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UNITED STATES OF AMERICA
DEPARTMENT OF ENERGY
OFFICE OF FOSSIL ENERGY

IN THE MATTER OF	)	
	)	**FE DOCKET NO. 12-77-LNG**
LNG Development Company, LLC	)	
(d/b/a/ Oregon LNG	)	

SIERRA CLUB and COLUMBIA RIVERKEEPER'S MOTION TO INTERVENE OUT OF TIME

On November 6, 2012, Sierra Club and Columbia Riverkeeper filed a motion to intervene, protest, and comment in the above-captioned proceeding. This motion was filed roughly two hours out of time, the Department of Energy's Office of Fossil Energy ("DOE/FE") explained on November 16, 2012. As DOE/FE requested, Sierra Club and Columbia Riverkeeper now supplement that motion with a request to be allowed to intervene out of time.

Sierra Club and Columbia Riverkeeper incorporate their previous filing herein by reference; this filing makes the additional showing required for motions to intervene out of time.

I. Sierra Club and Columbia Riverkeeper Meet the Standard for Intervention Out of Time

Movants' previous filing demonstrated the "rights and interests" they seeks to assert in this proceeding as required by 10 C.F.R. § 590.303(b). When a motion to intervene is filed out of time, it 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). Although DOE/FE has provided little interpretation of these terms, Sierra Club satisfies the analogous aspects of FERC rule 214(d)[1] and Federal Rules of Civil Procedure 24.[2]

[1] 18 C.F.R. § 385.214(d).
[2] 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."

Of these factors, the impact to the proceedings is generally regarded as the more important. Indeed, FERC has adopted a general policy of allowing late intervention in natural gas proceedings so long as intervention is sought before a final order is issued. *See, e.g., Cameron LNG, LLC*, 118 FERC ¶ 61019 (Jan. 18, 2007). Here, movants' *de minimus* two-hour delay in submitting their motion to intervene does not prejudice or impact the proceedings in any meaningful way. Indeed, these proceedings are in their infancy: DOE/FE has not issued any orders, and DOE/FE anticipates extensive further review, including collaboration with the FERC to review the environmental impact of the proposal. That review must take place regardless of whether movants are permitted to intervene, so our late motion does not multiply, complicate, or otherwise negatively impact the proceedings. To the contrary, intervention by environmental organizations intimately familiar with the issues that must be considered will benefit the proceedings and the public by assisting DOE in its review of these matters that DOE is obliged to undertake even absent our intervention.

Analogous decisions from the federal courts and FERC strongly supports this outcome. 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 our *de minimus* delay in filing.

Similarly, numerous FERC decisions hold that untimely intervention will not cause prejudice if the intervention is sought prior to the final decision. *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 cannot prejudice any party, or delay the proceeding, because DOE/FE must consider the environmental questions in this protest.

Insofar as a further or independent showing of good cause is required, Sierra Club and Columbia Riverkeeper have good cause for their two hour delay. In one of the few cases where, after finding a lack of prejudice, FERC goes on to assess whether good cause is shown, FERC has held that even where the "excuse for untimely filing is flimsy at best," the absence of prejudice nonetheless warranted allowing intervention. *Am. Ref-Fuel Co. of Hempstead*, 47 FERC ¶ 61161 (Apr. 28, 1989). Here, delay in submission of movants' motion was due to technical errors in generation of PDF files, errors that have since been corrected. These errors were compounded by the fact Sierra Club, which filed the document, grants its employees a half day holiday for election day, which meant that Sierra Club's production staff were unavailable to correct these errors in a timely manner when they occurred. This confluence of events has been addressed, and is extraordinarily unlikely to recur, given that there are few, if any, other days that are holidays for Movant but not for the federal government. As such, movants have demonstrated good cause that more than outweighs any impact from their delay in filing.

II. CONCLUSION

For the reasons explained in their November 6 filing, Sierra Club and Columbia Riverkeeper have rights and interests in this proceeding that warrant intervention. Although their motion was submitted roughly two hours after DOE/FE's 4:30 eastern filing deadline, movants have shown a lack of prejudice to the proceedings and good cause for the delay sufficient to warrant intervention out of time. Accordingly, their motion to intervene must be granted.

As explained previously, the proposed project will have significant environmental and economic impacts. DOE/FE must ensure that these impacts are fully considered before taking action on the application. Moreover, the available evidence indicates that, in light of these impacts, the application is contrary to the public interest, and should therefore be denied.

Respectfully submitted,

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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. § 590.107, on November 20, 2012.

Dated at San Francisco, CA, this 20th day of November, 2012.

_____

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VERIFICATION

SAN FRANCISCO	§
	§
CALIFORNIA	§

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 20 day of November, 2012.

Notary Public

NICHOLAS JAMES LIFE
Commission # 1951418
Notary Public - California
San Francisco County
My Comm. Expires Sep 9, 2015

My commission expires: 09/09/2015