

UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF)
)
Pangea LNG (North America) Holdings, LLC) FE DOCKET NO. 12-184-LNG
)

SIERRA CLUB'S MOTION TO HAVE LATE-FILED EXHIBITS CONSIDERED

On April 29, 2013, Sierra Club filed a timely motion to intervene, protest, and comment in the above-captioned proceeding. Following what Sierra Club believed to be DOE/FE's preferred practice, Sierra Club filed its motion via email to fergas@hq.doe.gov and submitted the exhibits to DOE/FE on a CD via overnight mail, postmarked April 29.

On May 2, 2013, DOE/FE informed Sierra Club that the exhibits to Sierra Club's motion could not be deemed to be timely filed. Sierra Club accordingly now moves for retroactive permission to file these exhibits out of time.

I. Sierra Club Meets the Standard for Intervention Out of Time

DOE regulations provide that a motion to intervene out of time will be granted "for good cause shown and after considering the impact of granting the late motion of the proceeding." 10 C.F.R. § 590.303(d). As we explain, Sierra Club has good cause for the one-day delay in submitting its exhibits, and acceptance of this late filing will have a *de minimis* impact on the proceedings. Accordingly, DOE/FE should grant this motion and consider both Sierra Club's motion to intervene and the subsequently-filed exhibits on the merits.

Sierra Club had good cause to submit the exhibits in the manner it did because Sierra Club was under the reasonable belief that, in doing so, it was complying with DOE/FE's explicit instructions. Over the past year, Sierra Club has filed similar motions to

intervene and protests in a significant number of these proceedings.¹ These filings have required the support of numerous exhibits. In what has been an ongoing and evolving process, Sierra Club has worked with DOE/FE to file these exhibits in the way that is most convenient for DOE/FE. Early DOE/FE notices of pending applications invited intervention and filings to be submitted by various methods, first among them “(1) Submitting comments in electronic form on the Federal eRulemaking Portal at <http://www.regulations.gov>, by following the on-line instructions and submitting such comments under FE Docket No. 11-128-LNG.” *Notice of Application for Dominion Cove Point LNG, LP Application to Export Domestic Liquefied Natural Gas to Non-Free Trade Agreement Nations*, DOE/FE Dkt. 11-128-LNG, 76 Fed. Reg. 76698, 76701 (Dec. 8, 2011). Following these instructions, Sierra Club submitted its intervention in docket 11-128 via [regulations.gov](http://www.regulations.gov).

After DOE/FE informed Sierra Club that technical problems on the government’s end made it difficult to receive and process Sierra Club’s filings through this website, Sierra Club submitted its next few applications using the other electronic submission method offered by DOE/FE, “emailing the filing to fergas@hq.doe.gov.” *See, e.g., id.* This method was more burdensome for Sierra Club, because low but unspecified limits on the maximum attachment size for email required Sierra Club to submit its exhibits through dozens of separate emails.² Sierra Club used this email filing method even for dockets where the notice of application were published after Sierra Club’s initial filings via [regulations.gov](http://www.regulations.gov) and explicitly invited further filing via [regulations.gov](http://www.regulations.gov). *See, e.g., Cameron LNG, LLC; Application for Long-Term Authorization To Export Domestically Produced Liquefied Natural Gas to Non-Free Trade Agreement Countries*, DOE/FE Dkt. 11-162-LNG, 77 Fed. Reg. 10732, 10735 (Feb. 23, 2013). Eventually DOE/FE removed the invitation to submit interventions via [regulations.gov](http://www.regulations.gov). *See, e.g., LNG Development Company, LLC; Application for Long-Term Authorization To Export Liquefied Natural Gas Produced From Canadian and Domestic Natural Gas Resources to Non-Free Trade Agreement Countries*, DOE/FE Dkt. No. 12-77-LNG, 77 Fed. Reg. 55197, 55199 (Sept. 7, 2012). Sierra Club continued to file by emailing all exhibits through November of 2012.³ As a courtesy, Sierra Club accompanied these online submissions with a CD containing the exhibits, mailed the day of the filing. Sierra Club and DOE/FE communicated regarding this courtesy submission, and at DOE/FE’s request, Sierra Club adopted the practice of sending these courtesy CD’s via overnight delivery rather than USPS First Class mail.⁴

Sierra Club again changed its filing practices in response to DOE/FE request in December 2012. After a phone call between Sierra Club employee Violet Lehrer and DOE/FE on

¹ *See, e.g.*, DOE/FE Dkts. 10-111, 11-128, 12-32, 11-162, 11-161, 12-05, 12-101, 12-77, 12-100, 12-146, 12-156, 12-97, 12-123.

² *See, e.g.*, Exhibit 1 (email filing for Cameron LNG, DOE/FE Dkt. 11-162-LNG).

³ *See, e.g.*, Exhibits 2-3 (email filing for Oregon LNG, DOE/FE Dkt. 12-77-LNG).

⁴ Email from Larine Moore to Nathan Matthews dated Nov. 15, 2012, Exhibit 3 pages 22-23.

December 17, 2012, regarding Sierra Club's then-forthcoming filing regarding the application of Southern LNG Company, L.L.C., DOE/FE docket 12-100-LNG, Sierra Club understood DOE/FE to have requested that Sierra Club *not* file exhibits electronically, whether through email or regulations.gov.⁵ Instead, Sierra Club understood DOE/FE to have requested Sierra Club to file the motion to intervene and protest electronically and to deliver the exhibits thereto on a CD sent via overnight mail postmarked by the filing deadline. Although DOE/FE's requested filing method would mean that DOE/FE would not receive the exhibits until a day after the filing deadline, Sierra Club understood DOE/FE to have explicitly confirmed that exhibits submitted according to this procedure would be considered timely filed. Sierra Club's understanding of DOE/FE's position was that email submission of these created congestion on DOE/FE's email servers and unnecessary work for DOE/FE employees, because in practice DOE/FE employees simply waited for the courtesy copy of the exhibits delivered via CD and used the CD to populate the docket. Sierra Club notes that the notice of availability of application for docket 12-100-LNG, like all subsequent notices of availability, explicitly invited filing via email. *Southern LNG Company, L.L.C.; Application for Long-Term Authorization To Export Liquefied Natural Gas Produced From Domestic Natural Gas Resources to Non-Free Trade Agreement Countries*, DOE/FE Dkt. 12-100, 77 Fed. Reg. 63806, 63808-09 (Oct. 17, 2012).

In this docket, Sierra Club submitted its motion and exhibits pursuant to this practice, believing that this remained an approved, and indeed requested, procedure. On April 29, 2013, Sierra Club employee Sherri Liang called DOE/FE and spoke with DOE/FE employee Natalie Wood to inquire whether DOE/FE would be including the two economic studies commissioned from EIA and NERA and their associated material in this docket.⁶ Ms. Wood informed Ms. Liang that DOE/FE would not be doing so, such that if Sierra Club wanted any of these materials included in the online docket for this filing, Sierra Club would need to include those materials as exhibits. Ms. Liang did not understand Ms. Wood to have discussed any change in DOE/FE filing procedures, and instead believed that Ms. Wood, speaking on behalf of DOE/FE, had implicitly approved Sierra Club's continued use of DOE/FE's previously-requested practice of electronically submitting the motion on the filing deadline and submitting exhibits by overnight mail postmarked by that deadline.

On May 2, 2013, DOE/FE informed Sierra Club employee Kathleen Krust that the exhibits submitted in this docket, which DOE/FE received on April 30, 2013, would not be considered timely filed. After multiple discussions between various Sierra Club and DOE/FE employees, Sierra Club came to understand DOE/FE as having changed its position, to require receipt of exhibits by the filing deadline, whether via CD delivered so as to be received by that deadline or whether by electronic submission accompanied by

⁵ Exhibit 4 (Lehrer Decl.).

⁶ Exhibit 5 (Liang Decl.).

a CD received after the deadline. DOE/FE employee Ms. Wood states that she informed Ms. Liang of this change during their April 29 phone call.

Sierra Club accepts that Ms. Wood attempted to inform Ms. Liang of this change when Ms. Liang called DOE/FE on April 29, and that the fault for our failure to understand this change lies with us. Nonetheless, Sierra Club contends that DOE/FE did not otherwise inform Sierra Club of this change in policy, and in conversations between DOE/FE and Sierra Club, DOE/FE has not identified any other DOE/FE action communicating this change. Accordingly, insofar as DOE/FE's receipt of Sierra Club's exhibits on April 30, 2013 renders Sierra Club's motion to intervene untimely, Sierra Club contends that it has good cause for this untimely submission. Good cause is demonstrated by Sierra Club's history of attempting to work with DOE/FE to ensure a filing process that works smoothly for DOE/FE, Sierra Club's belief that it was following a procedure explicitly requested by DOE/FE, and DOE/FE's limited actions communicating an apparent change in policy to Sierra Club.⁷

The other factor to be considered in evaluating a motion to intervene out of time is harm or impact to the proceedings. Although DOE/FE has provided little interpretation of the harm inquiry under 10 C.F.R. § 590.303(d), authority interpreting the analogous aspects of FERC rule 214(d)⁸ and Federal Rules of Civil Procedure 24 strongly indicates that Sierra Club has met these standards here.⁹ The impact or prejudice inquiry looks to impacts specifically attributable to the delay, rather than impacts associated with the moving party's participation in the suit overall. "For the purpose of determining whether an application for intervention is timely, the relevant issue is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977) (interpreting Fed. R. Civ. P. 24), *see also AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 953 (9th Cir. 2006) (in determining whether to allow amendment of a complaint under Fed. R. Civ. P. 15, looking to prejudice specifically attributable to the delay in seeking amendment and excluding costs that would have been imposed had the amendment been filed earlier). Here, no party was injured by what is essentially a *de minimus* delay in receipt of the exhibits.

Indeed, numerous FERC decisions hold that untimely intervention will not cause prejudice if the intervention is sought prior to the final decision, allowing intervention

⁷ Sierra Club requests written clarification from DOE/FE regarding the method to be used for submitting exhibits in future filings in this and other dockets.

⁸ 18 C.F.R. § 385.214(d).

⁹ Note that FRCP 24 does not establish an explicit deadline for intervention, so under that rule the inquiry is not whether to allow an "untimely" motion to intervene, but instead whether a delayed or late motion to intervene is nonetheless "timely."

despite delays much greater than the minimal delay here. *See, e.g., Cent. Hudson Gas & Elec. Corp.*, 41 FERC ¶ 61313 (Dec. 15, 1987). For example, FERC has granted a motion to intervene that “was over two and one-half years late” where FERC was still processing the underlying application, such that intervention would not disrupt the proceeding or cause prejudice to the applicant. *Jack M. Fuls Tumalo Irrigation Dist.*, 36 FERC ¶ 61136 (July 30, 1986). Cases interpreting Federal Rule of Civil Procedure 24 likewise establish that “[t]he most important consideration in deciding” a late motion to intervene “is whether the delay in moving for intervention will prejudice the existing parties to the case.” § 1916 Timeliness of Motion, 7C Fed. Prac. & Proc. Civ. § 1916 (3d ed.) (summarizing cases). Similarly, where FERC has determined that late intervention will not delay, disrupt or otherwise prejudice the proceeding FERC has granted intervention. FERC has repeatedly gone so far as to find that the lack of prejudice itself demonstrated “good cause shown” without examining the reason for the delay in filing. *Superior Offshore Pipeline Co.*, 68 FERC ¶ 61089 (July 19, 1994), *E. Am. Energy Corp. Columbia Gas Transmission Corp.*, 68 FERC ¶ 61087 (July 19, 1994).

Here, Sierra Club’s intervention does not prejudice any party or meaningfully delay the proceeding. Sierra Club stipulates that the time for Pangea to file an answer, if any, to Sierra Club’s motion runs from the date of receipt of Sierra Club’s entire filing, exhibits included, rather than from receipt of the motion itself. In this proceeding, Sierra Club will stipulate to a further extension of the time for an answer, if Pangea or DOE/FE deem it appropriate, running from the filing of this motion.¹⁰ Accordingly, delay in receipt of the exhibits does not diminish the time available to Pangea to respond thereto. Thus, this delay does not harm Pangea’s ability to answer. Nor does this minimal delay meaningfully prolong the overall proceeding. Thus, if Sierra Club’s late-filed exhibits and this motion are treated as a late motion to intervene, the “impact of granting the late motion of the proceeding” will be de minimus.

II. Conclusion

For the reasons explained in Sierra Club’s April 29 filing, Sierra club has rights and interests in this proceeding that warrant intervention. Insofar as Sierra Club’s filing of exhibits via mail postmarked on April 29 renders Sierra Club’s filing untimely, Sierra Club moves for leave to intervene out of time. Because Sierra Club has demonstrated good cause for such a motion and because granting late intervention will not cause undue prejudice to the proceedings, DOE/FE should grant Sierra Club’s motion.

Respectfully submitted,

¹⁰ Sierra Club further notes that in other dockets Sierra Club has not objected where applicants have requested an extension of time to answer Sierra Club’s filings.



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CERTIFICATE OF SERVICE

I hereby certify that I caused the above documents to be served on the applicant and all others parties in this docket, in accordance with 10 C.F.R. § 590.017, on May 6, 2013.

Dated at San Francisco, CA, this 6th day of May, 2013.



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VERIFICATION

SAN FRANCISCO

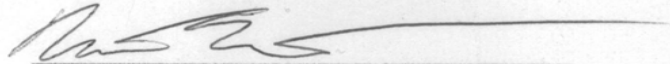
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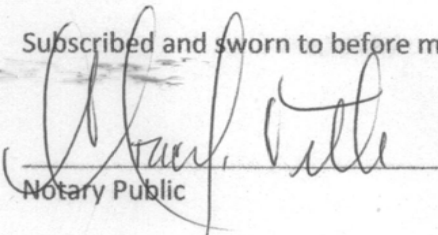
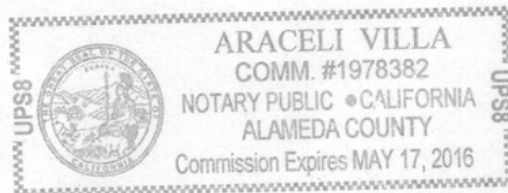
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Pursuant to C.F.R. §590.103(b), Nathan Matthews, being duly sworn, affirms that
he is authorized to execute this verification, that he has read the foregoing document,
and that facts stated herein are true and correct to the best of his knowledge,
information, and belief.



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Subscribed and sworn to before me this 3rd day of May, 2013.


Notary Public

My commission expires:

May 17, 2016