**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| NATIONAL PARKS CONSERVATION ASSOCIATION,<br>*Petitioner*,<br><br>v.<br><br>FEDERAL ENERGY REGULATORY COMMISSION,<br>*Respondent*,<br><br>EAGLE CREST ENERGY COMPANY,<br>*Respondent-Intervenor.* | No. 19-72915<br><br>FERC No. 13123-002 |

On Petition for Review of an Order of the
Federal Energy Regulatory Commission

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| IN RE NATIONAL PARKS CONSERVATION ASSOCIATION, | No. 19-73079 |
| NATIONAL PARKS CONSERVATION ASSOCIATION, *Petitioner*, v. FEDERAL ENERGY REGULATORY COMMISSION, *Respondent*, EAGLE CREST ENERGY COMPANY, *Respondent-Intervenor.* | OPINION |

Petition for Writ of Mandamus

Argued and Submitted October 13, 2020
San Francisco, California

Filed July 28, 2021

Before: M. Margaret McKeown and Jacqueline H. Nguyen, Circuit Judges, and Robert H. Whaley,[*] District Judge.

Opinion by Judge McKeown

[*] The Honorable Robert H. Whaley, United States District Judge for the Eastern District of Washington, sitting by designation.

## SUMMARY[**]

### Federal Energy Regulatory Commission

The panel denied a petition for review which alleged that the Federal Energy Regulatory Commission acted arbitrarily or capriciously, or abused its discretion, in denying National Parks Conservation Association's motion to intervene in post-licensing deadline extension proceedings pertaining to the Eagle Mountain Pumped Storage Hydroelectric Project in California.

On June 19, 2014, the Commission issued Eagle Crest Energy Company ("Eagle Crest") an original license to construct, operate, and maintain the Project pursuant to sections 4(e) and 15 of the Federal Power Act ("FPA"). Eagle Crest obtained one extension of the deadline to commence construction, and then after the expiration of the extended deadline, requested a second two-year extension to commence construction and a corresponding two-year extension to complete construction, relying on the enactment of the America's Water Infrastructure Act of 2018 ("Infrastructure Act"), which amended Section 13 of the FPA by changing the maximum number of extensions a licensee could receive from a one-time, two-year extension to any number of extensions totaling not more than 8 additional years.

The National Parks Conservation Association moved to intervene in the deadline extension proceedings and filed

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

comments arguing that the Federal Energy Regulatory Commission could not apply the Infrastructure Act to a license that, in the Association's view, had already expired. The Commission issued an order granting an extension of the deadlines to commence and complete construction, denied the Association's motion to intervene, and denied rehearing.

The Commission concluded that the Commission's Rule 214, the relevant intervention regulation, was inapplicable because post-licensing deadline extension proceedings are not proceedings where the Commission permits intervention, the extension-of-time request was not a material amendment to the license such that an exception to the Commission's precedent was warranted, and the Commission did not violate the FPA's notice requirements.

The panel held that the Commission's interpretation of Rule 214 deserved deference, and thus the Commission could properly limit intervention in post-licensing proceedings. The panel was persuaded that Rule 214 was ambiguous as to whether it applied in post-licensing deadline extension proceedings and determined that the Commission's interpretation was reasonable. The panel further held that despite the Commission's overly narrow interpretation of what constitutes a material change to a project or existing license, substantial evidence supported the Commission's explanations and conclusion that Eagle Crest's deadline extension request was not a material amendment under *Kings River Conservation District*, 36 FERC 61,365 (1986). The panel further concluded that the Commission did not abuse its discretion in denying the Association's motion to intervene, where the only change sought by the licensee was an extension of time to commence construction. The panel therefore concluded that

the Commission did not abuse its discretion, or act arbitrarily or capriciously, in denying the Association's motion to intervene.

The panel next considered whether the Commission was required, under Section 6 of the FPA, to give public notice of Eagle Crest's post-licensing request. The Commission determined that public notice was not required because Eagle Crest's request did not significantly alter the license. The panel held that the Commission's interpretation of Section 6 of the FPA was sufficiently persuasive as applied to deadline extension requests. The panel noted that the FPA was silent as to the precise meaning of "altered" in 16 U.S.C. § 799, and the Commission's interpretation that deadline extensions do not trigger Section 6 notice requirements was reasonable. The panel further held that the Commission's determination that Eagle Crest's request did not trigger Section 6 notice requirements was supported by substantial evidence. The Commission's finding was especially sound since Eagle Crest requested only a two-year extension and sought no other changes to the Project or the license. Given these considerations, the panel upheld the Commission's conclusion that notice was not required.

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## COUNSEL

Amanda Zerbe (argued), Ryan Gallagher (argued), C.J. Biggs, Michael Golz, and Joseph Zabel, Certified Law Students; Deborah Ann Sivas (argued), Matthew J. Sanders (argued), and Alicia E. Thesing, Supervising Attorneys; Environmental Law Clinic, Stanford, California; for Petitioner.

Jared Fish (argued), Attorney; Robert H. Solomon, Solicitor; David Morenoff, Acting General Counsel; Federal Energy Regulatory Commission, Washington, D.C.; for Respondents.

Joshua E. Adrian and Donald H. Clarke, Duncan Weinberg Genzer & Pembroke P.C., Washington, D.C., for Respondent-Intervenor.

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## OPINION

McKEOWN, Circuit Judge:

In this petition for review, we consider whether the Federal Energy Regulatory Commission (the "Commission") acted arbitrarily or capriciously, or abused its discretion, in denying National Parks Conservation Association's (the "Association") motion to intervene in post-licensing deadline extension proceedings. We conclude that it did not and that the Commission did not violate the Federal Power Act ("FPA") in failing to provide public notice. Accordingly, we deny the petition.

## BACKGROUND

At the heart of this dispute is the Eagle Mountain Pumped Storage Hydroelectric Project in California (the "Project"). On June 19, 2014, the Commission issued Eagle Crest Energy Company ("Eagle Crest") an original license to construct, operate, and maintain the Project pursuant to sections 4(e) and 15 of the FPA (the "License"). *See* 16 U.S.C. §§ 797(e), 808. The Project would serve as a closed-loop pumped storage facility to provide system peaking capacity and transmission regulating benefits to Southern California's regional electric utilities. It is set to

occupy approximately 2,500 acres of an abandoned mine site, on private and Bureau of Land Management ("BLM") lands situated near the eastern boundary of Joshua Tree National Park.

The chronology of the proceedings following the original licensing is illuminating. Article 301 of the License required Eagle Crest to commence Project construction within two years of the License's issuance and to complete construction within seven years of the License's issuance. Approximately four months before the deadline to commence construction, Eagle Crest requested an extension to commence construction. Under Section 13 of the FPA, 16 U.S.C. § 806, as it existed at that time, the Commission was authorized to issue a single, two-year extension of time. The Commission granted Eagle Crest's request and set June 19, 2018 as the new deadline.

Eagle Crest again failed to commence construction by the new deadline. On the same day that the extended deadline expired, the Association requested that the Commission issue a notice of probable termination of the License, noting that Eagle Crest had exhausted the number of statutory extensions allowed by Section 13 of the FPA. The Commission never acted on the Association's request.

Later, on October 23, 2018, Congress enacted the America's Water Infrastructure Act of 2018 (the "Infrastructure Act"). The Infrastructure Act amended Section 13 of the FPA by changing the maximum number of extensions a licensee could receive from a one-time, two-year extension to any number of extensions totaling "not more than 8 additional years." Infrastructure Act, Pub. L. No. 115-270, § 3001(b), 132 Stat. 3765, 3862 (2018).

Relying on the newly amended version of Section 13 of the FPA, and almost five months after expiration of its extended deadline, Eagle Crest, on November 6, 2018, requested a second two-year extension to commence construction.[1] The company did not seek any other changes to the Project or the License. Although the Commission did not issue public notice of this request, the Association moved to intervene in the deadline extension proceedings and filed comments arguing that the Commission could not apply the Infrastructure Act to a license that, in the Association's view, had already expired. No person or entity opposed the Association's intervention motion. On December 18, 2018, Eagle Crest requested a corresponding two-year extension to complete construction.

The Commission issued an order granting an extension of the deadlines to commence and complete construction and denying the Association's motion to intervene on May 7, 2019 (the "Extension Order").[2] As to the motion to intervene, the Commission explained that, according to Commission precedent, "a request to extend the deadline for the commencement of project construction is generally not an action subject to intervention" and that the Association

[1] Commission regulations require that any application for a time extension be filed not less than three months prior to expiration of the deadline to commence construction. 18 C.F.R. § 4.202(b). Eagle Crest did not apply for a second extension of time or seek a stay prior to the deadline's expiration, *see* 5 U.S.C. § 705, but the Association does not ask this court now to rely on a violation of 18 C.F.R. § 4.202(b) to invalidate the orders on review.

[2] Under the Extension Order, Eagle Crest had until June 19, 2020 to commence construction. Eagle Crest requested a third extension, which the Commission again granted. Eagle Crest now has until June 19, 2022 to commence construction.

had not otherwise "explained how it would be adversely affected by the proposed extension." *Eagle Crest Energy Co.*, 167 FERC ¶ 61,117, 61,631 (2019). One Commissioner dissented from the denial of the motion to intervene. *Id.* at 61,631–32.

The Association timely sought rehearing and requested a stay of the Extension Order, claiming that the Commission violated Rule 214 of the Commission's regulations in denying intervention and Section 6 of the FPA in failing to issue a public notice of the deadline extension proceedings. *See* 18 C.F.R. § 385.214; 16 U.S.C. § 799.

On September 19, 2019, the Commission issued an order denying the requests for rehearing and a stay (the "Rehearing Order"). The Commission concluded that Rule 214, the relevant intervention regulation, was inapplicable because post-licensing deadline extension proceedings are not proceedings where the Commission permits intervention, the extension-of-time request was not a material amendment to the License such that an exception to its precedent was warranted, and the Commission did not violate the FPA's notice requirements. One Commissioner again partially dissented. The Association filed a petition for review of the orders.[3]

## ANALYSIS

Our review of Commission orders, governed by the FPA, is highly deferential. *Cal. Trout v. FERC*, 572 F.3d 1003, 1012 (9th Cir. 2009). We examine only whether the

[3] The Association separately petitioned for a writ of mandamus under 28 U.S.C. § 1651. We consolidated the petitions and address mandamus relief and the Commission's jurisdictional challenges on appeal in a concurrently filed memorandum disposition.

Commission's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Cal. Pub. Utils. Comm'n v. FERC*, 879 F.3d 966, 973 (9th Cir. 2018). Under the arbitrary and capricious standard, "[a] court is not to ask whether a regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 292 (2016). While we are "not to substitute [our] judgment for that of the agency," the Commission nevertheless "must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). We do not disturb the Commission's factual findings unless they are unsupported by substantial evidence. 16 U.S.C. § 825*l*(b); *see also Am. Rivers v. FERC*, 201 F.3d 1186, 1194 (9th Cir. 1999).

## I. MOTION TO INTERVENE

We first address whether the Commission erred in denying the Association's motion to intervene. Although the Association was not a party to the proceedings, we have jurisdiction to address this question because a non-party petitioner is "considered a party for the limited purpose of reviewing the agency's basis for denying party status." *Covelo Indian Cmty. v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990) (per curiam) (citation omitted); *see also* 16 U.S.C. § 825*l*(a)–(b) (providing that only a "party" to Commission proceedings may seek administrative or judicial review of the Commission's final orders); 18 C.F.R. § 385.102(c) (defining "party" as "[a]ny respondent to a proceeding" or

"[a] person whose intervention in a proceeding is effective under Rule 214").[4]

Section 308 of the FPA grants the Commission the authority to promulgate rules and regulations governing the process through which interested persons become "parties" to a Commission proceeding:

> In any proceeding before it, the Commission, *in accordance with such rules and regulations as it may prescribe*, may admit as a party any interested State, State commission, municipality, or any representative of interested consumers or security holders, or any competitor of a party to such proceeding, or any other person whose participation in the proceeding may be in the public interest.

16 U.S.C. § 825g(a) (emphasis added).

The rule at issue here is the Commission's Rule 214, which governs intervention:

> (a) Filing.
>
> . . .

[4] Because the Association was not a party to the proceeding, we lack jurisdiction to review the Association's substantive challenge that the Commission exceeded its authority in extending the commencement of construction deadline in the License.

> (3) Any person seeking to intervene to become a party . . . must file a motion to intervene.
>
> . . .

(b) Contents of motion.

> (1) Any motion to intervene must state, to the extent known, the position taken by the movant and the basis in fact and law for that position.
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> (2) A motion to intervene must also state the movant's interest in sufficient factual detail to demonstrate that:
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> (i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action;
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> (ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding . . . ; or
>
> (iii) The movant's participation is in the public interest.

(3) If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must, in addition to complying with paragraph (b)(1) of this section, show good cause why the time limitation should be waived.

> (c) Grant of party status.
>
> > (1) If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the movant becomes a party at the end of the 15 day period.
> >
> > (2) If an answer in opposition to a timely motion to intervene is filed not later than 15 days after the motion to intervene is filed or, if the motion is not timely, the movant becomes a party only when the motion is expressly granted.
>
> . . . .

18 C.F.R. § 385.214.

Since adoption of Rule 214, the Commission has announced additional procedures regarding intervention. In *Kings River Conservation District*, the Commission explained that it is not required to give notice or entertain interventions in proceedings occurring after an original license has been issued subject to two limited exceptions: first, where the licensee's filings "entail material changes in the plan of project development or in the terms and conditions of the license," and, second, where the filings "could adversely affect the rights of property-holders in a manner not contemplated by the license." 36 FERC ¶ 61,365, 61,882–83 (1986).[5]

[5] In *Pacific Gas and Electric Company*, the Commission added that it would also entertain post-licensing intervention by agencies and other

On appeal, the Commission takes the position that Rule 214 is inapplicable to the Association's intervention motion because *Kings River* establishes that the Commission is not required to entertain intervention in post-licensing proceedings such as construction deadline extensions, and neither *Kings River* exception applies. The Association argues that intervention should have been automatically granted because Rule 214 does not differentiate between licensing and post-licensing proceedings, its motion complied with the letter of Rule 214, and no opposition was filed. In the alternative, it argues that the *Kings River* exceptions apply because the deadline extension request was a material amendment to the License and the extension adversely affected the rights of property holders in a manner not contemplated by the License. We address each issue in turn.

### A. APPLICABILITY OF RULE 214 TO POST-LICENSING DEADLINE EXTENSION PROCEEDINGS

We evaluate the deference owed to the Commission's interpretation of Rule 214 under the test set forth in *Kisor v. Wilkie*. 139 S. Ct. 2400, 2415–18 (2019). Under *Kisor*, deference to an agency's interpretation of its own regulation is warranted as long the regulation is genuinely ambiguous, the agency's interpretation is reasonable, the interpretation is the agency's authoritative or official position, the interpretation in some way implicates the agency's substantive expertise, and the agency's reading of its rule reflects the agency's fair and considered judgment. *Id.* *Kisor* is consistent with the longstanding principle that, while an agency may announce new rules in an adjudicatory

entities involving a license provision that expressly grants a consultation role to the entity seeking to intervene. 40 FERC ¶ 61,035, 61,099 (1987).

proceeding, "if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the Administrative Procedure Act." *Cal. Trout*, 572 F.3d at 1023 (alteration in original) (quoting *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996)).

We conclude that the Commission's interpretation of Rule 214 deserves deference, and thus it may properly limit intervention in post-licensing proceedings. We further conclude that the Commission did not abuse its discretion in denying the Association's motion to intervene, where the only change sought by the licensee was an extension of time to commence construction.

As an initial matter, we are persuaded that Rule 214 is ambiguous as to whether it applies in post-licensing deadline extension proceedings. On the one hand, the plain text of Rule 214 grants automatic intervention to a movant who complies with the rule's form, content, and timeliness requirements when no opposition is filed. 18 C.F.R. § 385.214(a)(3), (b), (c)(1). This reading comports with the Commission's own statements regarding the workings of Rule 214. *See* Revision of Rules of Practice and Procedure to Expedite Trial-Type Hearings, 47 Fed. Reg. 19,014, 19,017–18 (May 3, 1982) ("Since it is rare in Commission practice for a petition to intervene to be denied, the Commission, in Rule 214, is providing for automatic intervention, unless an answer in opposition is filed . . . .").

However, Rule 214 may also be read as establishing only *who* may intervene (any person), *how* to do so, and *when*

intervention is granted (after 15 days, if no opposition is filed)—but not *whether* automatic intervention is always allowed. Although the Association is correct that the text of Rule 214 does not expressly distinguish between licensing and post-licensing proceedings, Rule 214 is also silent as to whether compliance with the filing requirements allows a movant to automatically intervene *in all proceedings*, including those held after an original license has already been issued and where the licensee seeks only an extension of time to commence (and complete) construction.

Thus, while intervention may be automatic in some circumstances, it is not necessarily universal. The Commission does not define "proceedings" in Rule 214 or other applicable regulations. *See* 18 C.F.R. § 385.214; *see also id.* § 385.102 (providing definitions for purposes of Part 385). Neither does Rule 214, nor any other Commission regulation or provision of the FPA, grant any person or entity an express, absolute right of intervention in any and all proceedings, or a specific right to intervene in post-licensing deadline extension matters. The regulatory history of Rule 214 is similarly unhelpful.[6] For these reasons, there is

[6] *See, e.g.*, Revision of Rules of Practice, 47 Fed. Reg. at 19,014, 19,017–18 (enacting Rule 214 as part of the Commission's efforts to reorganize, revise, and update its procedural rules); Adopting and Promulgating Codification and Reissuance of General Rules, Including Rules of Practice and Procedure, 12 Fed. Reg. 8,461, 8,474 (Dec. 19, 1947) (codifying Rule 214's predecessor rule at 18 C.F.R. § 1.8). In 2008, the Commission added 18 C.F.R. § 385.214(a)(4), providing that "[n]o person, including entities listed in paragraphs (a)(1) and (a)(2) of [§ 385.214], may intervene as a matter of right in a proceeding arising from an investigation pursuant to Part 1b of [chapter I]." *See* Ex Parte Contacts and Separation of Functions, 73 Fed. Reg. 62,881, 62,886 (Oct. 22, 2008). Because Part 1b concerns "investigations conducted by the Commission but does not apply to adjudicative proceedings," 18 C.F.R.

genuine ambiguity as to the application of Rule 214 to post-licensing proceedings.

Moving to the next step of *Kisor*, we conclude that the Commission's interpretation is reasonable. We have recognized that "[a]gencies must have the ability to manage their own dockets and set reasonable limitations on the processes by which interested persons can support or contest proposed actions." *Cal. Trout*, 572 F.3d at 1007. Limiting automatic intervention in post-licensing matters where the licensee seeks only a deadline extension prevents relitigation of substantive issues already decided in the original licensing proceeding. The Commission's approach makes sense in light of the FPA's purpose of "promot[ing] the comprehensive development of the water resources of the Nation," *First Iowa Hydro-Elec. Coop. v. Fed. Power Comm'n*, 328 U.S. 152, 180 (1946), as it allows the Commission "to act on numerous hydroelectric compliance matters in a manner that is administratively efficient," Rehearing Order, 168 FERC at 62,109. As at least one of our sister circuits has recognized, the language in Section 308 of the FPA, 16 U.S.C. § 825g(a), gives the Commission "ample authority reasonably to limit those eligible to intervene . . . ." *Scenic Hudson Pres. Conf. v. Fed. Power Comm'n*, 354 F.2d 608, 617 (2d Cir. 1965). This authority is reasonably exercised by limiting the applicability of Rule 214 in post-licensing deadline extension proceedings.

Our conclusion is buttressed by the Commission's consistent reliance on *Kings River*, a 1986 decision, to deny intervention in post-licensing proceedings. *See, e.g.*, *Felts Mills Energy Partners, L.P.*, 87 FERC ¶ 61,094, 61,409 &

§ 1b.2, § 385.214(a)(4) does not aid in analyzing whether Rule 214 applies in this instance.

n.5 (1999); *Baldwin Hydroelectric Corp.*, 84 FERC ¶ 61,132, 61,743 & n.2 (1998). The Association cites to no case in which the Commission has entertained post-licensing intervention where the only change sought by the licensee was an extension of the construction deadlines. And while *Kings River* did not explicitly conclude, as here, that Rule 214 was "inapplicable," the Commission's orders are not inconsistent with this approach. *See City of Summersville*, 86 FERC ¶ 61,149, 61,534 (1999) ("*Kings River* in no way conflicts with the FPA or with our regulations; rather, it sets forth an explanation of instances in which the public interest does not warrant the granting of interventions."). In this sense, the Commission's Orders surely do not represent an irrational departure from Commission precedent. *See Cal. Trout*, 572 F.3d at 1023. Nor can we say that this case falls within the "narrow class of cases" where an agency's reliance on adjudication to announce new legal principles is improper. *Pfaff v. U.S. Dep't of Hous. & Urb. Dev.*, 88 F.3d 739, 748 (9th Cir. 1996). Indeed, the Commission's interpretation concerns a procedural matter intertwined with adjudication.

Finally, the Commission's interpretation of Rule 214 meets the other requirements of *Kisor*. 139 S. Ct. at 2415–18. Without doubt, the Commission's orders represent an authoritative statement of the agency and implicate the Commission's core expertise in administering the FPA. *See Martin v. Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 154 (1991) ("[A]djudication operates as an appropriate mechanism not only for factfinding, but also for the exercise of delegated lawmaking powers, including lawmaking by interpretation."); 16 U.S.C. § 792. Although the Commission's analysis could have been more comprehensive, it was not merely a "convenient litigating position," nor did it "create[] unfair surprise to regulated

parties," especially in light of the reliance on *Kings River* and other Commission precedent following that policy. *See Kisor*, 139 S. Ct. at 2417–18 (internal quotation marks and citations omitted); *see also Goffney v. Becerra*, 995 F.3d 737, 745 (9th Cir. 2021) ("[T]he agency [need not] engage in an exhaustive interpretive discussion—even an interpretation implicit in an agency's order can reflect the agency's fair and considered judgment." (internal quotation marks omitted)). Accordingly, the Commission's interpretation of Rule 214 deserves deference.

### B. APPLICABILITY OF *KINGS RIVER*'S EXCEPTIONS

In *Kings River*, the Commission established an exception to the general rule that Rule 214 is inapplicable in post-licensing proceedings if the post-licensing filings "entail material changes in the plan of project development or in the terms and conditions of the license . . . ." 36 FERC at 61,883.

Our task is to determine whether the Commission reasonably interpreted "material changes" under *Kings River* to be "only those fundamental and significant changes that result in physical changes," and whether the Commission erred in concluding that Eagle Crest's deadline extension request was not material. *See* Rehearing Order, 168 FERC at 62,109–10. To the extent that the Commission relies on its own regulations, we again evaluate the deference owed to the Commission under *Kisor*, 139 S. Ct. at 2415–18. We review the Commission's finding that Eagle Crest's request does not entail a material amendment for substantial evidence. 16 U.S.C. § 825*l*(b); *see also Green Island Power Auth. v. FERC*, 577 F.3d 148, 162 (2d Cir. 2009) (applying the substantial evidence standard to determine whether changes to a project materially amended a license application). Substantial evidence "means such relevant

evidence as a reasonable mind might accept as adequate to support a conclusion." *Fall River Rural Elec. Coop., Inc. v. FERC*, 543 F.3d 519, 525 (9th Cir. 2008) (citation omitted).

We reject at the outset the Commission's conclusion that non-physical changes to a project are never material. Nonetheless, substantial evidence supports the Commission's conclusion that Eagle Crest's deadline extension request was not a material amendment to the License.

To begin, as with "proceedings," no regulation defines "material amendment" for purposes of amendments to *existing* licenses. To analyze whether Eagle Crest's deadline extension request was a material change, the Commission relied on its regulation governing amendments to license *applications*. 18 C.F.R. § 4.35. Subsection (f) of that regulation, which deals with amendments of applications, provides in relevant part:

> (f) Definitions.
>
> > (1) For the purposes of this section, a material amendment to plans of development proposed in an application for a license or exemption from licensing means any fundamental and significant change, including but not limited to:
> >
> > > (i) A change in the installed capacity, or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project;

> (ii) A material change in the location, size, or composition of the dam, the location of the powerhouse, or the size and elevation of the reservoir if the change would:
>
> > (A) Enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse; or
> >
> > (B) Cause adverse environmental impacts not previously discussed in the original application; or
>
> (iii) A change in the number of discrete units of development to be included within the project boundary.

*Id.* § 4.35(f)(1).

The regulation defines a "material amendment" to be "any fundamental and significant change." *Id.* The Commission takes the position that because the listed examples of such changes share the common trait of referring to tangible aspects of a project, a "material amendment" means "only those fundamental and significant changes that result in physical changes." Rehearing Order, 168 FERC at 62,110; *see also Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion) (applying the interpretative principle *noscitur a sociis*—"a word is known by the company it keeps").

The Commission reasonably draws from the analogous license application regulation to guide its decision. *Cf. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 319 (2014) ("One ordinarily assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted)). But the language of 18 C.F.R. § 4.35(f)(1) unambiguously admits the possibility that material amendments may exist beyond the listed examples. 18 C.F.R. § 4.35(f)(1) ("[A] material amendment . . . means *any* fundamental and significant change, *including but not limited to* . . . .") (emphases added)). This observation comports with the Commission's acknowledgement that the "rule specifies *the most common types of changes* that would result in treatment of an amended license application as a newly submitted application." Revisions to Certain Regulations Governing Applications for Preliminary Permit and License for Water Power Projects, 46 Fed. Reg. 55,245, 55,250 (Nov. 9, 1981) (emphasis added).

Thus, while physical changes will often be the source of material amendments to a license, it does not follow that an amendment that does not change a physical aspect of a project can *never* be a "fundamental and significant change." *See* 18 C.F.R. § 4.35(f)(1). The language of *Kings River* itself concerns not only material changes in the plan of project development but also "in the terms and conditions of the license." 36 FERC at 61,883. There are myriad situations where a licensee could seek to change the terms and conditions of a license in ways that, while not impacting the physical aspects of the project, are nevertheless material. For example, the Commission itself has acknowledged that "[a] case could arise where repeated [deadline] extensions [for a post-licensing compliance filing] over a very long period of time could give rise to legitimate grounds for

intervention and appeal." *City of Tacoma*, 89 FERC ¶ 61,275, 61,800 (1999) (first alteration in original) (quoting *Cent. Me. Power Co.*, 53 FERC ¶ 61,089, 61,250 n.8 (1990)); *see also Erie Boulevard Hydropower, L.P.*, 131 FERC ¶ 61,036, 61,226 (2010) (recognizing that 18 C.F.R. § 4.35(f)(1) is not limited to examples that concern a project's physical features and therefore examining "all aspects of the [proposed amendments] to determine whether they might constitute a fundamental and significant change"), *aff'd sub nom. Green Island Power Auth. v. FERC*, 497 F. App'x 127 (2d Cir. 2012); *Felts Mills*, 87 FERC at 61,409 (contemplating that deadline extensions may constitute material amendments under *Kings River*, even if only "rarely"). The Commission's seemingly categorical exclusion of non-physical changes cannot stand in light of these considerations and the unambiguous regulatory language on which the agency relies. *See Kisor*, 139 S. Ct. at 2415–18.

Despite the Commission's overly narrow interpretation of "material changes," substantial evidence supports its conclusion that Eagle Crest's deadline extension request was *not* a material amendment under *Kings River*. The Commission found that Eagle Crest's requested extensions of time to commence and complete construction were "routine administrative matters," "d[id] not affect the merits or physical nature of the [P]roject," and "add[ed] no environmental impacts to those already studied in the now-final licensing proceeding." Rehearing Order, 168 FERC at 62,110. The Commission also addressed the Association's specific arguments. In particular, the Commission noted that as part of the underlying License proceedings, it had already balanced the protection of environmental resources with the need for power to be produced by the Project—an analysis consistent with the comprehensive development objectives

of the FPA. It further observed that, as a purely administrative action that does not involve any construction or changes to the Project development, the extension requests were appropriately excluded from additional National Environmental Policy Act review.

These explanations adequately support the Commission's determination that the deadline extension request was neither "material" nor "fundamental and significant." *See* 18 C.F.R. § 4.35(f)(1). The Association does not allege that Eagle Crest's request entails any changes to the Project or License other than the time delay. Rather, the Association's grounds for arguing materiality are premised on the Association's assessment of what would have happened had the Commission terminated the License and the effects of the deadline extension *on the Association*—and on the Association's conservation efforts—rather than on "the plan of project development or [] the terms and conditions of the license." *Kings River*, 36 FERC at 61,883. And while there may be a case where successive extensions "over a very long period of time" may appropriately warrant intervention, the extension here only extended the commencement of construction two years beyond the first extended deadline. *See City of Tacoma*, 89 FERC at 61,800 (citation omitted).

Importantly, the Commission's treatment of the intervention request is also fully consistent with agency precedent. *See Cal. Trout*, 572 F.3d at 1022 ("We generally expect agencies to deal consistently with the parties or persons coming before them."). The Commission has always deemed post-licensing deadline extension requests

nonmaterial for purposes of intervention.[7] As with its argument regarding the applicability of Rule 214, the Association cites to no Commission decision where an extension of time to commence construction, without more, was found to be a material amendment to a license such that intervention was permitted.

Finally, as a fallback position, the Association argues on appeal that the extension "could adversely affect the rights of property-holders in a manner not contemplated by the [L]icense," thus falling within the second *Kings River* exception. 36 FERC ¶ 61,365, at 61,883. But the Association failed to properly raise this argument in either its request for rehearing or motion to intervene and does not offer a reasonable ground for its failure to do so. Accordingly, we cannot rule on this claim on appeal. *See* 16 U.S.C. § 825*l*(b); *High Country Res. v. FERC*, 255 F.3d 741, 745–46 (9th Cir. 2001) (requiring a petitioner to specifically raise an objection in a request for rehearing to trigger appellate review).

In light of these considerations, we conclude that the Commission did not abuse its discretion, or act arbitrarily or capriciously, in denying the Association's motion to intervene.

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[7] *See, e.g.*, *Felts Mills*, 87 FERC at 61,409 (denying intervention because the post-licensing requests for extensions of the licensee's construction deadlines were not material changes in the project's development plans or license terms); *Baldwin Hydroelectric*, 84 FERC at 61,743 (same, regarding a post-licensing request to extend time to complete construction); *Pub. Util. Dist. No. 1 of Okanogan Cnty.*, 160 FERC ¶ 61,094, at *2, 7 (2017) (same, regarding a post-licensing request for a stay of the deadline to commence and complete construction).

## II. PUBLIC NOTICE

We next consider whether the Commission erred in not giving public notice of Eagle Crest's post-licensing request. The parties agree that, given the reference in Rule 214 to Rule 210, if the Commission is required to provide public notice of a proposed license amendment, it must also entertain intervention.[8] *See* 18 C.F.R. § 385.214(b)(3) ("If a motion to intervene is filed after the end of any time period established under Rule 210, such a motion must . . . show good cause why the time limitation should be waived."). Accordingly, as with the motion to intervene, we have jurisdiction to address whether public notice was required even though the Association was not a party to the proceedings. *See Covelo*, 895 F.2d at 586; *see also N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984) ("[W]here a complainant was not a party to the agency proceeding, and . . . objects to the agency's failure to give notice" and the agency "declines to reopen the matter, that decision itself would be a statutorily reviewable order." (internal quotation marks omitted)).

Section 6 of the FPA governs public notice:

> Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and *may be altered*

[8] As to the inverse proposition—whether intervention is disallowed where public notice is not required—we do not express an opinion. However, we note that the Commission has recognized that "[i]n instances where [the Commission] do[es] not issue public notice of a proceeding, but where intervention is appropriate, [it] consider[s] motions to intervene filed within 30 days of an order (the same time period for requesting rehearing) to be timely." Rehearing Order, 168 FERC at 62,111.

> or surrendered only upon mutual agreement between the licensee and the Commission *after thirty days' public notice*.

16 U.S.C. § 799 (emphases added).

Although the term "altered" is not statutorily defined, the Commission has interpreted Section 6 as requiring notice only where "significant alterations" to a license are implicated:

> If it is determined that approval of the application for amendment of license would constitute a *significant alteration* of license pursuant to section 6 of the [FPA], 16 U.S.C. [§] 799, public notice of such application shall be given at least 30 days prior to action upon the application.

18 C.F.R. § 4.202(a) (emphasis added). No Commission regulations define the meaning of "significant."

Based on longstanding interpretative precedent, the Commission determined that Eagle Crest's request was not a significant alteration of the License because the requested extensions were not inconsistent with the Project's plan of development or terms of the License. The Association takes issue with the Commission's interpretation of Section 6 of the FPA as requiring notice only where alterations are "significant." But even if this limitation was permissible, the Association argues, Eagle Crest's deadline extension request was a significant alteration of the original license because it revived an "expired" project despite significant intervening regulatory and environmental developments.

We evaluate de novo the Commission's understanding of its statutory mandate, utilizing the well-trodden test set forth in *Chevron*. *Chevron v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984); *see also Am. Rivers*, 201 F.3d at 1194. Under *Chevron*, we first employ traditional tools of construction to ascertain whether the intent of Congress is clear or whether, instead, the statute is silent or ambiguous as to the precise question at issue. 467 U.S. at 842–43 & n.9. If the statute is silent or ambiguous, the agency's interpretation will stand unless it is unreasonable. *Id.* at 843–44; *see also Am. Rivers*, 201 F.3d at 1197. Where, however, the Commission relies on interpretative rules that are not the result of notice-and-comment rulemaking or formal adjudication, we look to "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see also United States v. Mead Corp.*, 533 U.S. 218, 230 (2001). What constitutes an "alteration" for Section 6 purposes is a factual issue that we review under the substantial evidence standard. *See Fall River*, 543 F.3d at 526.

The Commission's interpretation of Section 6 of the FPA is sufficiently persuasive as applied to deadline extension requests. To begin, as we have noted, the FPA is silent as to the precise meaning of the term "altered" in 16 U.S.C. § 799. Congress did not include words like "in any way" or "significantly" in the text of the statute to indicate the breadth of its intended scope. The legislative history of Section 6 does not aid our analysis. Congress appears to have acknowledged that not all amendments to a license trigger the requirements of Section 6: Congressional committee reports at the time of the 1935 amendments to the Federal Water Power Act, which would later become Part I

of the FPA, stated with respect to reducing the notice period that "[t]he present provision, *applying as it does to every material change in the terms of a license*, causes unnecessary delay." *Public Utility Holding Company Act of 1935: Hearing on S. 1725 Before the S. Interstate Commerce Comm.*, 74th Cong. 236 (1935) (emphasis added). Even so, Congress has not clearly expressed which amendments trigger notice, much less whether deadline extensions are such amendments.

Because the statute is silent, we next ask whether the Commission's interpretation is reasonable. Other courts have recognized that Section 6 "must incorporate some common sense limits." *See Pac. Gas & Elec. Co. v. FERC*, 720 F.2d 78, 89 (D.C. Cir. 1983). And we have previously "assume[d] without deciding that in order for Section 6 of the FPA to apply, a proposed project must substantially alter an existing license." *Fall River*, 543 F.3d at 525–26. We take a similar approach here: while we express no opinion as to whether the term "altered" in Section 6 of the FPA refers only to "significant" alterations, we conclude that the Commission reasonably determined that deadline extensions do not trigger Section 6 notice requirements.

Since the Commission relied on informal rules to reach its conclusion, our inquiry into the reasonableness of the Commission's interpretation of Section 6 necessarily implicates a *Skidmore* analysis. The Commission persuasively relied on the 1923 opinion by the chief counsel of the Federal Power Commission, the Commission's predecessor agency. *See* Rehearing Order, 168 FERC at 62,111. There, the chief counsel explained that

> The language of [S]ection 6, if literally construed, would include any change in a license or in the plans forming a part of the

> license, but other provisions of the [FPA] indicate that the provisions of [S]ection 6 should not receive this literal construction . . . . [T]herefore, . . . the requirement of [S]ection 6 . . . should be construed as limited to such alterations in project plans as would constitute a substantial modification or departure from the plan of development as originally . . . authorized . . . ; and further, that in so far as they involve the license in general, the provision has reference only to such changes in its terms and conditions as would constitute new terms and conditions and not mere corrections of errors or *extensions of time* within the scope authorized by the [FPA], or to other changes of similar character involving no substantial modification of the original provisions of the license.

3 Fed. Power Comm'n Ann. Rep. 224–25 (1923) (emphasis added).

The conclusion of the 1923 opinion that deadline extensions do not trigger Section 6 notice requirements comports with the Commission's later statements in the regulatory preamble to 18 C.F.R. § 4.202. Application for License for Major Unconstructed Projects and Major Modified Projects; Application for License for Transmission Lines Only; and Application for Amendment to License, 46 Fed. Reg. 55,926 (Nov. 13, 1981). There, the Commission stated that amendments that are "not so fundamental as to create a different licensed project" did not call for public notice or intervention. *Id.* at 55,931. The Commission has not deviated from the understanding that

deadline extensions are not fundamental. *See Nat. Res. Def. Council v. EPA*, 526 F.3d 591, 602 (9th Cir. 2008) ("As a component of whether an agency's interpretation is permissible, we will take into account the consistency of the agency's position over time."). It is no surprise that the Association cites to no case or Commission order where an extension request of the sort presented here required notice.

The reasonableness of the Commission's interpretation is reinforced by the consistency with Section 6's purpose of promoting stable financial expectations among investors, and with the FPA's larger purpose of promoting the "comprehensive development" of waterways. *Pac. Gas*, 720 F.2d at 89 & n.32; *First Iowa*, 328 U.S. at 180. Requiring a 30-day notice period every time a licensee requests a deadline extension to commence construction, but nothing more, would inevitably cause delay. It could also upend the sense of finality in the proceedings that investors expect.

Having resolved that the Commission's interpretation of Section 6 is deserving of deference, at least as applied to deadline extension requests in particular, we also hold that the Commission's determination that Eagle Crest's request did not trigger Section 6 notice requirements is supported by substantial evidence. The Commission's finding is especially sound since Eagle Crest requested only a two-year extension and sought no other changes to the Project or the License. We also think it significant that the Association's chief challenges to the lack of notice are based on the questionable premise that the extension "revived" an expired project and made more difficult the Association's conservation efforts. Given these considerations, we uphold the Commission's conclusion that notice was not required.

The petition for review is **DENIED**.