

121 FERC ¶ 61,192  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Joseph M. Keating

Project No. 7267-017

NOTICE DISMISSING REQUEST FOR REHEARING

(November 19, 2007)

Mr. Joseph M. Keating, licensee for the proposed Tungstar Project No. 12767,<sup>1</sup> has filed a timely request for rehearing of the order issued by the Commission on September 20, 2007,<sup>2</sup> lifting the stay of the construction deadlines for, and providing notice of termination of, the project's license. The project would be located on Morgan Creek and Pine Creek in Inyo County, California, and would occupy lands of the United States within the Inyo National Forest administered by the United States Department of Agriculture's Forest Service (Forest Service).

Mr. Keating's rehearing request is deficient because it fails to include a Statement of Issues section separate from its arguments. Rule 713(c)(2) of the Commission's Rules of Practice and Procedure<sup>3</sup> requires that a rehearing request must include a separate section entitled "Statement of Issues" listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.<sup>4</sup> Under Rule 713, any issue not so listed will be deemed waived. Accordingly, Mr. Keating's rehearing request is dismissed.<sup>5</sup>

---

<sup>1</sup> 60 FERC ¶ 61,016 (1992).

<sup>2</sup> 120 FERC ¶ 61,246 (2007).

<sup>3</sup> 18 C.F.R. § 385.713(c)(2) (2007). *See Revisions of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 70 *Fed. Reg.* 55,723 (September 23, 2005), FERC Stats and Regs ¶ 31,193 (2005). *See also*, Order No. 663-A, effective March 23, 2006, which amended Order 663 to limit its applicability to rehearing requests. *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 71 *Fed. Reg.* 14,640 (March 23, 2006), FERC Stats and Regs ¶ 31,211 (2006).

<sup>4</sup> As explained in Order No. 663, the purpose of this requirement is to benefit all participants in a proceeding by ensuring that the filer, the Commission, and all other participants understand the issues raised by the filer, and to enable the Commission to

(continued)

In any event, Mr. Keating's rehearing request is without merit. The stay was granted in 1996<sup>6</sup> based on a pre-construction license condition, submitted by the Forest Service under section 4(e) of the Federal Power Act,<sup>7</sup> requiring Mr. Keating to obtain sufficient water rights to operate the project as a prerequisite to receiving a Forest Service special use permit. In lifting the stay, the Commission found that the chances of Mr. Keating fulfilling the pre-construction requirements for obtaining water rights and a special use permit were unreasonably speculative and would result in additional prolonged delays in starting construction.<sup>8</sup>

On rehearing, Mr. Keating argues that he has been diligent in trying to fulfill the conditions to starting construction and other requirements of his license. However, Mr. Keating's diligence (or lack of diligence) was not the deciding factor in the Commission's decision. Rather, it was the "prolonged, continuing, and indefinite delay in Mr. Keating's attempts to obtain water rights and other required pre-construction approvals," and the fact that, 15 years after issuance of the license, "[t]here is no reasonable assurance that Mr. Keating will be able to commence project construction anytime in the foreseeable future."<sup>9</sup>

---

respond to these issues. Having a clearly articulated Statement of Issues ensures that the issues are properly raised before the Commission and avoids the waste of time and resources involved in litigating appeals regarding which the courts of appeals lack jurisdiction because the issues on appeal were not clearly identified before the Commission. *See* Order No. 663 at P 3-4.

<sup>5</sup> *See, e.g., South Carolina Electric & Gas Company*, 116 FERC ¶ 61,218 (2006); *Duke Power Company, LLC*, 116 FERC ¶ 61,171 (2006).

<sup>6</sup> 77 FERC ¶ 61,060 (1996).

<sup>7</sup> 16 U.S.C. §797(e) (2000).

<sup>8</sup> 120 FERC ¶ 61,246, *supra*, at P 19, *citing East Bench Irrigation District*, 59 FERC ¶ 61,277 n. 16 (1992), *citing as analogous City of Redding, California*, 56 FERC ¶ 61,146 (1991).

<sup>9</sup>*Id.* at P 1 and 22.

Project No. 7267-044

3

This notice constitutes final agency action. Request for rehearing of this notice must be filed within 30 days of the date of issuance of this notice, pursuant to 18 C.F.R. § 385.713 (2007).

Kimberly D. Bose,  
Secretary.