Nos. 19-72915, 19-73079

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIONAL PARKS CONSERVATION ASSOCIATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

EAGLE CREST ENERGY COMPANY,
Respondent-Intervenor.

PETITIONER'S OPENING BRIEF IN PETITION FOR REVIEW
(Ninth Circuit No. 19-72915; FERC No. 13123-002)

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner makes the following disclosures: Petitioner National Parks Conservation Association is a not-for-profit organization and has no parent companies, subsidiaries, or affiliates that have issued stock to the public in the United States or abroad.

Dated: February 6, 2020

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INTRODUCTION

Joshua Tree National Park is one of our nation's last wild places. Since it was first protected in 1936, the Park has been an oasis of life in an inhospitable, sere desert landscape. The Park's countless rare species, including the desert tortoise, desert bighorn sheep, and golden eagle, dart amongst the shadows of the unmistakable Joshua trees that find their home in the Mojave Desert and nowhere else. The Park is at the center of an integrated and fragile desert ecosystem facing old and new threats, including human encroachment, groundwater depletion, and climate change.

Petitioner National Parks Conservation Association ("NPCA") works tirelessly to protect America's wild places, including Joshua Tree National Park. For decades, NPCA has fought to protect the Park from the unceasing pressure of development and ensure that its unparalleled ecological and cultural resources remain intact for future generations. In 2014, NPCA defeated a massive landfill proposed on now-exhausted mining claims on the Park's eastern flank. *See Nat'l Parks Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9th Cir. 2010) (final judgment entered in NPCA's favor in 2014). For two decades, the landfill threatened sensitive lands that were once protected within the Park boundary and have long been proposed for re-inclusion in the Park. In this case, NPCA seeks to protect those same lands from the latest threat: the Eagle Mountain Pumped-

Storage Hydroelectric Project ("Eagle Mountain Project" or "Project"), which would use the pits of the old mines to bank energy the region cannot effectively use, withdrawing massive amounts of water the region cannot afford to lose.

Despite public outcry and skepticism from federal and state governmental agencies, in 2014 the Federal Energy Regulatory Commission ("Commission") issued the Eagle Mountain Project a license to construct and operate, purportedly to provide additional electric grid storage capacity and address transmission congestion. But the Project has been unable to secure a power-purchase agreement or long-term funding, and the Eagle Crest Energy Company ("Eagle Crest") missed its first deadline to commence construction. One extension and two years later, Eagle Crest again failed to break ground. Eagle Crest's license expired, and, under the Federal Power Act, the Commission was required to terminate it. Instead, five months after its expiration, the Commission extended the license again, this time by retroactively—and unlawfully—applying an amendment to the Federal Power Act enacted after the license expired.

NPCA moved to intervene in this second extension proceeding, explaining that the Commission could not retroactively revive the Project and extend its license, and that significant new information and regulatory changes required the Commission to revisit its environmental review for the Project. The Commission, however, denied NPCA's motion and request for rehearing.

In doing so, the Commission failed to comply with the Federal Power Act and the Commission's own controlling regulations, for two reasons. First, NPCA met all the criteria for intervention set forth in the plain language of Commission Rule 214 (18 C.F.R. § 385.214). Nonetheless, the Commission contends that Rule 214 does not apply in "post-licensing" proceedings where there is no "material" change to a license, a standard the Commission employs to reject intervention in *every* case involving extensions of deadlines to commence or complete construction. However: (1) Rule 214 is not ambiguous about the criteria for intervening in Commission proceedings; (2) even if it were, the Commission's cramped reading of it is neither reasonable nor fair; and (3) the second, retroactive extension of Eagle Crest's expired license was in any event a "material" change under the Commission's regulations and adjudications. The Commission's blanket policy that no entity like NPCA may ever intervene in a license-extension proceeding is unlawful and unfair, at least in this case.

Second, the Commission failed to issue a public notice for the Eagle Mountain Project license-extension proceeding, as required by section 6 of the Federal Power Act and the Commission's regulations (18 C.F.R. §§ 385.210, 4.200, 4.202). Issuing such notice sets the timeline for intervention, meaning that a proceeding for which a public notice is required is necessarily open to intervention.

Here, too, the Commission's decision to extend the Project license meets the Commission's test, in that the decision was a "significant alteration" of the license.

In short, the Commission's decision to deny NPCA intervention violates the Federal Power Act and the Commission's own regulations. But that is not all. The decision precludes NPCA from fully litigating the Commission's authority to grant the extension. The decision advances a project that will have significant environmental consequences, is of questionable utility, and that may require modification or be barred altogether. Most of all, the decision ignores fairness, common sense, and basic principles of informed agency decision-making. For a project as controversial and consequential as the Eagle Mountain Project, NPCA's intervention in the Commission's license-extension proceeding is not only legally required but essential.[1]

ISSUES PRESENTED

1. In denying NPCA's timely, unopposed motion to intervene in the proceeding to extend Eagle Crest's Project license, did the Commission violate (a) 18 C.F.R. § 385.214 (Rule 214), which grants automatic intervention to a

[1] Even if the Court grants NPCA party status in the license-extension proceeding via this petition for review, NPCA cannot seek judicial review of the Commission's extension decision. The reasons are summarized briefly in footnote 10 below and discussed fully in NPCA's petition for writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651, Ninth Cir. No. 19-73079. The Court has consolidated these two cases and ordered the Commission and Eagle Crest, which intervened in both cases, to respond to NPCA's writ petition.

movant that adequately states its position and interests and whose motion is unopposed, and/or (b) the Commission's regulations and adjudications, which permit intervention where there is a "material change" to a project?

2. In denying NPCA intervention, did the Commission violate section 6 of the Federal Power Act, 16 U.S.C. § 799, and 18 C.F.R. § 4.202, which require that the Commission give public notice of any proceeding involving a "significant alteration" to a license?

STATEMENT OF THE CASE

I. Legal background

A. Licensing under the Federal Power Act

The Federal Power Act permits the Commission to grant up to 50-year licenses for hydroelectric power projects, including pumped-storage facilities like the Eagle Mountain Project. 16 U.S.C. §§ 797(e), 799. In evaluating license applications, the Commission "shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." *Id.* § 797(e).

Hydropower licenses are subject to strict statutory deadlines. Section 13 of the Federal Power Act requires licensees to commence construction of a project

within the time fixed by the license, which "shall not be more than two years from the date" of license issuance. 16 U.S.C. § 806. When a licensee fails to commence construction within the maximum time allowed by the Federal Power Act, "after due notice given, the license *shall*, as to such project works or part thereof, *be terminated* upon written order of the commission." *Id.* (emphasis added).

A licensee may apply to extend the deadline(s) to commence or complete construction of a project, but must file such application "not less than three months prior to" the expiration of the deadline(s). 18 C.F.R. § 4.202. Prior to October 23, 2018, section 13 of the Federal Power Act allowed the Commission to extend the commencement of construction deadline only once and only for up to two years. 16 U.S.C. § 806 (2012). However, on October 23, Congress amended section 13 of the Federal Power Act as part of the America's Water Infrastructure Act, Pub. L. No. 115-270, § 3001 *et seq.*, 132 Stat. 3765, 3862-70 (2018) ("Infrastructure Act"). As amended, section 13 allows the Commission to extend deadlines to commence construction for up to eight years, rather than two. *Id.* § 3001(b).

The Infrastructure Act was notable in three respects. First, unlike prior amendments to the Federal Power Act, the Infrastructure Act did not contain any express language allowing the Commission to reinstate expired licenses, nor any indication that Congress intended the Infrastructure Act to apply to licenses that had already exercised their maximum allowable statutory extensions under the

prior section 13. Second, where Congress intended to authorize the Commission to retroactively reinstate licenses, Congress included explicit provisions in the Infrastructure Act to that effect. None of these provisions applies to the Eagle Mountain Project license. *See id.* §§ 3007-3009. Third, these license-specific provisions allowing retroactive extensions were originally proposed in independent, project-specific bills authorizing the "reinstatement of [the] expired license." *See, e.g.*, Petitioner's Initial Excerpts of Record ("ER") 266, 340 (listing similar bills from the last two legislative sessions). Representative Paul Cook's H.R. 5817, 115th Cong. (2018), which would have specifically allowed the Commission to reinstate and extend the expired Eagle Crest license, was not incorporated into the Infrastructure Act.[2] *See* ER 265-66 (also available at https://www.congress.gov/bill/115th-congress/house-bill/5817/).

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[2] Congress, in its history of legislating on expired licenses, including in H.R. 5817, has consistently recognized the legal importance of, and distinction between, "reinstating" an expired license before "extending" its term. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) ("The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" (citation omitted)); *cf. Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 373 (2019) ("That 'expenses' and 'attorney's fees' appear in tandem across various statutes shifting litigation costs indicates that Congress understands the two terms to be distinct and not inclusive of each other.").

B. Intervention in Commission proceedings

Proceedings arising under the Federal Power Act are subject to the Commission's promulgated rules of practice and procedure. 16 U.S.C. § 825g(b). Rule 214, 18 C.F.R. § 385.214, governs intervention in such proceedings. Under Rule 214, a "person" may intervene in a Commission proceeding by filing a motion to intervene.[3] *Id.* § 385.214(a)(3). The movant must provide the basis in fact and law for its legal position and demonstrate, in "sufficient factual detail," either that the movant "has or represents an interest which may be directly affected by the outcome of the proceeding," or that the movant's "participation is in the public interest." *Id.* § 385.214(b)(1)-(2).

If no party files an answer in opposition within 15 days of the motion to intervene, the movant becomes a party at the end of the 15-day period without any further action by the Commission. *Id.* § 385.214(c)(1). Intervention in this scenario is therefore considered "automatic." 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 within 15 days.").

[3] "Person" refers to any corporation, association, or organized group of persons, whether incorporated or not. 18 C.F.R. § 385.102(d).

Finally, section 6 of the Federal Power Act, 16 U.S.C. § 799, requires the Commission to provide "thirty days' public notice" of a proceeding to "alter[ ]" a license. The Commission interprets this requirement to apply to any "significant alteration" of a license. 18 C.F.R. § 4.202(a). The Commission's regulations specifically require an application to amend a license where a licensee seeks to "[e]xtend the time fixed in the license for commencement or completion of project works." *Id.* § 4.200(c). Section 6's public-notice requirement intertwines with intervention under Commission Rule 210; where public notice is required for an "application[ ]," the Commission, in issuing the notice, prescribes the deadline for filing motions to intervene. *Id.* § 385.210. Thus, proceedings that require public notice under section 6 are proceedings in which intervention is allowed.

II. Factual background

A. Joshua Tree National Park

Our nation's National Park System is one of the world's finest achievements in conservation and cultural preservation. Of all the protected, wild treasures in the Park System, Joshua Tree National Park stands out as one of the most spectacular. The Park's unique location at the border of two deserts, just 130 miles east of Los Angeles, creates a singular ecosystem harboring countless rare species, including the desert tortoise, desert bighorn sheep, fan palm oases, and more than 700 plant species, including the iconic Joshua tree. Sweeping vistas of ruggedly majestic

landscape stretch for miles, creating a place that is truly one of a kind. *See* National Park Service, *Eagle Mountain Boundary Study Including Possible Land Withdrawal Environmental Assessment*, at 2 (Mar. 2016) ("*Park Service Boundary Study*").[4] Beyond its natural resources, the Park serves as the record of millennia of human history, replete with remnants of ancient cultures like the Pinto dating as far back as 10,000 years; thousands of sites and artifacts of the Cahuilla, Chemehuevi, Mojave, and Serrano tribes; and the remains of settlements that marked the spread of frontier ranching and mining. *Id.* at 2-3.

In 1936, the federal government granted National Monument status to this fragile and precious landscape, recognizing the necessity of protecting these irreplaceable resources. But in 1950, newly patented mining claims led to the removal of much of the acreage from the Monument's eastern flank. *Id.* at 1, 5. When Joshua Tree became a National Park in 1994 via the California Desert Protection Act, Pub. L. 103-433, 108 Stat. 4471, these patented claims remained. The resulting fragmentation yields an awkward carveout, creating a spearhead of important but unprotected land that still cuts deep into the Park. *See Park Service Boundary Study* at 4; Figures 1-2 (next page).

[4] *Available at* https://parkplanning.nps.gov/document.cfm?parkID=310&projectID=59291&documentID=71932. NPCA cited, discussed, and hyperlinked this document in its filings before the Commission. *See* ER 37 & n.1, 72, 75, 261-62, 291, 294, 320.

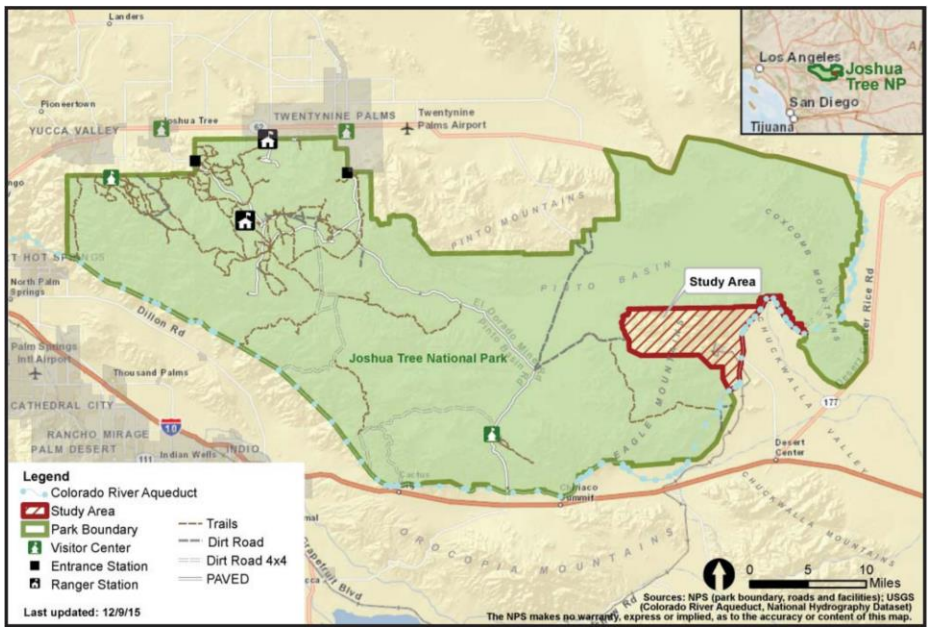

Figure 1. Map of Joshua Tree National Park showing "Study Area," which includes lands proposed to be occupied by the Eagle Mountain Project. *Source: National Park Service*, Park Service Boundary Study, *at 4 (2015)*

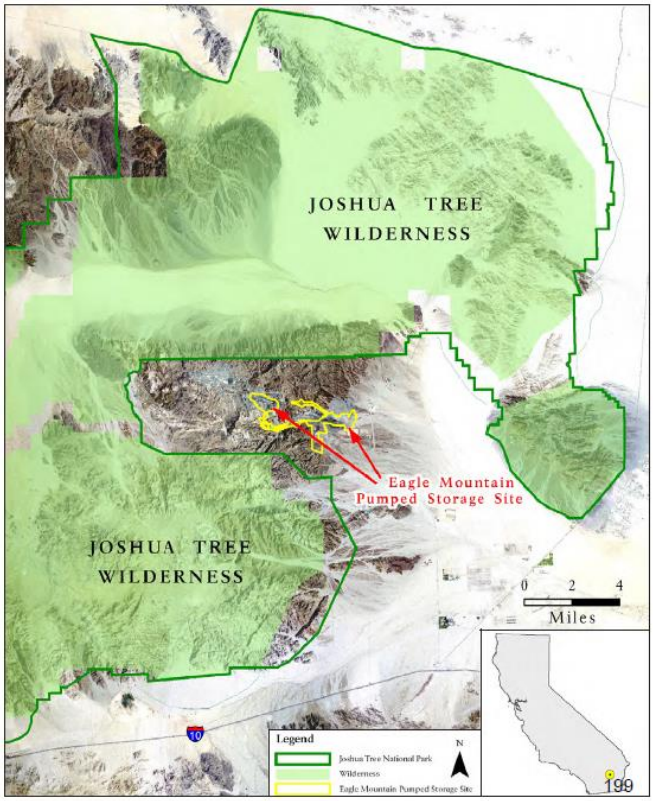

Figure 2. Map of Joshua Tree National Park showing the Eagle Mountain Project. *Source: National Park Service (2013) (from ER 250)*

From 1948 until 1983, the mining company Kaiser Steel Corporation established the largest iron mine in the Western United States on the 1950 mining claims, creating massive pits. *Park Service Boundary Study* at 1, 5-6. In 1989, Kaiser Eagle Mountain, Inc. ("Kaiser") proposed to convert the pits into the largest landfill in the United States, a permanent garbage dump that would accept up to 20,000 tons of garbage each day from the Los Angeles region. *Id.*

NPCA filed suit against the landfill and won. This Court held that the federal land exchanges necessary to construct the landfill were unlawful, ending the viability of the project in 2014. *Id.* at 1; *Nat'l Parks Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058 (9th Cir. 2010). Unfortunately, just as it seemed that Joshua Tree could once again become whole, another development proposal that had been waiting on the sidelines moved front and center: the Eagle Mountain Project. In 2014, the Commission issued the Eagle Mountain Project license that is at the center of this litigation.

In response to this never-ending threat of development, in 2016 the National Park Service conducted its Boundary Study to assess the possibility of annexing the 31,500-acre Study Area in Figure 1 above into Joshua Tree National Park. *Park Service Boundary Study* at 1, 12. This area included the site of the proposed Eagle Mountain Project. *See id.* at 13. Based on this study, the Park Service concluded that the "Eagle Mountain area remains a key building block for

landscape-scale conservation in the California desert," and that "[i]nclusion of the study area in the national park boundary could help to achieve landscape-scale conservation objectives for the unique California desert region." *Id.* at 14. The Park Service therefore recommended that Congress adjust the Park boundaries to permanently add the Study Area. *See, e.g.*, *id.* at 110. To facilitate the adjustment, in 2016 the Park Service temporarily withdrew over 20,000 acres of the land from entry, patent, or disposal under federal public-lands laws, and proposed a longer withdrawal to give Congress time to act. 81 Fed. Reg. 81,798 (Nov. 18, 2016). The temporary withdrawal expired on November 19, 2018, *id.* at 81,801, and the current administration did not formalize the 20-year withdrawal, *see* 43 U.S.C. § 1714(c) (providing withdrawal authority and procedures).

Fortunately, the government has made other efforts to protect this extraordinary area. In 2016, the same year the Park Service conducted its Boundary Study, much of the Project area and surrounding public lands became subject to the Desert Renewable Energy Conservation Plan, a federal and state land-use plan designed to comprehensively manage land uses in the California desert. The Conservation Plan imposed new conservation designations for much of the Project area, including Areas of Critical Environmental Concern and National Conservation Lands, and included mitigation measures to protect groundwater supplies. The Plan exempted "valid existing rights," including

hydroelectric licenses, in place as of the Plan's effective date of September 14, 2016; whenever those rights terminate, the lands they cover will become subject to the Conservation Plan's restrictions. *See* U.S. Bureau of Land Management, *Environmental Assessment and Draft CDCA Plan Amendment for the Eagle Mountain Pumped Storage Hydroelectric Project*, at Figure 1-1 (Apr. 2017)[5] (map showing Project area and conservation designations); *id.* at 6 (discussing valid existing rights); *id.* at Table 1-3 (listing conservation measures, including for groundwater, that the Project cannot comply with, and was not required to at that time because the Commission license was considered a "valid existing right"); *see also* U.S. Bureau of Land Management, *Desert Renewable Energy Conservation Plan – Land Use Plan Amendment*, at 87 (Sept. 14, 2016)[6] (including objective to "[m]itigate unavoidable impacts to groundwater-dependent habitats due to groundwater extraction through offsetting actions.").

[5] *Available at* https://eplanning.blm.gov/epl-front-office/projects/nepa/66002/105799/129372/Environmental_Assessment_and_Proposed_Plan_Amendment_April_2017.pdf. NPCA cited, discussed, and hyperlinked this document in its filings before the Commission. *See* ER 53-86, 265-308.

[6] *Available at* https://eplanning.blm.gov/epl-front-office/projects/lup/66459/133474/163144/DRECP_BLM_LUPA.pdf. NPCA cited, discussed, and hyperlinked this document in its filings before the Commission. *See* ER 34, 38, 45, 54-55, 76, 81, 83-86, 302-03.

B. The Eagle Mountain Project

The Eagle Mountain Project is a pumped-storage hydroelectric facility proposed to occupy approximately 2,500 acres of the lands the Park Service has long sought to annex into Joshua Tree National Park. *See Eagle Crest Energy Co.*, 147 FERC ¶ 61,220, 62,224 (2014). Using two pits of differential height left over from Kaiser's mining operation, the Project would use energy produced during periods of peak electricity generation to pump water uphill into the higher reservoir. Then, during periods of peak electricity demand, the Project would release water downhill, passing the water through turbines and generating electricity. Eagle Crest would profit by arbitraging short-term energy prices. ER 58, 136-37, 270, 736.

Most hydroelectric pumped-storage projects take advantage of adjacent free-flowing water, like rivers, to generate the power they store. At the border of the Colorado and Mojave deserts, where the Eagle Mountain Project would be built, there is no such water. To compensate, Eagle Crest intends to draw 32,000 acre-feet—over 10 billion gallons—of water from ancient aquifers in the Chuckwalla Valley Groundwater Basin to fill the mining pits. ER 123, 141. It would take four years to completely fill the pits, after which the Project would require roughly 3,200 additional acre-feet every year over its 50-year lifespan to offset seepage and the heavy evaporation rates of the arid desert environment. ER 141-42.

By design, the Project would result in a net energy loss for each year of its estimated 50-year life. In the process of moving water uphill and downhill, the Project would consume 5,744 gigawatt-hours ("GWh") but generate only 4,308 GWh per year, a loss of 1,436 GWh, or enough electricity to power over 133,000 homes. ER 56. Accordingly, the Project's purpose is not to generate electricity, but rather "to provide system peaking [storage] capacity and transmission regulating benefits to regional electric utilities." ER 746 (FERC, *Final Environmental Impact Statement for the Proposed Eagle Mountain Pumped Storage Hydroelectric Project (P-13123-002)*, at 1 (Jan. 30, 2012)).[7]

Eagle Crest originally proposed the Project in 1991, first applied for a license from the Commission in 1994, and reapplied for a license in 2009. The putative need for the project, dubious at best during its inception nearly 30 years ago, has only further dwindled as superior methods for energy storage and electricity demand management have come online. *See* ER 57-62, 89-90, 92-97, 272-78. The California Public Utilities Commission previously determined that pumped-storage projects, including the Eagle Mountain Project, were ineligible to meet California's energy storage procurement targets for large utilities (it is currently reviewing, but has not reversed, that decision). ER 275 (citing California

[7] The Commission's full environmental impact statement for the Eagle Mountain Project is included at ER 716-1218, and can be found at https://www.ferc.gov/industries/hydropower/enviro/eis/2012/01-30-12.asp.

Public Utilities Commission, *Rulemaking 15-03-011 Decision on Track 2 Energy Storage Issues* at 9-11 (Apr. 27, 2017)).[8] Likewise, the California Independent System Operator, which manages the state's electric transmission grid, has concluded that the proposed Eagle Mountain Project will not materially reduce regional grid congestion, obviating another of the Project's few reasons for being. ER 275-76 (citing California Independent System Operator, *2017-2018 Transmission Plan* at 294 (approved March 22, 2017)).[9] It is therefore no surprise that Eagle Crest has been unable to obtain an approved power purchase agreement, without which the Project is not commercially viable.

Government agencies and the public have raised substantial concerns about the Project's impacts on the area's ecological and cultural resources. Chief among these concerns, the Project poses substantial risks to the region's fragile, limited groundwater reserves. The Park Service explains that the "potential impact to the basin overdraft from the proposed project pumping should be considered *significant* as it will exacerbate groundwater storage depletion and declining water levels already occurring in the basin." ER 1148; *see also* ER 252 (Park Service

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[8] *Available at* http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M185/K070/185070054.PDF. NPCA cited, discussed, and hyperlinked this document in its filings before the Commission. *See* ER 59, 275.

[9] *Available at* http://www.caiso.com/Documents/BoardApproved-2017-2018_Transmission_Plan.pdf. NPCA cited, discussed, and hyperlinked this document in its filings before the Commission. *See* ER 275.

expressing similar concerns in 2013); ER 378 (Park Service explaining in 2017 that it "continues to find that there is substantial controversy regarding the groundwater recharge rate" and that recent "research suggests that the planned withdraw rate would cause damaging overdraft conditions"). Similarly, the U.S. Department of the Interior is concerned by the Commission's reliance on ambiguous "historical levels" as a baseline for its groundwater withdrawal comparisons. ER 1163. Even Kaiser, the former mining company, faulted the Commission for using unjustified, atypical groundwater modeling in its environmental impact statement. ER 1136.

With respect to groundwater quality, the Los Angeles County Sanitation District No. 2 has criticized the Commission for failing to properly analyze noxious acid mine seepage from the ore pits, ER 1137, an environmental disaster the Commission admits might take years to identify, let alone rectify, ER 1200. The Park Service is also concerned about seepage, especially since the Project will likely be obsolete or subject to decommissioning before the end of its 50-year term, and given that the Project's environmental review did not address the hazards of contaminated pit water in the event of early decommissioning. *See* ER 1173; *see also* ER 252 (Park Service expressing similar concern in 2013); ER 594 (Park Service explaining in 2015 that, "[i]n addition to ground water depletion, the main concern we have relates to water quality monitoring").

These are just the Project's groundwater impacts; the Project's impacts on other resources have also caused alarm. For example, the Project could permanently affect onsite plant communities and wildlife habitat. ER 1179. The Project is liable to increase predation by ravens of the imperiled desert tortoise over 330,000 acres of "prime" tortoise habitat. ER 251, 253. The Project could disrupt migratory paths for bighorn sheep, an impact the Park Service, the U.S. Fish & Wildlife Service, and environmental organizations worry the Commission has not adequately studied. ER 1182. And, according to the Park Service and the California State Water Resources Control Board, the Project would harm the area's exceptional, undeveloped viewsheds and therefore its recreational opportunities. ER 1203. All told, the Project has the potential to significantly, adversely affect the Project area, Joshua Tree National Park, and the inestimable ecological and cultural resources they contain.

Finally, as we discussed above, the lands and waters the Eagle Mountain Project will affect are subject to special conservation designations (e.g., Areas of Environmental Concern and National Conservation Lands) and conservation measures under the 2016 Desert Renewable Energy Conservation Plan. Although the Project's Federal Power Act license is a "valid existing right" exempt from the Conservation Plan, that is true for only so long as the license continues to exist. In addition, the Project requires rights-of-way from the Bureau of Land Management

to utilize federal public lands that are subject to the Conservation Plan. For that reason, the Project can proceed only if the Conservation Plan is amended. *See* ER 34, 38, 45. Eagle Crest applied for, and the Bureau of Land Management granted, a Conservation Plan amendment. NPCA has appealed that decision to the Interior Board of Land Appeals, where it is still pending. *See* ER 38, 53-86, 265-309.

III. Procedural background

A. Eagle Crest's initial license and failure to commence construction

In June, 2009, Eagle Crest submitted its application to construct and operate the Project on the former Kaiser mine site and federal public lands under the Bureau of Land Management's jurisdiction. 147 FERC ¶ 61,220, at 62,223; ER 618. During the licensing process, numerous state and federal government agencies and members of the public moved to intervene or submitted comments on Eagle Crest's application, voicing their serious concerns about the proposed Project. *Id.* at 62,224. Despite these concerns, on June 19, 2014, the Commission issued Eagle Crest a license for a 50-year term. *Id.* at 62,243; ER 618-714.

Article 301 of the license required Eagle Crest to commence construction within two years—by June 19, 2016—per section 13 of the Federal Power Act. 147 FERC ¶ 61,220, at 62,247; ER 672. The license further required Eagle Crest to complete construction by June 19, 2021. 147 FERC ¶ 61,220, at 62,247; ER 672. Pursuant to section 13, Eagle Crest subsequently sought, and the Commission

granted, an extension to commence construction by June 19, 2018. ER 590-91. In granting the extension, the Commission warned Eagle Crest that "the deadline for starting construction may only be extended once, for a period not exceeding two additional years and that therefore, the Commission could not grant any further extensions of time for the commencement of project construction." ER 591.

Eagle Crest failed to commence construction by the June 19, 2018, deadline. Eagle Crest further failed to timely apply for any further extension or stay of the license's deadlines. *See* 18 C.F.R. § 4.202(b) (requiring that applications for extensions be filed "not less than three months prior to the [commencement of construction] date"). Because Eagle Crest exhausted all available extensions under section 13 of the Federal Power Act, on June 19, 2018, NPCA petitioned the Commission to issue an order terminating Eagle Crest's license for failure to commence construction by the deadline mandated by the Federal Power Act. NPCA cited the interests of effectuating the Act and protecting the ecological and cultural resources of the affected lands. ER 319-21. The Commission never acted on NPCA's petition.

B. The Commission's decision to revive and extend Eagle Crest's expired license and deny NPCA intervention

On November 7, 2018, Eagle Crest applied for yet another extension of its deadlines to commence and complete construction. This application came eight

months after it was due under 18 C.F.R. § 4.202(b), and five months after the final statutory extension had passed on June 19, 2018. ER 20 (¶¶ 3-5).

Because the Commission had never acted on or responded to NPCA's June 2018 request that it terminate Eagle Crest's license, on November 15, 2018, NPCA moved to intervene in the license-extension proceeding pursuant to 18 C.F.R. § 385.214 and submitted a detailed opposition to Eagle Crest's extension request. ER 21 (¶ 6); ER 350-72.

In its moving papers, NPCA detailed its abiding interest in the proceeding and in the lands and resources the Project would affect, and explained how extending Eagle Crest's license would adversely affect those interests. ER 35-41, 46-47, 350-53, 361-63. On the merits of Eagle Crest's extension request, NPCA argued that the Commission could not lawfully extend Eagle Crest's license, as the 2018 amendment to the Federal Power Act—the America's Water Infrastructure Act—could not be applied to retroactively extend the expired license. ER 45, 49 & n.5, 350, 353-63. Furthermore, regardless of any alleged authority to extend the license, new information and regulatory changes arising since the Commission issued the original license in 2014 required additional public process and environmental review. ER 44, 360-63.

On May 7, 2019, a panel of three Commissioners issued an order denying NPCA intervention and granting Eagle Crest its requested extension, with one

Commissioner dissenting. 167 FERC ¶ 61,117; ER 19-29. The extension gave Eagle Crest until June 19, 2020, to commence construction and until June 19, 2023, to complete construction. ER 25 (¶ (A)). In other words, Eagle Crest went from having two years to start construction to having six (based on the date of the original license), despite the fact that the license had already expired. Regarding NPCA's intervention, the Commission justified denying it as follows:

> The Commission issues notices and entertains intervention requests in post-licensing proceedings that entail a material change in the plan of project development or in the terms and conditions of the license, or that would adversely affect the would-be intervenor's rights in a manner not contemplated by the license. Post-licensing proceedings that do not involve such issues generally do not adversely affect any entities' rights because they typically do not alter the licensee's obligations or impose new burdens on third parties. Specifically, questions of timing are usually administrative matters that do not address the merits of the project in question. Accordingly, a request to extend the deadline for the commencement of project construction is generally not an action subject to intervention.

ER 24 (¶ 12). The Commission relied on this blanket policy to deny intervention without any specific analysis of NPCA's motion to intervene or the relevant facts of this case. ER 24-25 (¶ 12). The Commission did not explain how denying intervention squared with its own Rule 214, which makes intervention automatic where, as here, there is no timely answer in opposition. 18 C.F.R. § 385.214(c)(1). Nor did the Commission evaluate whether NPCA "has or represents an interest which may be directly affected by the outcome of the proceeding" or whether NPCA's participation "is in the public interest" under 18 C.F.R.

§ 385.214(b)(2)(ii)-(iii). Finally, the Commission dismissed in two paragraphs NPCA's argument that the Commission had unlawfully applied the Infrastructure Act to revive and extend Eagle Crest's license. The Commission claimed that Eagle Crest's license was "still in effect" when the Commission extended it, and that the Infrastructure Act did not explicitly prohibit extensions of previously issued licenses. ER 22-23 (¶¶ 8-9).

Commissioner Glick dissented from the decision to deny NPCA intervention. "By denying intervention" he wrote, "today's order deprives [NPCA] of the ability to challenge the merits of the Commission's responses on appeal." ER 28 (¶ 4 & n.7) (citing 16 U.S.C. § 825*l*(b) and *N. Colo. Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1515 (D.C. Cir. 1984) (holding that a non-party will be considered a party only for the purpose of reviewing the agency's basis for denying party status)). As to the merits of the denial, Commissioner Glick observed that NPCA "has adequately stated its interests in the proceeding and explained the adverse effects that the proceeding might have on those interests," which "should be sufficient for the Commission to grant [NPCA] party status and consider its arguments on the merits." ER 27 (¶ 2).

C. NPCA's request for rehearing

NPCA timely sought rehearing of the Commission's order denying intervention and concurrently requested a stay of its decision to extend Eagle

Crest's license. ER 32-340. On September 19, 2019, the Commission issued an order denying NPCA's requests. 168 FERC ¶ 61,186; ER 1-18.

As to the stay, the Commission stated (erroneously) that its decision to extend Eagle Crest's license would be subject to judicial review should a court find its denial of intervention unlawful. ER 5 (¶ 11). As to intervention, the Commission repeated that it categorically rejects motions to intervention in license-extension proceedings because such proceedings "generally do not adversely affect any entities' rights because they do not alter the licensee's obligations or impose new burdens on new parties." ER 6-7 (¶ 15). The Commission conceded that intervention is appropriate where there is a "material" amendment of a license, but asserted that extensions, including Eagle Crest's, of deadlines to start and finish construction are not "material" because they do not effect a "physical change" to a project. ER 9-10 (¶ 19). The Commission reached this conclusion even though Eagle Crest's license had expired, and even though Eagle Crest had exhausted the only timeline extensions to which it was entitled under the Federal Power Act. *See* ER 8-9 (¶ 18).

Commissioner Glick once again dissented. Commissioner Glick lamented that denying intervention unfairly prevented NPCA from seeking further review of the Commission's authority to extend Eagle Crest's license. ER 17 (¶ 5 & n.12). Commissioner Glick explained that "[d]eadlines to commence or complete

construction are important measures for ensuring that a project is consistent with the public interest, and the Commission ought to consider the perspectives of all affected parties before modifying those deadlines." ER 16 (¶ 3). And he "fail[ed] to see how preventing [NPCA] from litigating an important and unresolved legal question is good government or consistent with our responsibility to the public interest." ER 17 (¶ 5).

D. NPCA's petition for review (No. 19-72915) and related All Writs Act petition for writ of mandamus (No. 19-73079)

On November 18, 2019, NPCA timely filed this petition for review of the Commission's orders denying intervention and rehearing. On December 4, 2019, NPCA also filed a petition for writ of mandamus pursuant to the All Writs Act, 28 U.S.C. § 1651, because, as Commissioner Glick explained in his dissents, the interplay of the Federal Power Act and controlling Ninth Circuit precedent preclude NPCA from seeking review of the Commission's license extension, even if the Court grants this petition for review.[10] The Court has consolidated these two

[10] We explain this legal quandary more fully in our All Writs Act petition filed in No. 19-73079. Suffice it to say here that a "party" may seek judicial review of a Commission decision within 60 days of the Commission's order on a request for rehearing of that decision. 16 U.S.C. § 825*l*(b). Only a "party" may file a rehearing application, and it must do so within 30 days of the Commission's order. *Id.* § 825*l*(a). And a person other than a respondent (or certain applicants under the Interstate Commerce Act) becomes a "party" only where that person's "intervention in a proceeding is effective under Rule 214." 18 C.F.R. § 385.102. Thus, where the Commission denies a person intervention, that person does not become a "party" and cannot exhaust the Commission's rehearing process. Under

cases and ordered the Commission and Eagle Crest, which intervened in both cases, to respond to NPCA's writ petition.

STANDARD OF REVIEW

This Court reviews Commission decisions pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706. *Mountain Rhythm Res. v. FERC*, 302 F.3d 958, 963 (9th Cir. 2006). Under section 706(2) of that Act, a Commission decision will be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or if it was taken without observance of procedure required by law." *Rainsong Co. v. FERC*, 106 F.3d 269, 272 (9th Cir. 1997).

To be upheld, the Commission must "articulate[ ] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Cal. Pub. Utils. Comm'n v. FERC*, 854 F.3d 1136, 1146 (9th Cir. 2017) (quotation marks omitted). A showing that the Commission has not "considered relevant factors, examined alternative courses of action or made a rational policy choice" is sufficient to show arbitrary and capricious action under

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California Trout v. FERC, 572 F.3d 1003, 1013 (9th Cir. 2009), this Court has no jurisdiction to hear the merits of a non-party's challenge to the Commission's underlying decision. *See also* Order Dissent at 2 (¶ 4) (Commissioner Glick citing *N. Colo. Water Conservancy Dist.*, 730 F.2d at 1515, which is to the same effect as *California Trout*). So, given NPCA's nonparty status in the license-extension proceeding, the Court may review only the Commission's denial of intervention; the Court may not address the merits of the substantive license extension without also granting NPCA's All Writs Act petition.

section 706(2). *Gulf Power Co. v. FERC*, 983 F.2d 1095, 1099 (D.C. Cir. 1993). So too is a showing that the Commission has unreasonably failed to follow its own regulations. *See Aerial Banners, Inc. v. FAA*, 547 F.3d 1257, 1260 (11th Cir. 2008); *Singh v. U.S. Dep't of Justice*, 461 F.3d 290, 296 (2d Cir. 2006).

SUMMARY OF ARGUMENT

Like every federal agency, the Commission must follow its own promulgated regulations. Commission Rule 214 grants automatic intervention in a proceeding to any entity that states its position and interests, or whose participation is in the public interest, so long as no opposition is timely filed. NPCA's motion to intervene satisfied each of these criteria, setting forth both NPCA's argument that the Commission could not lawfully reinstate Eagle Crest's license and extend its construction deadlines, and NPCA's and the public's interests in protecting the lands and resources that the Eagle Mountain Project will adversely affect.

In denying NPCA's motion, the Commission ignored the plain language of Rule 214 and barely considered NPCA's arguments. Instead, the Commission relied on two blanket policies to reflexively deny intervention: (1) Rule 214 does not apply in "post-licensing proceedings" unless the decision in question would be a "material" change to the license or would "adversely affect the would-be intervenor's rights in a manner not contemplated by the license," and (2) license extensions are *never* "material" changes. However, these policies misconstrue

Rule 214's plain language, which does not distinguish between "licensing" and "post-licensing" proceedings, and are unreasonable and unfair. Even if the policies were permissible, the Commission's decision to retroactively extend the expired Eagle Mountain Project license satisfied the Commission's "material" change and "adverse effect" tests. NPCA was entitled to intervene in the license-extension proceeding.

That conclusion is underscored by the Commission's failure to issue the required public notice for the Eagle Mountain Project license-extension proceeding. Under section 6 of the Federal Power Act and the Commission's regulations, including Rule 210, the Commission must give the public 30 days' notice of applications to make any change to a license that qualifies as a "significant alteration." Issuing such notice sets the timeline for intervention, meaning that a proceeding for which a public notice is required is necessarily open to intervention. Eagle Crest's extension significantly altered its original license by reviving a dead project that was subject to intervening regulatory and environmental developments that likely precluded the Project or at least required substantial changes to it. As such, the Commission was required to provide public notice of the extension proceeding and allow NPCA to intervene.

The consequences of denying NPCA intervention in this case are grave. The Commission retroactively revived and extended an expired license using a law that

did not permit it to do so. NPCA cannot fully argue that important legal issue, or seek judicial review of the Commission's resolution of it, without being a party to the license-extension proceeding. Indeed, according to the Commission's categorical interpretation of its own rules, no entity like NPCA may *ever* intervene in a proceeding to extend a hydropower license. That position cannot be right. And then there are the lands and resources the Eagle Mountain Project will affect for decades, if not longer. By denying NPCA intervention, the Commission has, without the meaningful input of other parties, precluded the Project area from rejoining Joshua Tree National Park and ignored intervening regulatory changes and new information that would bar, question, or require changes to the Project. NPCA and the public deserve more fair and informed decision-making from our government.

ARGUMENT

I. The Commission was required to grant NPCA intervention.

A. Rule 214 entitled NPCA to automatic intervention.

All proceedings under the Federal Power Act "shall be governed by rules of practice and procedure to be adopted by the Commission." 16 U.S.C. § 825g(b). "[I]n accordance with such rules and regulations," the Commission may admit as a party to a proceeding "any . . . person whose participation in the proceeding may be in the public interest." *Id.* § 825g(a). Pursuant to this authorization, the

Commission has promulgated binding regulations to govern the practice and procedure of its proceedings. *See* 18 C.F.R. part 385. Most relevant here is Rule 214, which governs intervention in Commission proceedings. *Id.* § 385.214.

Under Rule 214, any person who wishes to participate in a proceeding must file a motion to intervene and "must state, to the extent known, the position taken by the movant and the basis in fact and law for that position." *Id.* § 385.214(a)(3), (b)(1). The movant must also state in "sufficient factual detail" that either (1) it "has or represents an interest that may be directly affected by the outcome of the proceeding," or (2) its "participation is in the public interest." *Id.* § 385.214(b)(2)(ii), (iii).

If a motion to intervene meets these criteria, and if no answer in opposition is filed within 15 days, the movant automatically becomes a party without further action by the Commission. *Id.* § 385.214(c)(1); *cf. id.* § 385.214(c)(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."); *see also* 47 Fed. Reg. at 19,017-18 (confirming that, absent opposition, intervention is "automatic" where no opposition is filed).

Here, NPCA timely moved to intervene, filing its motion only eight days after Eagle Crest filed its application for an extension, and squarely met Rule 214's

requirements. First, NPCA stated its "position" and "the basis in law and fact for that position." 18 C.F.R. § 385.214(b)(1). NPCA explained that the Commission could not legally grant Eagle Crest an extension of its deadlines to commence and complete construction, as Eagle Crest had let those deadlines (and its license) expire. At this point, the Commission was required to terminate the license. The 2018 amendment to the Federal Power Act, the America's Water Infrastructure Act, did not and could not apply retroactively to revive Eagle Crest's expired license. And, even if an extension were lawful, changed circumstances and new information required further environmental review before the Commission could grant one. ER 44-45, 49 & n.5, 350, 353-63.

Second, NPCA set forth in "sufficient factual detail" its "interest which may be directly affected by the outcome of the" license-extension proceeding. 18 C.F.R. § 385.214(b)(2)(ii). NPCA explained that it, acting on behalf of its more than one (now 1.4) million members and supporters, has an abiding interest in protecting the lands and resources that the Eagle Mountain Project will irrevocably affect. *See* ER 35-41, 351-53. For more than two decades, NPCA has fought to protect these same lands from development as a garbage landfill and pursued avenues for their inclusion in Joshua Tree National Park; these successful litigation and advocacy efforts ended in the landfill's defeat and a subsequent Park Service Boundary Study recommending that the lands be incorporated into the Park.

ER 36-37, 352-53. At the same time, NPCA has participated in the concurrent regulatory process for the Eagle Mountain Project—a proposed alternative to the landfill—by submitting comments during the Commission's licensing process, challenging the Clean Water Act section 401 certification for the Project by the California State Water Resources Control Board, protesting federal rights-of-way granted by the U.S. Bureau of Land Management, and appealing that Bureau's decisions to the Interior Board of Land Appeals. ER 38, 352-53. NPCA monitored the Commission proceedings closely and immediately petitioned to terminate the Eagle Mountain Project license when its final statutory extension expired in June, 2018. ER 319-21.

Third, even though stating a "directly affected interest" was sufficient under Rule 214, NPCA also described in "sufficient factual detail" how its "participation" in the license-extension proceeding was "in the public interest." 18 C.F.R. § 385.214(b)(2)(iii). NPCA explained that, according to California energy regulators, the Eagle Mountain Project was of questionable value for the State and energy consumers, and that the Project portended significant adverse impacts for local groundwater aquifers. ER 361-63. NPCA explained that whether the Commission could grant Eagle Crest a retroactive extension was "an important legal question of significant policy concern." ER 40. And NPCA explained that the Commission's extension would destroy, for the foreseeable future, the

"opportunity to enhance wildlife and wilderness values on the federal public lands" near the Project. ER 37-38, 46-47. For all these reasons, an extension "would breathe new life into a Project which, in light of changed circumstances and new information, may not serve the public interest." ER 353; *see also* ER 17 (¶ 4) (Commissioner Glick stating that the "public interest" would be "better served by permitting intervention in these proceedings").

No opposition to NPCA's motion was filed within 15 days of NPCA's motion, or indeed at any point. Under subsection (c) of Rule 214—"Grant of party status"—that meant that NPCA would automatically "become[ ] a party at the end of the 15 day period." 18 C.F.R. § 385.214(c). As Commissioner Glick explained, NPCA "has adequately stated its interests in the proceeding and explained the adverse effects that the proceeding might have on those interests. That should be sufficient for the Commission to grant [NPCA] party status and consider its arguments on the merits." ER 15-16 (¶ 2 & n.3) (Glick, Commissioner, dissenting) (citing Rule 214).

In neither of its orders denying intervention and rehearing does the Commission claim that NPCA failed to meet Rule 214's criteria. The Commission's denial of intervention was therefore unlawful. *See United States v. 1996 Freightliner FLD Tractor*, 634 F.3d 1113, 1116 (9th Cir. 2011) (holding that the "government is bound by the regulations it imposes on itself"); *United States v.*

Ramos, 623 F.3d 672, 683 (9th Cir. 2010) ("It is a well-known maxim that agencies must comply with their own regulations." (quotation marks omitted)); *Steenholdt v. FAA*, 314 F.3d 633, 639 (D.C. Cir. 2003) (Supreme Court precedent "requires federal agencies to follow their own rules, even gratuitous procedural rules that limit otherwise discretionary actions."); *see also Hernandez-Velasquez v. Holder*, 611 F.3d 1073, 1077 (9th Cir. 2010) ("An error of law is an abuse of discretion."). And even if NPCA were not entitled to automatic intervention (it was), the Commission's failure to fully evaluate whether NPCA met Rule 214's intervention criteria was arbitrary, capricious, an abuse of discretion, and inconsistent with law because "it was not 'based on a consideration of the relevant factors.'" *California Trout*, 572 F.3d at 1012 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

B. The Commission's reasons for denying NPCA intervention lack merit.

The Commission, in its orders denying intervention and rehearing, offers a parade of justifications for its decision to deny NPCA intervention, all oriented around the idea that Rule 214 does not apply. None withstands scrutiny.

1. The Commission's blanket policy against intervention in "post-licensing proceedings" violates its unambiguous regulations.

The Commission first asserts a blanket policy against intervention in "post-licensing proceedings," reasoning that the Commission is entitled to "clarif[y] in

which circumstances [Rule 214] applies" through its adjudicatory decisions. ER 24 (¶ 12); ER 6-7 (¶ 15); *see also* ER 6-7 (¶ 15 & n.39) (asserting that the Commission "can in any event waive its regulations where appropriate"). However, while the Commission may establish policy through adjudications, it may not set policy that conflicts with rules promulgated pursuant to its quasi-legislative powers. *See Ariz. Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 388-89 (1932) ("[The Interstate Commerce Commission] may not in a subsequent proceeding, acting in its quasi-judicial capacity, ignore its own pronouncement promulgated in its quasi-legislative capacity . . . ."). Thus, the Commission may not introduce a mechanical distinction between "licensing" and "post-licensing" matters to deny intervention where Rule 214, or indeed any Commission regulation, contemplates no such distinction. *See* 18 C.F.R. § 385.101(a) (explaining that procedural rules apply to "[a]ny filing or proceeding under this chapter"); *id.* § 385.214(a)(1), (b)(1) (referring to "any proceeding" and "[a]ny motion to intervene").

In trying to winnow the proceedings to which Rule 214 applies, the Commission's real argument is that it deserves deference in interpreting Rule 214. But an agency has leeway in interpreting its own rule only where the rule is "genuinely ambiguous"; even then, the agency's interpretation must be "reasonable," implicate the agency's "substantive expertise," and reflect a "fair and

considered judgment." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-18 (2019) (internal quotation marks omitted). Rule 214 is not ambiguous and does not support the Commission's cramped reading of it. *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) ("The regulation in this case, however, is not ambiguous—it is plainly permissive. To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation."). Nor does Rule 214 require expert delimiting by the Commission; "administrative[ ] efficiency," the Commission's only rationale for selectively applying Rule 214, does not implicate the Commission's "substantive expertise." *See* ER 6-7 (¶ 15). Above all, Rule 214 out of fairness allows intervention by anyone who meets its criteria; the Commission's contrary interpretation is inherently unfair. The Commission deserves no deference in interpreting the plain language of Rule 214, which required the Commission to allow NPCA to intervene.

2. The Commission's "material change" test violates its own regulations and adjudications.

Perhaps recognizing the risks inherent in ignoring the plain language of its own regulation, the Commission offers that its rigid policy against intervention in post-licensing proceedings gives way in "certain limited circumstances." ER 7 (¶ 16). According to the Commission, post-licensing intervention is appropriate in (and only in) proceedings "that entail a material change in the plan of project

development or in the terms and conditions of the license, or that would adversely affect the would-be intervenor's rights in a manner not contemplated by the license." ER 24 (¶ 12); ER 7 (¶ 16) (citing *Kings River Conservation Dist.*, 36 FERC ¶ 61,365, at 61,882-61,883 (1986) ("*Kings River*")).

As we have explained, Rule 214's plain and expansive language permits anyone who meets its criteria to intervene; it does not impose a categorical bar with a narrow exception. Thus the Commission's interpretation is unlawful. But even if the Commission's "material" change/"adverse effect" exception were lawful, alas, the Commission tells us, it is of no use in this case, or indeed in any case involving a license extension, due to yet another blanket policy: "The Commission does not treat requests for extensions of compliance deadlines in a license—including deadlines for starting and completing construction—as material changes." ER 9-10 (¶ 19). Extensions are "questions of timing," we are told, "administrative matters that do not address the merits of the project in question." ER 24 (¶ 12) (footnote omitted). Rather, only "those fundamental and significant changes that result in physical changes" to a project are "material" changes. ER 9 (¶ 19 & nn.53-55) (citing Commission adjudications); *see also* ER 24-25 (¶ 12) (reaching same conclusion).

The Commission's reasoning once again runs afoul of its own regulations, as well as of its own adjudications. Under the regulations, "physical changes" to a

project are just one of the circumstances that require an application to amend a license. Under 18 C.F.R. § 4.200, such application is required where a licensee seeks to "(a) Make a change in the physical features of the project or its boundary . . . ; (b) Make a change in the plans for the project under license; or (c) Extend the time fixed in the license for commencement or completion of project works." Correspondingly, while the regulation the Commission cites in its order denying rehearing, 18 C.F.R. § 4.35(f)(1), does not expressly include extensions among its examples of "material" amendments, it states that a "material amendment … means *any fundamental and significant change*, including *but not limited to*" those examples (emphasis added). This capacious definition of "material" amendment matches the expansive test set forth in the Commission's adjudications, which provides that intervention is appropriate where (1) there are "material changes in the plan of project development or in the terms and conditions of the license," or (2) an amendment "could adversely affect the rights of property-holders in a manner not contemplated by the license." *Kings River*, 36 FERC ¶ 61,365, at 61,883.

The Commission's decision to extend Eagle Crest's license meets both criteria. As NPCA explained in its request for rehearing, the extension is a "material" change to the original license because it precluded, or at least made much more difficult, NPCA's and the National Park Service's efforts to include the

Project lands in the Park Service's boundary adjustment for Joshua Tree National Park. ER 44-45. Terminating Eagle Crest's "valid existing rights" would have facilitated the administrative or legislative transfer of Bureau of Land Management lands currently reserved ("withdrawn") for Eagle Crest to the National Park Service, and such termination would have occurred by operation of law had the Commission timely and properly terminated Eagle Crest's license in June, 2018. *See* ER 44-45. The revived Project now stands in the way of these actions, and the administrative withdrawal that the Park Service undertook to facilitate the boundary adjustment has now expired. It will now be much more difficult for NPCA, the Park Service, and Congress to devote the Project area to conservation in the foreseeable future. These are "material" changes that affect third-party (NPCA, Park Service, congressional, and public) rights in "a manner not contemplated by the [original] license."

There are three other reasons the Commission's extension was a "material" change to the original Project license and affects third-party rights in a new way. *See* ER 45-46, 360-63 (NPCA's arguments on this point below). First, the 2016 Desert Renewable Energy Conservation Plan applied new environmental protections to federal public lands throughout the California desert, including the lands and groundwater the Project will adversely affect. The Conservation Plan does not apply to pre-existing valid rights, of which the Project's hydropower

license is one, but its protections would apply immediately upon the termination of any such rights. The Commission's extension prevents the Project area from being subject to these additional protections.[11]

Second, the Commission's extension was a "major Federal action" subject to supplemental review under the National Environmental Policy Act. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.9(c). In extending the license without allowing intervention, the Commission deprived NPCA and the public of the right to participate in the review process and, ultimately, to obtain judicial review of the Commission's decision or environmental-review compliance. *California Trout*, 572 F.3d at 1013.

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[11] The Conservation Plan explains that the Chuckwalla Area of Critical Environmental Concern that the Project will affect is the "most outstanding representative of the Colorado Desert in California with a full complement of characteristic wildlife and plant species." Moreover, the U.S. Fish & Wildlife Service has designated the "entire area" as critical habitat for the threatened desert tortoise, and it "contains areas of exceptional desert tortoise densities, the highest known in the Sonoran Desert." The flora are among the "most botanically diverse" in the California desert, with "158 plant species including several species found nowhere else," and the area is the "most important habitat" for burro deer and the "best remaining habitat" for endangered Sonoran pronghorn deer. The list goes on. *See* U.S. Bureau of Land Management, *Desert Renewable Energy Conservation Plan – Land Use Plan Amendment, App. B (Colorado Desert Subregion)*, at 144 (Sept. 14, 2016), *available at* https://eplanning.blm.gov/epl-front-office/projects/lup/66459/133476/163149/Colorado_Desert_Subregion_AppB.pdf; *see also id.* at 208-11 (discussing important groundwater-dependent ecological resources in the adjacent Palen Lake area, namely sensitive plant assemblages in the Palen-Ford Playa Dunes Area of Critical Environmental Concern). NPCA cited, discussed, and hyperlinked this document in its filings before the Commission. *See* ER 34, 38, 45, 54-55, 76, 81, 83-86, 302-03.

Finally, the Commission's extension revives the Project at a time when it is even less useful than it might have been when Eagle Crest originally proposed it in 1991, or even when the Commission originally approved it in 2014. Rapid advances in other forms of short- and long-duration energy storage, such as batteries, demand response, and other technologies, have rendered a pump-storage project in the middle of the California desert obsolete. It is no wonder that Congress, in amending the Federal Power Act in 2018, saw no need to provide for reviving and extending Eagle Crest's license; that Congress, in considering Congressman Paul Cook's H.R. 5817 Eagle Crest license reinstatement legislation in 2018, saw no need to provide any hearing or vote on the bill; that California's energy regulators have looked to other storage technologies to meet the State's needs; and that Eagle Crest has been unable to find a buyer for the Project's energy. The Commission's revival of an outdated project is a "material" change, and it precluded critical input from regulators and the public about whether the Project still makes sense.

3. The Commission's cited adjudications do not justify denying NPCA intervention in this case.

Having shown that the extension of Eagle Crest's license was a "material" change under the Commission's regulations and *Kings River*, the Commission will no doubt fall back on the many other adjudications it cites in its orders denying NPCA intervention and rehearing. However, as we have discussed, the

Commission's adjudications cannot contradict the plain language of its promulgated rules. Moreover, many of those adjudications are irrelevant on their facts because they concerned only "physical changes" or "changes in the plans for the project," not extensions of statutory project deadlines for expired licenses. *See, e.g.*, *Kings River*, 36 FERC ¶ 61,365, at 61,883-84 (compliance reports and reservoir-clearing and recreational plans).[12]

That leaves the adjudications that assert what apparently has become the Commission's reflexive decree in every case involving an extension of a deadline to commence and complete construction: that such extensions are *never* a "material" change. *See* ER 9 (¶ 19 & nn.53-55). However, none of these adjudications offers any real explanation as to why license extensions generally are not material changes, and neither they nor the Commission explain why the extension *in this case* was not a material change. The Commission itself admits that a "'case could arise where repeated extensions over a very long period of time

[12] Eagle Crest's extension qualifies as a "material" change even by the facts of these adjudications. *Kings River* concerned regulatory compliance reports and reservoir-clearing and recreational plans. 36 FERC ¶ 61,365, at 61,883-84. Another adjudication the Commission relies on, *Erie Boulevard Hydropower, L.P.*, concerned plans to reduce the size of the generation unit, use a more fish-friendly turbine, and provide flexibility for the unit's housing. 131 FERC ¶ 61,036, 61,227 (2010). In contrast, Eagle Crest's license extension revives a project that NPCA and the Park Service thought was dead, with significant on-the-ground implications for NPCA, the Park Service, Joshua Tree National Park, California's electrical grid, and the public.

could give rise to legitimate grounds for intervention and appeal.'" *City of Tacoma, Wash.*, 89 FERC ¶ 61,275, at 61,800 (1999) (quoting *Central Maine Power Co.*, 53 FERC ¶ 61,089, at 61,250 n.8 (1990)). Here, the Commission extended the Eagle Mountain Project's deadlines twice, for four years, and then used an inapplicable law to retroactively extend the deadlines another two years, after the license had expired and after the Commission was required to terminate it. The Commission's decision to revive a dead license has significant consequences for NPCA, the Park Service, the public, and the environment. If ever there was a case where "repeated extensions" constituted a "material" change justifying an open public process, this is it.

4. The Commission's remaining arguments fail.

The Commission makes two final arguments to justify keeping NPCA out of Eagle Crest's license-extension proceeding, both of which falter. First, as noted above, the Commission asserts that "limiting notice and intervention in post-licensing proceedings allows the Commission to act on numerous hydroelectric compliance matters in a manner that is administratively efficient and is consistent with [Federal Power Act] and due process notice requirements." ER 6-7 (¶ 15). But, as Commissioner Glick observes, responding to NPCA's arguments is "hardly an oppressive administrative burden." ER 17 (¶ 4). In any event, generic appeals to efficiency cannot excuse the Commission from adhering to its own rules, which

promote fairness and informed decision-making. Again, Commissioner Glick: "I do not think it is appropriate for the Commission to deny an entity party status—and the rights that come with it—simply because the Commission is bothered that it would need to address their comments opposing the extension. . . . [T]he Commission cannot let the desire for administrative efficiency prevent us from developing a full record and giving that record the consideration it deserves." ER 16-17 (¶¶ 3-4) (footnote omitted).

Second, the Commission argues that the Federal Power Act "creates no absolute right of intervention and gives the Commission authority to reasonably limit those eligible to intervene or to seek review." ER 8 (¶ 17). But NPCA claims no such right. NPCA's motion to intervene met all of the requirements set forth in the Commission's own rule, which delineates those who are "eligible to intervene or to seek review." And even if the Commission's adjudication-based limits on Rule 214 are permissible, NPCA met the criteria in those decisions, too. The only thing NPCA seeks in this case is that the Commission follow its own rules and policies and allow NPCA to be heard.

Finally, lest the Commission argue that it has already considered and rejected NPCA's arguments on their merits, NPCA, by virtue of not being a party to the license-extension proceeding, had only an abbreviated opportunity to make those arguments in its short motion to intervene and request for rehearing. The

Commission summarily rejected NPCA's arguments in four paragraphs in its Order and one paragraph in its order denying rehearing. ER 22-24 (¶¶ 8-11); ER 11 (¶ 22). Intervention would allow NPCA to fully make, and the Commission to fully consider, NPCA's arguments. Moreover, the Commission is well aware that, unless NPCA is granted party status, NPCA may not seek judicial review of the Commission's extension decision.

II. The Commission was required to provide public notice of Eagle Crest's license-extension proceeding.

Under the Federal Power Act, "[l]icenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice." 16 U.S.C. § 799. The Commission has adopted regulations governing the amendments of licenses and the process for obtaining such amendments. *See* 18 C.F.R. §§ 4.200-202. Those regulations apply to requests to "[e]xtend the time fixed in the license for commencement or completion of project works." *Id.* § 4.200(c). They mandate that public notice of an application to amend "shall be given at least 30 days prior to action upon the application" if the amendment will result in a "significant alteration of [a] license pursuant to section 6 of the Act, 16 U.S.C. 799." *Id.* § 4.202(a); *see also id.* § 4.202(b) (specifically mentioning extensions after "significant alteration" language in subsection (a)).

As the Commission has explained, "all revisions to a license, no matter how small, are by definition amendments, although the procedural and substantive

requirements will vary according to the nature of the amendment." *Consumers Energy Co. & the Detroit Edison Co.*, 87 FERC ¶ 61,150, 61,619 (1999). And where the Commission is required to provide public notice of a proposed license amendment, it must allow intervention by interested stakeholders. *See* 18 C.F.R. § 385.210 (any notice of an "application[ ]" "will establish the dates for filing interventions and protests").

In this case, Eagle Crest's filing of a request for extension on November 7, 2018, was a license amendment that commenced a new "post-licensing proceeding" requiring separate intervention, even for parties to the original licensing proceeding. ER 25 (¶ 13). The Commission, however, never provided public notice of the extension proceeding and never prescribed a time for intervention, thereby violating section 6 and the Commission's own regulations. (Nevertheless, NPCA filed its intervention motion expeditiously one week later after Eagle Crest's request.)

In ruling otherwise, the Commission employs the same approach as it does with Rule 214: it argues that license extensions *categorically* are not "significant alterations" because they "involve[ ] no substantial modification or departure from the plan of development." ER 12 (¶ 26) (citing *Kings River*, 36 FERC ¶ 61,365, at 61,882). Put another way, extending Eagle Crest's license is "not inconsistent with the project's plan of development or terms of the license." ER 12 (¶ 27).

As an initial matter, this Court has not decided whether the term "alter[ ]" in section 6 of the Federal Power Act, 16 U.S.C. § 799, actually means "significant alteration," as the Commission has concluded in its regulation, 18 C.F.R. § 4.202(a). *See Fall River Rural Elec. Co-op., Inc. v. FERC*, 543 F.3d 519, 525-26 (9th Cir. 2008) ("As neither party disputes the relevant standard, for purposes of this appeal we assume without deciding that in order for Section 6 of the FPA to apply, a proposed project must substantially alter an existing license."). At least one other court has questioned the Commission's test. *See Pac. Gas & Elec. Co. v. FERC*, 720 F.2d 78, 90 n.36 (D.C. Cir. 1983) ("We do not, however, adopt FERC's view that only 'substantial alterations' in a license engage section 6 protections, largely because that test, as FERC articulates it, seems entirely circular.").

But even if the Commission's "significant alteration" test is permissible, its interpretation that license extensions *never* meet that test is not, at least not in this case. The Commission's decision to extend Eagle Crest's license was a "significant alteration" of the original license because it revived an expired project, changing both Eagle Crest's rights (by enabling Eagle Crest to pursue the otherwise-defunct Project) and third parties' rights (by making it difficult or impossible to transition the Project area to conservation in the foreseeable future). The extension also permitted an outdated project to proceed, ignoring

technological and energy-market changes that had taken place since Eagle Crest proposed the Project in 1991, and even since the Commission granted the original Project license in 2014. These changes begged the question whether the Project still makes sense for California's energy consumers and electrical grid. Similarly, the extension permitted the Project to proceed despite intervening regulatory changes that would have precluded it (the 2016 Desert Renewable Energy Conservation Plan), as well as required supplemental environmental review that might have required changes to the Project's plans of development. As under Rule 214, if ever there were a case where an extension significantly altered an original (expired) license, this is it.

This conclusion finds support in the case law and Commission adjudications construing section 6. In *Fall River*, this Court explained that the "significant alteration" standard permits the Commission to authorize "'de minimis'" changes to a project, such as "'annual fluctuations in water supply,'" without providing public notice. 543 F.3d at 526 (quoting *Pac. Gas & Elec. Co.*, 720 F.2d at 90 n.36). But more significant changes, such as "doubling the number of intake openings used and installing new gates on the intake tower," do require public notice, especially where their "cumulative impact" yields real differences. *Fall River*, 543 F.3d at 527; *cf. Kings River*, 36 FERC ¶ 61,365, at 61,882-85

(biological reports, resources plan revisions, and final design drawings were not "significant alteration" of original license).

If in *Fall River* the Commission took the position that modifications to intake openings and towers were "significant alterations" to a hydropower license, it is difficult to see how in this case it can say that reviving an expired project and extending its deadline to commence construction—despite significant intervening regulatory and environmental developments *that likely precluded the Project or at least required substantial changes to it*—were not.

The single authority the Commission relies on to suggest otherwise—a 1923 opinion from the Commission's chief counsel—actually underscores this conclusion. While "extensions of time *within the scope authorized by the [Federal Power Act]*" may not be "significant alterations,"[13] retroactive extensions of expired projects that Congress never intended or allowed the Commission to grant—i.e., that are *outside* the scope of the Federal Power Act—clearly are. At the very least the question was sufficiently debatable, such that the Commission should have given the public notice that it would extend new life to a controversial

[13] Third Annual Report of the Federal Power Commission, at 225 (1923), *available at* https://books.google.com/books?id=F32kJxgJwPcC&lpg=PP3&ots=IMfOgTfX0h&dq=%22third%20annual%20report%20of%20the%20federal%20power%20commission%22%201923&pg=PA223#v=onepage&q=%22third%20annual%20report%20of%20the%20federal%20power%20commission%22%201923&f=false.

project that everyone believed was dead. As Commissioner Glick observes: "Deadlines to commence or complete construction are important measures for ensuring that a project is consistent with the public interest, and the Commission ought to consider the perspectives of all affected parties before modifying those deadlines." ER 16 (¶ 3).

The Commission's only remaining argument is "no harm, no foul"—it could ignore its statutory duty to notify the public because NPCA still managed to file a motion to intervene. ER 12-13 (¶ 28). But NPCA represents just some of the public's many interests in the Eagle Mountain Project, and NPCA's diligence cannot absolve the Commission of its responsibility to comply with the Federal Power Act or its own regulations.

CONCLUSION

The Commission's decision to revive and extend the expired Eagle Mountain Project license has significant consequences for the Project, the public, and the environment. Simultaneously, the Commission's decision to deny NPCA intervention prevents the Commission and this Court from fully vetting those consequences. That decision cannot stand, especially when it violates the Commission's own governing laws and regulations. NPCA respectfully requests that the Court grant this petition and direct the Commission to give NPCA party status in the Eagle Mountain Project license-extension proceeding.

Dated: February 6, 2020

Respectfully submitted,

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STATEMENT OF RELATED CASES

By order dated January 23, 2020, the Court has consolidated Ninth Circuit Nos. 19-72915 and 19-73079, both of which concern the Federal Energy Regulatory Commission's May 7, 2019, order granting a license extension and denying NPCA intervention in the license-extension proceeding, and the Commission's September 19, 2019, order denying rehearing of its May 7, 2019, order.

This case raises very similar issues to those that were pending before the Court in *American Whitewater, et al. v. Federal Energy Regulatory Commission*, No. 18-70765. That case was argued on May 15, 2019, and dismissed as moot on February 3, 2020, because the Commission terminated the license at issue in that case.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 21(d) and 32(g) and Ninth Circuit Rule 32-1(a), I certify that the attached brief is proportionately spaced, has a typeface of 14 points, and contains 11,786 words.

/s/ Deborah A. Sivas
Deborah A. Sivas

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System:

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on February 6, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Deborah A. Sivas
Deborah A. Sivas