

122 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Joseph M. Keating

Project No. 7267-045

ORDER DISMISSING MOTION FOR STAY

(Issued January 17, 2008)

1. By order issued September 20, 2007,¹ we lifted the 1996 stay of the construction deadlines for the proposed 990-kilowatt Tungstar Project No. 7267 and gave notice, pursuant to section 13 of the Federal Power Act,² of the termination of the project's license³ for failure to commence construction. On December 4, 2007, the project's licensee, Mr. Joseph M. Keating, filed a motion to stay the Commission's September 20 Order. As described below, we are dismissing the stay request as moot.

Discussion

2. On October 19, 2007, Mr. Keating filed a request for rehearing of our September 20 Order.⁴ By notice issued November 19, 2007,⁵ we dismissed Mr. Keating's request for rehearing as deficient for failure to include a Statement of Issues section separate from its arguments, as required by Rule 713(c)(2) of the

¹ 120 FERC ¶ 61,246 (2007) (September 20 Order).

² 16 U.S.C. § 806 (2000).

³ 60 FERC ¶ 61,016 (1992).

⁴ A detailed description of the background of this proceeding is contained in the September 20 Order.

⁵ 121 FERC ¶ 61,192 (2007).

Commission's Rules of Practice and Procedure.⁶ The deadline for filing for rehearing of the November 19 dismissal notice was December 19, 2007. Mr. Keating did not seek rehearing of the notice.

3. Mr. Keating seeks a stay of the September 20 Order, pending judicial review of the order, which he states he intends to request. However, since Mr. Keating has failed to seek rehearing of our November 19 notice dismissing his request for rehearing of the September 20 Order, he has failed to exhaust his administrative remedies in this proceeding, which is a prerequisite to the filing of a court appeal.⁷

4. Pursuant to section 313 of the Federal Power Act,⁸ an entity aggrieved by a Commission order may seek judicial review of the order only after the Commission has acted on a request for rehearing of the order. In this case, the Commission dismissed Mr. Keating's request for rehearing for failure to comply with the Commission's regulations. The dismissal notice stated that Mr. Keating could seek rehearing of it within 30 days.⁹ Mr. Keating did not do so. Consequently, since Mr. Keating cannot avail himself of court review, the predicate for his stay request, we dismiss the stay request as moot.

⁶ 18 C.F.R. § 385.713(c)(2) (2007). Under Rule 713, any issue not so listed is deemed waived.

⁷ See, e.g., *Niagara Mohawk Power Corporation, et al. v. Federal Energy Regulatory Commission*, 306 F.3d 1264 (2d Cir. 2002).

⁸ 16 U.S.C. § 825l (2000).

⁹ Such a request for rehearing could have addressed any manner in which the Commission allegedly erred in dismissing the initial request for rehearing. We will reinstate requests for rehearing where parties demonstrate that dismissing the request was erroneous. See, e.g., *Flambeau Hydro, L.L.C.*, 113 FERC ¶ 61,236 (2005) (reinstating request for rehearing dismissed because filing entity was not party to the proceeding after determining that entity had filed motion for late intervention); *Wisconsin Public Service Corporation*, 104 FERC ¶ 61,295 (2003) (reinstating request for rehearing where Commission had mistakenly concluded that request had not been timely filed); *Minnesota Power & Light Company*, 73 FERC ¶ 61,170 (1995) (reinstating request for rehearing where dismissal notice erred in concluding that filer was not a party to the proceeding). Indeed, we have granted rehearing of a notice that properly dismissed a request for rehearing for a failure to include a Statement of Issues, where we found that the filer was not represented by counsel, was appearing before us for the first time, was a small local group, and had filed a short, simple pleading which, while not containing a statement of issues, made clear the limited issues raised. *Duke Power Company, LLC*, 117 FERC ¶ 61,300 (2006).

5. In any event, we would not have granted a stay of the September 20 Order. In that order, we explained that Mr. Keating has not been able to commence project construction in the 15 years since the license was issued, and that there was no reasonable assurance that he would be able to do so anytime in the foreseeable future.¹⁰ Nothing in Mr. Keating's stay request indicates that we were incorrect. We have previously stated that "the public interest in timely development of [a hydropower] site pursuant to the FPA and in a competitive environment will best be served if we do not reserve the site for an additional, indeterminate period for development by an applicant that has been unable, for whatever reason, to construct a licensed project at the site for well over a decade."¹¹ Here, Mr. Keating has been unable to develop the Tungstar Project, and we have accordingly terminated his license. The record in no way indicates that granting a stay of the termination order is required by justice or is otherwise in the public interest.¹² In fact, given the length of time that this site has been reserved for a project that has not been developed, the contrary is true.

The Commission orders:

The motion, filed December 4, 2007, by Mr. Joseph M. Keating, for stay of the September 20, 2007 Order terminating the license for Project No. 7267 is dismissed.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁰ 120 FERC ¶ 61,246 at P 22.

¹¹ *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 15 (2006). See also *Electric Plant Board of the City of Augusta, Kentucky*, 115 FERC ¶ 61,198 at P 10 (2006).

¹² See, e.g., *FPL Maine Energy Hydro, LLC*, 107 FERC ¶ 61,120 (2004); *Clifton Power Corp.*, 58 FERC ¶ 61,094 (1992).