trout ("CalTrout") and Friends of the River ("Friends," jointly "Petitioners"), where Petitioners fully participated in the Commission's ongoing proceeding, were well aware of the potential issues in the proceeding from the outset and yet chose not to timely intervene.

COUNTERSTATEMENT OF JURISDICTION

Jurisdiction is proper under section 313(b) of the Federal Power Act ("FPA"), 16 U.S.C. § 825*l*(b), except with regard to two arguments that CalTrout and Friends failed to raise on rehearing before the Commission. First, neither CalTrout nor Friends raised the argument on rehearing before the Commission that the Commission's decision to issue an environmental assessment ("EA"), and not an environmental impact statement, caused them to realize they needed to intervene. Br. at 32; *see infra* pp. 26-27. Second, both CalTrout and Friends failed to raise objections (Br. at 46) to the Commission's denial of their late interventions based on the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, on rehearing before the Commission. *See infra* pp. 35-36. As further discussed below, Petitioners' failure to raises these issues on rehearing deprives this Court of jurisdiction over these issues under FPA § 313(b), 16 U.S.C. § 825*l*(b).

STATUTORY AND REGULATORY PROVISIONS

The applicable statutes and regulations are contained in the Addendum to this brief.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

This case arises out of an ongoing Commission proceeding concerning a license amendment application for the California Aqueduct Project ("Project"), a

Commission-licensed hydroelectric project. The licensees filed the amendment application with the Commission in 2005, and the Commission issued public notice, soliciting comments and interventions, with a deadline in July 2005. Notice of Application for Amendment of License and Soliciting Comments, Motions to Intervene, and Protests, ARI 4:1 ("Notice").[1] The Commission has yet to issue a decision on the amendment application, and this case concerns only the Commission's denial of CalTrout and Friends' late intervention motions.

CalTrout and Friends both received notice of the amendment application and have fully participated in the Commission's proceeding, with CalTrout filing three sets of comments with the Commission even before the July 2005 intervention deadline. CalTrout Comments (filed Apr. 6, 2005) ("CalTrout First Comments"), ARI 2:1; CalTrout Supplemental Comments (filed Apr. 25, 2005) ("CalTrout Second Comments"), ARI 3:1; CalTrout Comments (filed July 14, 2005) ("CalTrout Third Comments"), ARI 6:1; *see also* CalTrout and Friends Comments on Draft EA (Apr. 30, 2007), ARI 13:1. However, neither CalTrout nor Friends moved to intervene in the proceeding until nearly two years after the deadline for interventions, following Commission staff's issuance of the draft EA for the

[1] Citations to specific pages of record documents follow the format used in Petitioners' Excerpts of Record. The first number refers to the Amended Record Index ("ARI"), or record item number. The second number refers to the page within that document.

proposed amendment. *See* CalTrout Motion for Late Intervention, ARI 10:1 (Apr. 13, 2007) ("CalTrout Motion"); Friends Motion to Intervene Out of Time (June 11, 2007), ARI 16:i ("Friends Motion").

The Commission denied CalTrout and Friends' late motions to intervene, explaining that they had failed to justify their delay, as they knew of the potential issues in the case from the outset. *California Dep't of Water Resources*, Notice Denying Late Intervention, Project No. 2426-197 (May 18, 2007) ("CalTrout Notice"), ARI 14:1, *reh'g denied*, 120 FERC ¶ 61,057 (July 19, 2007) ("CalTrout First Rehearing Order"), ARI 21:1, *reh'g rejected*, 120 FERC ¶ 61,248 (Sept. 20, 2007) ("CalTrout Second Rehearing Order"), ARI 24:1; *California Dep't of Water Resources*, Notice Denying Late Intervention, Project No. 2426-197 (Nov. 28, 2007) ("Friends Notice"), ARI 26:1, *reh'g denied*, 122 FERC ¶ 61,150 (Feb. 21, 2008) ("Friends Rehearing Order"), ARI 29:1. Before this Court, CalTrout and Friends challenge these orders, claiming that changed circumstances and the Commission's obligations under other statutes compel it to exercise its discretion to grant their late interventions.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Framework

Part I of the Federal Power Act ("FPA"), § 4 *et seq.*, 16 U.S.C. § 797 *et seq.*, constitutes "a complete scheme of national regulation" to "promote the

comprehensive development of the water resources of the Nation." *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 180 (1946). Under this Part, the Commission is authorized to issue licenses for the construction, operation and maintenance of hydroelectric projects on jurisdictional waters, and, as relevant here, to amend such licenses upon application by the licensee. *See* FPA § 6, 16 U.S.C. § 799.

The Commission's licensing process is designed to ensure that it has adequate information to satisfy its responsibilities under the FPA, National Environmental Policy Act ("NEPA"), 55 U.S.C. § 4321 *et seq*., and other federal statutes. Under the FPA, the Commission must ensure that the project approved, or as here, amended, will be "best adapted to a comprehensive plan for improving or developing a waterway" for a number of purposes, such as "the improvement and utilization of water-power development, . . . the adequate protection, mitigation, and enhancement of fish and wildlife . . . , and . . . other beneficial public uses," FPA § 10(a)(1), 16 U.S.C. § 803(a)(1). Under NEPA, the Commission must follow certain procedures designed to ensure that environmental effects of proposed actions are "adequately identified and evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

Under the FPA and the Commission's regulations, a person may become a "party" to a proceeding by filing a timely motion to intervene. *See* FPA § 308, 16

U.S.C. § 825g(a); 18 C.F.R. § 385.214. A person filing a late motion to intervene must demonstrate good cause for failing to timely intervene. 18 C.F.R. § 385.214(b)(3); *see also* 18 C.F.R. § 385.214(d)(1)(i).

B. Events Leading To The Challenged Orders

This case concerns certain procedural orders in an ongoing license amendment proceeding for the California Aqueduct Project, licensed to the California Department of Water Resources and the City of Los Angeles (together, "licensees"). On March 17, 2005, the licensees filed an application to amend the project license to change the instream flow requirements for Piru Creek below Pyramid Dam, and to modify the trout fishery requirements of the license. Amendment Application, ARI 1:1. The licensees requested this amendment, which is intended to simulate natural flows, to avoid an incidental take of the endangered arroyo toad under the Endangered Species Act. Notice, ARI 4:2.

In a separate proceeding, the licensees also sought a temporary waiver of the license's relevant minimum flow requirements to allow the flow modifications in Piru Creek to go into effect pending the Commission's review of the amendment application. In an order not on review here, the Commission approved a temporary waiver of those minimum flow requirements. *California Dep't of Water Resources*, 111 FERC ¶ 62,040 (Apr. 12, 2005).

CalTrout filed two sets of comments on the proposed license amendment even before the Commission issued public notice of the application on June 8, 2005. CalTrout First Comments, ARI 2:1; CalTrout Second Comments, ARI 3:1; Notice, ARI 4:1. The public notice solicited comments, protests and motions to intervene and established a deadline of July 8, 2005. Notice, ARI 4:1. CalTrout filed a third set of comments, dated July 8, 2005, on July 14, 2005, but did not move to intervene. CalTrout Third Comments, ARI 6:1.

On March 1, 2007, Commission staff issued a draft EA on the proposed amendment, and solicited public comments. Notice of Availability of Draft EA (Mar. 1, 2007), ARI 9:A. Both CalTrout and Friends filed comments on the draft EA on April 30, 2007. CalTrout and Friends Comments on Draft EA (Apr. 30, 2007), ARI 13:1; Friends Comments on Draft EA (Apr. 30, 2007) (forwarding letters from public), ARI 12:1.

The licensee's amendment application remains pending with the Commission, although Commission staff recently issued the final EA. *See* Notice of Availability of Final EA, Project No. 2426-197 (June 12, 2008) (Attachment A to Petitioners' Request for Judicial Notice). FERC staff has indicated that the Commission will not rule on the amendment application earlier than the end of 2008, in light of an outstanding state authorization. *See* Letter, Re: Issuance of

Final Assessment (June 17, 2008) (Attachment B to Petitioners' Request for Judicial Notice).

C. The Commission's Proceedings And Orders

1. The Motions To Intervene And Initial Orders

CalTrout moved to intervene in the Commission's proceeding on April 13, 2007, after the Commission issued its draft EA. CalTrout Motion, ARI 10:1. In support of its motion, CalTrout asserted that it should be permitted to intervene to protect its interests in certain species of concern, including the endangered steelhead trout, that it believed could be adversely affected by the proposed license amendment. ARI 10:2-4. CalTrout also claimed that it was not adequately represented by other parties to the proceeding, and that granting it party status would not disrupt the proceeding or burden or prejudice existing parties. ARI 10:4, 5.

The Commission issued a notice denying CalTrout's late intervention on May 18, 2007. CalTrout Notice, ARI 14:1. The Notice explained that CalTrout had "failed to explain why it did not seek to intervene until now, 21 months after the deadline" and did not provide "good cause for its late filing," as required by the Commission's regulations, 18 C.F.R. §§ 385.214(b)(3), 385.214(d). ARI 14:1, 2.

Subsequently, on June 11, 2007, Friends filed a motion for late intervention. Friends Motion, ARI 16:1. Like CalTrout, Friends stated that its intervention was

based on its interests in certain species of concern, including endangered steelhead, that it believed could be adversely affected by the proposed license amendment. ARI 16:1-4. Friends claimed that it had "no actual notice of the deadline for motions to intervene" (ARI 16:3), that even if it had received actual notice, it "would still not have known of its need to intervene until FERC released the [draft] EA" (ARI 16:4), and that significant developments occurring after the deadline provided good cause for its late filing. ARI 16:4-5. Friends also argued that the Commission should granting its intervention because no other parties represent its interests (ARI 16:6), and it would not disrupt the proceeding or burden or prejudice existing parties. ARI 16:5.

The Commission denied Friends' motion for late intervention on November 28, 2007. Friends Notice, ARI 26:1. The Commission explained that, because it had published public notice of the amendment application, Friends was on notice of the application. ARI 26:1. By failing to timely intervene "based on the reasonably foreseeable issues arising from" the amendment application and FERC's notice, Friends "assume[d] the risk that the case [would] be settled in a manner that is not to its liking." ARI 26:2.

2. The Commission's Rehearing Orders

Both CalTrout and Friends sought rehearing of the notices denying late intervention, raising essentially the same issues.

CalTrout argued that it had demonstrated good cause for missing the intervention deadline, and that changed circumstances, including new documents concerning the potential impact of the proposed amendment on steelhead, also justified its delay. CalTrout Rehearing Request (filed June 11, 2007), ARI 17:1.

By order issued July 19, 2007, the Commission denied CalTrout's request for rehearing, along with a rehearing request filed by the U.S. Department of Commerce National Marine Fisheries Service ("NOAA Fisheries") of a separate Commission notice denying that agency's late intervention request. CalTrout First Rehearing Order, ARI 21:1. The Commission explained that when parties seek to intervene in a proceeding "well past its initial stages" they must "provide a more substantial justification." *Id*. at P 8, ARI 21:3. CalTrout did not provide "any convincing reason why [it] could not have intervened earlier in the proceeding," particularly where it had participated in the proceeding from the outset, and voiced concern about the effect of the proposal on steelhead in comments filed prior to the deadline for interventions. *Id*. at P 13, ARI 21:6. Permitting new interventions every time new information is placed in the record would thwart the Commission's regulations providing for an orderly process. *Id*. at P 14, ARI 21:7-8. And, the Commission found that granting CalTrout's late intervention would "delay, prejudice, and place additional burdens" on the proceedings and the parties. *Id*.

CalTrout sought rehearing for a second time, primarily arguing that the Commission erred in failing to address its argument that NEPA required the Commission to grant its intervention. CalTrout Second Rehearing Request (filed Aug. 17, 2007), ARI 22:1. The Commission rejected CalTrout's request for rehearing, explaining that rehearing was not available because the First Rehearing Order did not modify "the result reached in the original order in a manner that gives rise to a wholly new objection." CalTrout Second Rehearing Order at P 10, ARI 24:3-4. The Commission also noted that it had addressed CalTrout's NEPA argument on rehearing, explaining that the timing of the issuance of the EA is irrelevant, and that CalTrout's comments on the EA would be accorded full weight regardless of its party status. *Id*. at P 13, ARI 24:5. Further, the Commission confirmed that "[p]arty status is not a prerequisite for participation in [its] NEPA process." *Id*. at P 19, ARI 24:8. The Commission found arguments CalTrout raised for the first time in its second rehearing request to be both time-barred and meritless. *Id*. at PP 14-18, ARI 24:5-7.

On rehearing, Friends also relied upon changed circumstances to justify filing its motion to intervene over two years late, but additionally argued that it did not receive actual notice of the deadline for interventions. Friends Rehearing Request (filed Dec. 19, 2007), ARI 27:3, 5. Friends further elaborated on the NEPA arguments CalTrout raised in its second rehearing request, asserting that

NEPA's public participation requirements and the Commission's NEPA regulations required the Commission to grant its late motion. ARI 27:6-10.

The Commission denied Friends' request for rehearing by order issued February 21, 2008. Friends Rehearing Order, ARI 29:1. The Commission applied the same standard it had to CalTrout, requiring Friends to "provide substantial justification to show good cause for being allowed to intervene nearly two years after the deadline for interventions." *Id*. at P 8, ARI 29:2. As with CalTrout, the Commission found unpersuasive Friends' argument that new information regarding the potential impact on steelhead justified its delay. The Commission explained that "[i]t is the very nature of our licensing actions (such as amendments) that studies are conducted and new information is developed," and therefore, the fact that new information was placed in the record cannot justify late intervention where, as here, Friends was aware that "resources of concern to [it] may be affected by the proposed action." *Id*. at P 13, ARI 29:7. With regard to NEPA, the Commission explained that it had provided ample opportunity for public participation, as demonstrated by Friends' participation, and that it would consider all comments from the public without regard to party status. *Id*. at P 16, ARI 29:9.

SUMMARY OF ARGUMENT

The only issue before this Court is whether the Commission abused its discretion in denying CalTrout and Friends' motions for late intervention. Both CalTrout and Friends acknowledge that they were aware of the potential issues in this proceeding, including the potential impact on endangered species, from the time the licensees filed the amendment application – if not before. Indeed, both CalTrout and Friends fully participated in the Commission's proceeding, voicing their concerns about these issues in written comments, before finally choosing to intervene nearly two years after the deadline for doing so. Because CalTrout and Friends have not substantially justified their choice to participate, but not to timely intervene, in light of their knowledge of the issues, the Commission did not abuse its discretion in denying their motions for late intervention.

In support of their claims, Petitioners point to nothing new – only to documents and events that amplified their existing concerns regarding the same issues. Petitioners assert that their intervention was unnecessary based on, for instance, their expectation that an Endangered Species Act ruling by another agency would adequately protect steelhead affected by the Project, and their belief that the Commission would adopt their views on the potential impacts of the proposal. But, the Commission's policy, as embodied in its regulations and precedent, requires parties to act promptly to protect their interests, not merely to

wait and see what happens. CalTrout and Friends waited nearly two years while the Commission prepared the draft EA, saw results not to their liking, and only then sought to protect those same interests that had been identified at the outset of the proceeding.

CalTrout and Friends mistakenly rely on NEPA and the Endangered Species Act to justify their extended delay in moving to intervene. As evidenced by Petitioners' multiple comments in the Commission's proceeding, which the Commission has made clear it will consider, the Commission has ensured meaningful public participation, and NEPA, in this respect, requires nothing more. Petitioners' Endangered Species Act claims are not only jurisdictionally barred because they were not raised on rehearing to the Commission, but they are merely premature attempts to challenge the merits of a draft EA upon which the Commission has yet to rule. The Commission certainly bears important responsibilities under both statutes, but this does not cure Petitioners' own error in failing to timely intervene.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews Commission decisions on motions for late intervention under the deferential "abuse of discretion" standard. *The Covelo Indian Community v. FERC*, 895 F.2d 581, 587 (9th Cir. 1990) ("FERC did not abuse its discretion in denying the Community's late request to intervene"); *see also State of Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 713 n.13 (9th Cir. 2003) (rejecting petitioner's argument that FERC abused its discretion in denying late motion to intervene); *see also So. Cal. Edison v. Lynch*, 307 F.3d 794, 802 (9th Cir. 2002) (reviewing a district court's denial of permissive intervention for abuse of discretion). In general, courts use a higher level of deference when examining the Commission's application of procedural rules. *See, e.g., Power Co. of America v. FERC*, 245 F.3d 839, 843 (D.C. Cir. 2001) (petitioner did not demonstrate good cause for intervening late, "certainly not to a degree sufficient to warrant our upsetting the Commission's application of its own procedural rule"). When considering whether an agency abused its discretion, the "court must consider whether the [agency] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005) (citation omitted)

("An abuse of discretion is 'a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effect of the facts as are found.'").

FERC's factual findings are conclusive if supported by substantial evidence. FPA § 313(b), 16 U.S.C. § 825*l*(b); *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003). Further, FERC's interpretations of its own orders are entitled to deference. *Cal. Dep't of Water Res. v. FERC*, 489 F.3d 1029, 1036 (9th Cir. 2007). Likewise, FERC's interpretations of its regulations warrant deference, unless the interpretation is plainly erroneous. *Id*. at 1035-36.

II. FERC PROPERLY EXERCISED ITS DISCRETION UNDER ITS RULES GOVERNING LATE MOTIONS TO INTERVENE.

A. The Commission Appropriately Found That Petitioners Failed To Meet The Standard For Late Interventions, Because They Were Aware Of The Potential Issues In The Proceeding From The Outset.

CalTrout and Friends overlook the logical fallacy in their arguments. They acknowledge that they "had informed FERC" that the proposed amendment raised issues regarding the impact on endangered species "from the outset" (Br. at 30), but claim that they saw no need to intervene until, they assert, later developments increased the significance of those *same issues*. *See, e.g.*, Br. at 33. Far from establishing the "good cause" required by the Commission's regulations and

policy, the claims of CalTrout and Friends beg the question why they did not intervene to protect their interests in those issues from the beginning.

The Commission's regulations require late motions to intervene to "show good cause why the time limitation should be waived." 18 C.F.R. § 385.214(b)(3). In acting on such a motion, 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; and
> (v) The motion conforms to the requirements of paragraph (b) of this section [pertaining to timely motions].

18 C.F.R. § 385.214(d).

Where, as here, a motion to intervene is filed after the earliest stages of a proceeding, but before the Commission issues a decision, the Commission requires a more substantial justification to satisfy the "good cause" standard. As the Commission explained, it is "more liberal in granting late intervention at the early stages of a proceeding, but becomes progressively more restrictive as the proceeding nears its end." CalTrout First Rehearing Order at P 8, ARI 21:2-3 (citing cases); Friends Rehearing Order at P 8, ARI 29:2 (same). Here, contrary to CalTrout and Friends' claim (Br. at 61), the Commission did not apply its most

stringent standard (requiring "extraordinary circumstances" rather than good cause). Rather, the Commission explained that, because CalTrout and Friends "are seeking to intervene in a proceeding well past its initial stages, [they] therefore must provide *a more substantial justification to show good cause* for being allowed to intervene nearly two years after the commencement of [the] proceeding." CalTrout First Rehearing Order at P 8, ARI 21:3 (emphasis added); Friends Rehearing Order at P 8, ARI 29:2; *see also Erie Boulevard Hydropower, LP*, 117 FERC ¶ 61,189 at 61,931 n.16 (2006) ("the passage of time may well affect our conclusions regarding good cause").

The Commission's intervention rules are intended to "ensure an orderly administrative process." CalTrout First Rehearing Order at P 14, ARI 21:7; Friends Rehearing Order at P 13, ARI 29:7. But, they are also intended to facilitate that process. As the Commission explained, "[a] key purpose of the intervention deadline is to determine, early on, who the interested parties are and what information and arguments they can bring to bear." CalTrout First Rehearing Order at P 9, ARI 21:4 (quoting *Summit Hydropower*, 58 FERC ¶ 61,360 at 62,200 (1992) (denying late intervention to state agency which had mistakenly assumed its concerns with the proposal would be addressed through a separate process)); Friends Rehearing Order at P 9, ARI 29:3. The Commission's commitment to enforcing its procedural rules in these circumstances is consistent with both its own

precedent (*see, e.g., Duke Energy Shared Services, Inc.*, 119 FERC ¶ 61,146 at 61,949 (2007) (denying motion for late intervention filed thirteen days late, but prior to Commission decision, because movant failed to demonstrate good cause for its delay where notice had been timely published in the Federal Register) *cited in* CalTrout First Rehearing Order at P 9 n.4, ARI 21:3 *and* Friends Rehearing Order at P 9 n.5, ARI 29:3)), and the courts' "reluctan[ce] to force agencies to prolong proceedings for later comers." *Covelo Indian Community*, 895 F.2d at 587 (citation omitted).

"Under the Commission's rules, . . . the burden is on the untimely movant to show good cause to intervene." *Power Co. of America*, 245 F.3d at 843. CalTrout and Friends' purport to justify their delay based on their assumptions that the proceeding would progress and conclude in their favor. *See* Br. at 32 (Petitioners "assume[d] that FERC would comply with NEPA"); CalTrout Rehearing Request, ARI 17:4-5 (CalTrout expected FERC to solicit interventions again), 17:6-7 (CalTrout "had believed that the [Endangered Species Act] would protect [steelhead] . . . , and thus concluded that the organization's intervention . . . was unnecessary"); Friends Rehearing Request, ARI 27:4 (Endangered Species Act decision by another federal agency "was particularly surprising"). But, the Commission, applying well-established legal principles and precedent, found that Petitioners' reliance on assumptions does not establish good cause.

CalTrout correctly notes that, from the very beginning of the Commission's proceeding, even before the Commission issued public notice of the proposed license amendment, it has raised with the Commission concerns regarding potential impacts on endangered species and the need to ensure compliance with related laws. Br. at 30-32. CalTrout filed two sets of comments on the proposed license amendment before the Commission even issued public notice. *See* CalTrout First Comments, ARI 1:1; CalTrout Second Comments, ARI 2:1. While CalTrout also filed comments in response to the Commission's notice soliciting interventions and comments (ARI 4:1), dated on the final day of the intervention period, it inexplicably chose not to file a motion to intervene at that time. *See* CalTrout Third Comments, ARI 6:1.

Friends has likewise been aware of the potential issues in this proceeding from the outset. *See* Friends Rehearing Order at P 12, ARI 29:5-6 (noting that licensees served Friends with the application). Indeed, as Friends explained in its late motion, it lobbied for legislation (enacted in 1992) designating Piru Creek as a study river under the Wild and Scenic Rivers Act and has "played a key role in informing the public and local elected officials of the problems associated with [the] flow plan for Piru Creek." Friends Motion, ARI 16:2, 3. But, Friends claims that it had no need to intervene until later developments – the Commission's issuance of the draft EA and the identification of new information about species of

concern – because it assumed the Commission would act in its favor. *See, e.g.*, Br. at 31-32. Even after those late developments, however, although Friends filed timely comments on the draft EA on April 30, 2007 (ARI 13:1; ARI 12:1), it still chose not to move to intervene in the proceeding until nearly two months *after* the close of the draft EA comment period. *See* Friends Motion, ARI 16:i (filed July 11, 2007).

"Rules is rules" and the Commission appropriately applied its regulations and long-standing precedent here in finding inadequate Petitioners' choice to delay moving to intervene until well past the early stages of the proceeding. *Granholm v. FERC*, 180 F.3d 278, 282 (D.C. Cir. 1999) (citation omitted). This alone is sufficient to justify the Commission's decision to deny Petitioners' late interventions, particularly under the abuse of discretion standard applicable to this Court's review. *See Covelo Indian Community*, 895 F.2d at 587 (applying abuse of discretion standard to intervention decision).

B. The Additional Information On Which CalTrout And Friends Rely Does Not Justify Their Delay In Moving To Intervene.

As the Commission found, the additional information concerning the potential impact of the proposed license amendment on steelhead that CalTrout and Friends point to does not justify their delay in moving to intervene. CalTrout First Rehearing Order at P 14, ARI 21:8; Friends Rehearing Order at P 13, ARI 29:7.

That information merely confirms what CalTrout and Friends already knew – that the proposed amendment potentially raises issues with regard to steelhead. *Id*.

CalTrout and Friends rely on the release of three documents to support their delay in intervening until April and June 2007, respectively: 1) a January *2006* NOAA Fisheries final rule listing steelhead trout as endangered but, unexpectedly according to Petitioners, omitting the relevant portion of Piru Creek from the critical habitat designation; 2) a February *2006* report, which Petitioners allege became available in April 2007, prepared by the licensees' consultant, indicating that the proposed amendment would reduce summer flows; and 3) a November *2006* NOAA Fisheries report genetically linking rainbow trout to steelhead. *See* CalTrout First Rehearing Order at P 10, ARI 21:5; Friends Rehearing Order at P 10, ARI 29:4-5.

CalTrout and Friends claim that the release of these documents heightened their concerns regarding the potential impact of the proposal on steelhead, prompting their need to intervene. Br. at 34-37. While the Commission agreed that the documents "provided additional information about steelhead," it concluded that the development of "additional information" about an *existing* issue – one that CalTrout and Friends were aware of from the outset – did not provide good cause for their late intervention. CalTrout First Rehearing Order at P 14, ARI 21:8; Friends Rehearing Order at P 13, ARI 29:7. "[T]he very nature of [FERC's]

licensing actions (such as amendments) [is] that studies are conducted and new information is developed as they proceed." CalTrout First Rehearing Order at P 14, ARI 21:8; Friends Rehearing Order at P 13, ARI 29:7. Thus, if FERC "allow[ed] new intervention every time a new study was conducted or new information was otherwise placed in the record, [it] would never be able to establish a deadline for interventions, which is necessary . . . to conduct orderly proceedings." *Id.*

In this regard, *Sierra Club v. Nuclear Regulatory Comm'n*, 862 F.2d 222 (9th Cir. 1988), on which CalTrout and Friends rely (Br. at 37-39), is readily distinguishable, even under Petitioners' strained reading of the decision. Contrary to Petitioners' description, in *Sierra Club*, any discussion of the good cause standard, or the timing of the new information, is not controlling because the agency "did not *address* the factors," including good cause, for late-filed "contentions," *i.e.*, issues.[2] *Id.* at 226 (emphasis added). Rather, the agency rejected the Sierra Club's late-filed contention as lacking "reasonable specificity," and the court's holding likewise addressed only this standard. *Id.* at 227. But, even assuming Petitioners correctly understand *Sierra Club*, this case is distinguishable because, as discussed above, the three new documents here merely

[2] Petitioners also incorrectly claim that the agency's decision was "vacated," when it was in fact remanded, with the petition being granted in part and denied in part. *Compare* Br. at 38 *with Sierra Club*, 862 F.2d at 231.

supplement the record on an *existing* issue of which Petitioners were well aware.[3] *See* CalTrout First Rehearing Order at P 14, ARI 21:8; Friends Rehearing Order at P 13, ARI 29:7.

Moreover, because the additional information here concerned an existing, known issue, granting CalTrout and Friends' late intervention would endorse the "wait and see" approach to intervention, contrary to Commission policy. The Commission explained that, under its long-standing precedent, "a party bears the responsibility for determining when a proceeding is relevant to its interests, such that it should file a motion to intervene." CalTrout First Rehearing Order at P 13, ARI 21:7; Friends Rehearing Order at P 12, ARI 29:6. Likewise, "[t]he 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." CalTrout First Rehearing Order at P 9, ARI 21:3; Friends Rehearing Order at P 9, ARI 29:3. Here, CalTrout and Friends acknowledge that they were indeed aware of the issues "from the outset" (Br. at 30), but yet chose not to timely intervene. *See Georgia-Pacific Corp.*, 33 FERC ¶ 61,417 at 61,814 (1985) (denying late intervention, filed before FERC decision,

[3] *Union of Concerned Scientists v. Nuclear Regulatory Comm'n*, 920 F.2d 50, 52-53 (D.C. Cir. 1990), which merely noted but did not hold that the late development of new information can constitute good cause, is distinguishable for the same reason. *See* Br. at 38.

where movant environmental organization "was fully aware of the pendency of the case before the deadline for filing a petition to intervene had passed"), *cited in* CalTrout First Rehearing Order at P 9 n.7, ARI 21:4 *and* Friends Rehearing Order at P 9 n.7, ARI 29:4.

Finally, Petitioners' argument that their need to intervene was triggered by three documents published between January and November 2006 is "seriously undercut" by their delay in moving to intervene until April and June 2007, well over a year after NOAA Fisheries published its final rule on steelhead trout. Friends Rehearing Order at P 13, ARI 29:8. Indeed, more than four months prior to moving to intervene, CalTrout actually filed comments (ARI 7:1) with FERC discussing the NOAA Fisheries November 2006 report on steelhead genetics, but again chose not to move to intervene at that time. Friends' delay is particularly egregious, as it did not move to intervene until nearly two months after it claims it received the report of the licensees' consultant. Friends Rehearing Order at P 13 n.23, ARI 29:7.

C. The Commission's Draft EA Does Not Justify CalTrout and Friends' Delay In Moving To Intervene.

As an initial matter, CalTrout and Friends' suggestion that the Court must rule on the adequacy of the Commission's draft EA or its compliance with NEPA, (*see* Br. at 30-32 (arguing draft EA is deficient), 43-46 (arguing FERC has failed its NEPA obligations)), must be rejected. The *only* issue before this Court is

whether the Commission erred in denying CalTrout and Friends' motions to intervene. *See Covelo Indian Community*, 895 F.2d at 586 (holding that the court's "review in this case is limited to FERC's denial of the Community's motion to intervene"). The draft EA was not a basis for the Commission's decision and the Commission has yet to issue a final decision in the underlying proceeding. *See* Br. at 22-23. Thus, CalTrout and Friends not only lack party status, which is necessary to litigate the merits of the proceeding (*see id*. at 585 (citing 16 U.S.C. § 825*l*(b))), but any such attempt would be premature.

Next, CalTrout and Friends' argument that their need to intervene was compelled by the Commission's decision to prepare an EA, rather than an environmental impact statement (Br. at 32), was not adequately preserved, and therefore is not properly before this Court. FPA section 313(b) provides that "[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing . . . ." 16 U.S.C. § 825*l*(b). In their requests for rehearing, both CalTrout and Friends' noted, as factual background, that they had filed comments urging FERC to prepare an environmental impact statement. CalTrout Rehearing Request, ARI 17:2; CalTrout Second Rehearing Request, ARI 22:4 n.5; Friends Rehearing Request, ARI 27:3, ARI 27:8 n.2. But, this court "require[s] much more specificity in the statement of objection in the administrative petition for rehearing

to trigger [its] appellate review . . . ." *High Country Res. v. FERC*, 255 F.3d 741, 746 (9th Cir. 2001); *see* 16 U.S.C. § 825*l*(a) ("The application for rehearing shall set forth specifically the ground or grounds upon which such application is based."). Factual statements – recitations of other pleadings – failing to present an objection or argument are insufficient to confer jurisdiction on this Court.

In any event, however, neither FERC's decision to prepare an EA and not an environmental impact statement, nor Petitioners' concerns over the content of that EA (Br. at 30), or the time Commission staff spent preparing it (Br. at 30, 33) justifies their delay. For reasons of their own choosing, Petitioners decided not to intervene until the proceeding moved in a direction they believe is inconsistent with their expectations and asserted interests. But, Petitioners were not entitled to assume that the Commission would prepare an environmental impact statement or would otherwise act in their favor. CalTrout First Rehearing Order at P 9, ARI 21:4 ("Interested parties are not entitled to hold back . . . [until] events take a turn not to their liking."); Friends Rehearing Order at P 9, ARI 29:3. Indeed, neither CalTrout nor Friends requested that FERC prepare an environmental impact statement (which was not required by the Commission's NEPA regulations, 18 C.F.R. § 380.6) until after FERC released the draft EA.

Petitioners are correct that the Commission has found environmental issues sufficient to justify late intervention in other circumstances (Br. at 57), but, unlike

the cases cited by Petitioners, here Petitioners were "inarguably aware when the application was filed that steelhead trout could be impacted, yet did not intervene in a timely manner." Friends Rehearing Order at P 13, ARI 29:7; *see also* CalTrout First Rehearing Order at P 13, ARI 21:6. As the Commission has held, "an entity cannot 'sleep on its rights' and then seek untimely intervention." CalTrout First Rehearing Order at P 14, ARI 21:7 (citing, *e.g.*, *San Diego Gas & Elec. Co. v. Sellers of Energy & Ancillary Servs. into Markets Operated by the Cal. Indep. System Operator & the Cal. Power Exch.,* 112 FERC ¶ 61,226 at 61,121 n.4 (2005) (movant's mistaken reliance on other parties to protect its interest did not justify late intervention); *Russell Canyon Corp.*, 58 FERC ¶ 61,288 at 61,922 (1992) (movant's mistaken belief in accuracy of legal position did not justify late intervention)); Friends Rehearing Order at P 13, ARI 29:6 (same). In this regard, Friends' decision to file timely comments on the draft EA, but not to file a motion for late intervention until nearly two months later, "weakens its argument that it intervened once it became aware of the contents of the EA." Friends Rehearing Order at P 13 n.23, ARI 29:7.[4]

Likewise, Petitioners' purported concerns regarding the timing of the draft EA (Br. at 30, 33), are unconvincing for the same reason: Petitioners have offered

[4] While CalTrout and Friends filed joint comments on the draft EA (ARI 13:1), only CalTrout moved to intervene during the comment period. Friends inexplicably waited nearly two more months to do so.

no justification for why they could not have timely intervened, or even intervened prior to release of the draft EA. The Commission explained, "[i]t is not unusual in complex administrative proceedings that such a temporal gap [between the notice period and the NEPA document] occurs, and the mere passage of time, by itself, is not enough to excuse the failure of an entity which was on notice of the commencement of the proceeding to move timely to protect its interests." CalTrout Second Rehearing Order at P 13 n.14, ARI 24:5; Friends Rehearing Order at P 17 & n.35, ARI 29:9-10; *see also* CalTrout First Rehearing Order at P 10 n.9, ARI 21:5. In sum, these three assertions do not justify Petitioners' tardiness in light of their knowledge of the potential issues "from the outset." Br. at 30.

CalTrout and Friends' references to proceedings where the Commission has granted late interventions during or even after the comment period for an environmental document are equally unpersuasive. Br. at 58-59. First, the Commission's decisions granting late interventions filed during the comment period on an environmental impact statement are inapposite. While the Commission's NEPA regulations (18 C.F.R. § 380.10(a)(1)(i)) require the Commission to deem such motions timely, in this case because Commission staff prepared an EA, not an environmental impact statement, that requirement does not apply. *See infra* p. 34. Second, none of the cited EA decisions involved

circumstances, such as those here, where the evidence clearly demonstrated that the movants were aware of the issues in the proceeding from the outset and failed to intervene promptly to protect their interests.

CalTrout and Friends' effort to undercut the Commission's citation to other cases in which it denied late intervention by raising factual distinctions (Br. at 62-63), fails as well. In the orders on review, the Commission relied on a long line of its own precedent for the legal principles it applied to the facts here; it did not rely on those cases as factual analogies. CalTrout First Rehearing Order at P 9, ARI 21:4 ("These holdings, which the Commission continues to apply to the facts here, have been affirmed by the courts."); *see also* Friends Rehearing Order at P 9, ARI 29:3. Indeed, the cases cited by the Commission demonstrate that the Commission has applied these legal rules, for example, that parties may not sleep on their rights, in a wide range of factual circumstances (*see, e.g.*, *Mohawk Dam 14 Assoc.*, 52 FERC ¶ 61,232 (1990) (denying motion filed eleven days after deadline); *Erie Boulevard Hydropower, LP*, 117 FERC ¶ 61,189 (denying motions filed thirteen years after deadline for interventions, but prior to Commission's final decision)), including circumstances similar to those here. *See, e.g.*, *Dale L.R. Lucas*, 41 FERC ¶ 61,187 at 61,488 (1987) (denying motion filed nearly two years after the deadline, where movants argued, as Friends did before the agency below (Friends Rehearing Request, ARI 27:3-4), that notice was inadequate). In any event,

however, the instant case, and those Petitioners seek to distinguish, all share the same fatal characteristic: in each case the movants failed to justify their delay in light of their knowledge of the issues in the proceeding at earlier stages. *Summit Hydropower*, 58 FERC ¶ 61,360 at 62,200 (state agency "made the conscious decision not to intervene timely" although it was well aware of the proceeding); *Cogeneration, Inc.*, 54 FERC ¶ 61,178 at 61,542 (1991) (movant federal agency participated, by filing comments, but did not intervene); *Erie Boulevard*, 117 FERC at 61,932-33 (movants were aware of proceeding earlier but did not intervene even though they believed the proposal was not in the public interest); *Dale L.R. Lucas*, 41 FERC at 61,488 (movants had actual notice at commencement of proceeding, and separate notice was not required by NEPA) (citing *Mega Hydro, Inc.*, 38 FERC ¶ 61,313 (1987)).

D. The Commission's NEPA Responsibilities Do Not Require It To Grant CalTrout And Friends' Late Interventions.

CalTrout and Friends' participation in the Commission's ongoing proceeding undermines their argument that the Commission has failed to satisfy NEPA's public participation requirements. Br. at 39-42. Petitioners emphasize the importance of public participation in the NEPA process, and the Commission concurs that it bears the responsibility to encourage "public participation in the evaluation of the environmental consequences" of a proposal. *California v. Block*, 690 F.2d 753, 770-71 (9th Cir. 1982). But, Petitioners do not, and cannot, dispute

that the Commission has ensured meaningful public participation in its ongoing proceeding by soliciting interventions and comments at the time the licensees filed the amendment application and by soliciting comments on the draft EA. CalTrout and Friends have availed themselves of these opportunities several times.

Moreover, the Commission made clear that it will consider CalTrout and Friends' comments in this proceeding (CalTrout First Rehearing Order at P 10 n.9, ARI 21:5; Friends Rehearing Order at P 16, ARI 29:9), consistent with the Commission's policy that "[p]arty status is not a prerequisite for participation in [the Commission's] NEPA process." Friends Rehearing Order at P 16, ARI 29:9; CalTrout Second Rehearing Order at P 19, ARI 24:8. Indeed, FERC staff's recent final EA demonstrates this commitment as it responds in detail to all public comments on the draft EA, including those by CalTrout and Friends. *See* Notice of Availability of Final EA, Project No. 2426-197 (June 12, 2008) (Appendix A) (summarizing and responding to comments received), *available at* http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=11712896. Accordingly, the Commission has satisfied its NEPA responsibility to ensure meaningful public participation in this ongoing proceeding.

Petitioners offer no convincing support for their claim that NEPA's public participation requirements compel the Commission to cast aside its regulations and decades of precedent and grant their unjustifiably late interventions. Br. at 41-42.

As the Commission explained, "[n]othing in NEPA, case law, the FPA, or the Commission's regulations remotely suggests that a decision as to whether an entity can become a party to a proceeding has any bearing on whether an agency has properly facilitated public involvement . . . ." Friends Rehearing Order at P 16, ARI 29:9; CalTrout Second Rehearing Order at P 19, ARI 24:8.

The cases on which CalTrout and Friends rely (Br. at 44-45), are inapposite. *Izaak Walton League of America v. Schlesinger*, 337 F.Supp. 287, 292-93 (D.D.C. 1971), *vacated*, 2 ELR 20388 (D.D.C. 1971), is not only distinguishable, but was vacated by a settlement in that proceeding. *Izaak Walton* once again involved the development of new information after the deadline for motions to intervene. *Id*. at 292 ("the manner in which the thermal effluents would be discharged . . . was not disclosed until" after the close of the intervention period). Here, however, the new documents Petitioners rely on merely add to the record on existing issues which were well known to Petitioners "from the outset" (Br. at 30) of the proceeding. *See supra* Part II.B.

Further, cited precedent suggesting that courts disfavor limitations on access to judicial review in NEPA cases (Br. at 44-46) does not further Petitioners' cause because the Commission provided opportunities for both intervention and public participation, and CalTrout and Friends chose to avail themselves of the latter but not the former. Thus, while CalTrout and Friends are correct that the

Commission's policies support "meaningful public participation in the NEPA process" (Br. at 41), that does not guarantee access to judicial review to those who sleep on their rights.

Finally, the Commission's NEPA regulations do not require it to grant CalTrout and Friends' late motions to intervene, as CalTrout and Friends posit. Br. at 40-41. The Commission's NEPA regulations provide that "[a]ny 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 . . . , as long as the motion is filed within the comment period for the draft environmental impact statement." 18 C.F.R. § 380.10(a)(1)(i) (emphasis added). As the Commission explained, that regulation does not apply to proceedings – such as this one – where the Commission prepares an EA. Friends Rehearing Order at P 15, ARI 29:8;[5] CalTrout Second Rehearing Order at PP 16-17 (further explaining distinction between EAs and environmental impact statements under NEPA regulations), ARI 24:6 ; *see also PacifiCorp*, 105 FERC ¶ 61,237 at 62,221 n.3 (2003) (explaining regulation). Moreover, while CalTrout and Friends continue to rely on *Cameron LNG, LLC*, 118 FERC ¶ 61,109 (2007), as establishing otherwise, the Commission

[5] As to Friends, the Commission also found this argument irrelevant, since Friends chose not to file its motion to intervene until nearly two months after the close of the comment period on the draft EA. Friends Rehearing Order at P 15 n.26, ARI 29:8.

found that *Cameron* is "an exception from our usual practice. It deviates from our construction of our regulations . . . ." Friends Rehearing Order at P 15, ARI 29:8; CalTrout Second Rehearing Order at P 18, ARI 24:7. In any event, the Commission noted that in *Cameron LNG*, unlike the present situation, there was no evidence that the movant was aware of the proceeding prior to publication of the draft EA. Friends Rehearing Order at P 15 n.29, ARI 29:8; CalTrout Second Rehearing Order at P 18 n.23, ARI 24:7. *See supra* p. 15 (Commission interpretation of its own regulations and orders deserves deference).

E. CalTrout And Friends Failed To Raise Their Endangered Species Act Arguments Before The Commission, Depriving This Court Of Jurisdiction.

CalTrout and Friends assert that they have good cause for their delay in moving to intervene in light of the Commission's decision not to initiate formal consultation under the Endangered Species Act, and its related decision to utilize the draft EA as a biological assessment for certain listed species, but not steelhead. Br. at 46-49. On rehearing, both CalTrout and Friends explained that NOAA Fisheries had published a final rule listing steelhead as endangered, but omitting the Project area from the critical habitat designation. Friends Rehearing Request, ARI 27:4; CalTrout Rehearing Request, ARI 17:2, 17:6. Neither, however, argued that the Commission's alleged failure to satisfy its responsibilities under the Endangered Species Act necessitated their intervention. And, claims in CalTrout

and Friends' motions for late intervention (CalTrout Motion, ARI 10:3-4, Friends Motion, ARI 16:2), simply do not satisfy the requirement of FPA § 313(b), 16 U.S.C. § 825*l*(b), that an argument be raised before the Commission *on rehearing* before it may be raised on judicial review. Accordingly, CalTrout and Friends' failure to raise their Endangered Species Act arguments on rehearing to the Commission deprives this Court of jurisdiction to consider those arguments on appeal. *See High Country Res.*, 255 F.3d at 746.

In any event, like the issuance of the draft EA itself, FERC staff's treatment of certain species under the Endangered Species Act in the draft EA does not justify Petitioners' choice not to timely intervene. By failing "to intervene in a timely fashion, [Petitioners] assume[d] the risk that the case [would] be settled in a manner that is not to its liking." CalTrout First Rehearing Order at P 13, ARI 21:7; Friends Rehearing Order at P 12, ARI 29:6.

Moreover, Petitioners' Endangered Species Act claims are merely premature attempts to challenge the merits of FERC staff's decisions regarding formal consultation and biological assessments. *See* Br. at 47 (arguing FERC has not complied with the Endangered Species Act). But, because the Commission has not yet ruled on these actions, Petitioners' claims are incurably premature. *American Rivers v. FERC*, 170 F.3d 896, 897 (9th Cir. 1999) (dismissing appeal where FERC had not yet acted on petition requesting it to engage in formal consultation

under the Endangered Species Act); *see also Steamboaters v. FERC*, 759 F.2d 1382, 1388 (9th Cir. 1985). Petitioners lack standing to raise such a claim in any event, as they may challenge only the denial of their interventions in this case. *Covelo Indian Community*, 895 F.2d at 586.

III. CALTROUT AND FRIENDS' ARGUMENTS THAT THE COMMISSION ERRED WITH REGARD TO THE REMAINING FACTORS LIKEWISE FAIL.

CalTrout and Friends disregard the very purpose of the Commission's regulations in arguing that the Commission failed to provide substantial evidence to support its conclusion that granting their late intervention would delay the proceeding or otherwise burden or prejudice existing parties. Br. at 50-54; *see* 18 C.F.R. § 385.214(d) (the Commission "may consider . . . [a]ny disruption to the proceeding . . . [and] [a]ny prejudice to, or addition burdens upon, the existing parties" that might result from granting the intervention). The Commission has explained that its regulations provide "certainty that there will be an end to interventions which prolong the proceeding" and that this "is an important consideration of parties filing before the Commission." CalTrout First Rehearing Order at P 14, ARI 21:7 (quoting *Palisades Irrigation District*, 34 FERC ¶ 61,377 at 61,702 (1986)); Friends Rehearing Order at P 13, ARI 29:7. As Petitioners acknowledge (*see*, *e.g.*, Br. at 27), granting Petitioners' late intervention would permit them to pursue rehearing and judicial review of any final order that may

harm their interests. Such additional procedures would certainly delay the proceeding, burdening and prejudicing other parties, including the licensees, and the Commission. Thus, the Commission determined that granting late intervention here would improperly set a precedent that the Commission will "allow new intervention every time a new study [is] conducted or new information [is] otherwise placed in the record." CalTrout First Rehearing Order at P 14, ARI 21:8; Friends Rehearing Order at P 13, ARI 29:7.

Finally, Petitioners claim that the Commission must grant their late interventions because no other party to the Commission's proceeding adequately represents their interests. Br. at 55. The Commission appropriately did not consider this factor in ruling on the late motions to intervene, as the Commission's regulations permit, but do not require the Commission to consider all of the listed factors. 18 C.F.R. § 385.214(d) (emphasis added) (Commission "**may** consider whether: . . . (iii) The movant's interest is not adequately represented . . . ."). Contrary to Petitioners' suggestion (Br. at 27), the Commission's use of the permissive "may" in this regulation cannot be overlooked, particularly in light of its use of the mandatory "must" elsewhere in the same regulation. *See*, *e.g.*, 18 C.F.R. §§ 385.214(a)(1) (notice "must" state position), 385.214(a)(2) (entity "must" file motion to intervene), 385.214(b)(3) (late motion to intervene "must" "show good cause why the time limitation should be waived"). Indeed, courts

presented with the question of whether the Commission must consider all the listed factors have held that this regulation "does not compel consideration of each of the factors; it merely states that the Commission 'may consider' them." *City of Orrville v. FERC*, 147 F.3d 979, 991 (D.C. Cir. 1998) (finding Commission did not abuse its discretion in denying late intervention); *see also Power Co. of America*, 245 F.3d at 843 ("Failure to establish good cause is, however, a sufficient condition to deny intervention, so the Commission was not obligated to consider any other factor.").

Notwithstanding CalTrout and Friends' arguments to the contrary (Br. at 27), in *Covelo Indian Community*, the Court was not presented with this question; therefore, the suggestion that the Commission "had to consider" each of the factors is not controlling. *Covelo Indian Community*, 895 F.2d at 586. In other circumstances, this Court has appropriately distinguished between the permissive "may" and the mandatory "shall" or "must," and the same is required by the language of 18 C.F.R. § 385.214(d) here. *See, e.g.*, *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 935 (9th Cir. 2006) (distinguishing between may and shall as used in the Endangered Species Act); *Haynes v. McVee*, 891 F.2d 235, 239-40 (9th Cir. 1989) (citations omitted) (invoking the rule of statutory construction that when "Congress uses both 'may' and 'shall,' the normal

inference is that each is being used in its ordinary sense – the one being permissive, the other mandatory.").

Here, the Commission properly exercised its discretion in finding that Petitioners failed to establish good cause for their nearly two-year delay in light of their knowledge of the issues from the very start of the proceeding (if not before), and the disruption, burden, and prejudice that could result from permitting their late intervention. This is all that is required by the Commission's regulations, particularly as viewed under the abuse of discretion standard. *See Power Co. of America*, 245 F.3d at 843 (failure to establish good cause, alone, is enough to sustain the Commission's ruling, and the court will defer to the Commission's application of its own procedures).

CalTrout and Friends mistakenly rely on cases granting environmental groups intervenor status in court litigation under the Federal Rules of Civil Procedure, where the government could not adequately represent their interests. Br. at 31, 49. The Commission has made clear that it has and will continue to consider CalTrout and Friends' comments in this proceeding. CalTrout First Rehearing Order at P 10 n.9, ARI 21:5; Friends Rehearing Order at P 16, ARI 29:9. Thus, their interests will be adequately represented. Further, the Commission's statutory mandate is to serve the public interest, by considering all relevant environmental and developmental issues. *See* FPA § 10(a)(1), 16 U.S.C. §

803(a)(1). The Commission, however, "is not required to make assumptions for parties who sit on their rights. Only [those parties are] responsible for ensuring that [their] interests are adequately represented in a timely fashion." CalTrout First Rehearing Order at P 14 n.21, ARI 21:8.

IV. ATTORNEYS' FEES

Petitioners' request (Br. at 65) for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), is premature in light of the early stage of this proceeding. 28 U.S.C. § 2412(d)(1)(B) (application to be submitted after final judgment); *see also* Cir. Rule 39-1.b.

CONCLUSION

For the foregoing reasons, the petitions for review should be denied.

Respectfully submitted,

Cynthia Marlette
General Counsel

Robert H. Solomon
Solicitor

Holly E. Cafer
Attorney

Federal Energy Regulatory
Commission
888 First Street, NE
Washington, DC 20426
Phone: (202) 502-8485
Fax: (202) 273-0901

August 13, 2008

STATEMENT OF RELATED CASES

Respondent is not aware of any related cases pending before this or another Court.

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a)(7)(C)(i) and Circuit Rule R.32-1, I certify that the Brief of Respondent Federal Energy Regulatory Commission is proportionally spaced, has a typeface of 14 points, and contains 9,300 words, not including the tables of contents and authorities, the certificates of counsel, and the addendum.

_____

Holly E. Cafer
Attorney for Federal Energy
Regulatory Commission

August 13, 2008