

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Confederated Salish and Kootenai Tribes	)	Project No. 5-098
Energy Keepers, Incorporated	)	Project No. 5-004

**ANSWER OF THE FLATHEAD, MISSION AND JOCKO VALLEY  
IRRIGATION DISTRICTS AND THE FLATHEAD JOINT BOARD OF  
CONTROL OF THE FLATHEAD, MISSION AND JOCKO IRRIGATION  
DISTRICTS TO MOTION TO DISREGARD THE  
REQUEST FOR HEARING REQUIRED BY ARTICLE 40(C) OF THE KERR  
HYDROELECTRIC PROJECT LICENSE**

The Flathead, Mission and Jocko Valley Irrigation Districts (“the Districts”) and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts (“FJBC”) intervenors herein, pursuant to Rule 213 of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure hereby answer the Motion to Disregard the Districts’ and FJBC’s request for the hearing required by Article 40(c) of the Kerr Hydroelectric Project (“Kerr Project”), FERC Project No. 5, license contained in the June 9, 2015 “Answer”<sup>1</sup> of the Confederated

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<sup>1</sup> Commission precedent is clear that the substance of a pleading, not the title controls. *See, e.g., ISO New England, Inc.*, 142 FERC ¶ 61,146, at n.21 (2013) (citing *Stowers Oil & Gas Co.*, 27 FERC ¶ 61,001, at 61,002 n.3 (1984) (“Nor does the style in which a petitioner frames a document necessarily dictate how the Commission must treat it.”)). In this instance, the Tribes style their pleading as an answer, but nonetheless move to disregard the Districts’ and FJBC’s request for the hearing. Tribes’ Answer at 12. Pursuant to Rule 213, the Districts and FJBC have the right to answer any motion, including the Tribes’ motion to disregard the request for the mandatory hearing. However, in the event the Commission disagrees and deems this pleading to be an answer to an answer, good cause exists to consider this pleading given that it clarifies the issues, provides the Commission information helpful to the disposition of an issue, and therefore aids the Commission in understanding and resolving disputed issues. *See, e.g., CNG Transmission Corp.*, 89 FERC ¶ 61,100, at n.11 (1999); *PJM Interconnection, L.L.C.*, 84 FERC ¶ 61,224, at 62,078 (1998); *New Energy Ventures, Inc. v. S. Cal. Edison Co.*, 82 FERC ¶ 61,335, at n.1 (1998); *N.Y. Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,188, at P 7 (2004) (accepting the NYISO’s answer to protests because it provided information that aided the Commission in better understanding the matters at issue in

Salish and Kootenai Tribes (“CSKT”) and Energy Keepers, Incorporated (“EKI”) (collectively, “the Tribes”). In support thereof, the Districts and FJBC state:

**I. The Requirement That A Hearing Be Held Within 12 Months of Request is A Mandatory Settlement and License Condition.**

In their pleading, the Tribes request that FERC disregard the Districts’ and FJBC’s request to institute an Article 40(c) proceeding “because an intervenor cannot unilaterally change the nature of an on-going proceeding through a Motion to Intervene.” Tribes’ Answer at 12. The Tribes also argue that if the Districts and FJBC would like to petition for an Article 40(c) hearing, they “should do so in a separate proceeding, stating their arguments in a more clear and concise manner.” *Id.* at 11.

The Tribes’ assertions as to venue ignore the fact that the Districts and FJBC filed their request for a hearing in both the transfer docket (Project No. 5-098) and the docket in which the Commission accepted the 1985 Settlement (Project No. 5-004). Accordingly, the Tribes’ argument that the hearing request should be made in a separate docket proceeding is nothing more than a red herring and should be rejected.

The request made by the Districts and FJBC that FERC establish the mandatory hearing required by Article 40(c) of the Kerr Project License was clear and concise. The Districts and FJBC are puzzled by the Tribes’ assertion that more is necessary. The Tribes were a party to the 1985 Settlement that requires the Commission establish a hearing upon request of certain parties (including the Districts) and defines the scope of that hearing. The Tribes’ assertion that a request made pursuant to that Settlement term should be disregarded is inconsistent with the clear, mandatory language of the 1985

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the proceeding); *Morgan Stanley Capital Group, Inc. v. N.Y. Indep. Sys. Operator, Inc.*, 93 FERC ¶ 61,017, at 61,036 (2000) (accepting an answer that was “helpful in the development of the record . . . .”); *Tenn. Gas Pipeline Co.*, 92 FERC ¶ 61,009, at 61,016 (2000).

Settlement. Furthermore, the Tribes' opposition to the mandatory hearing specifically incorporated in Article 40(c) of the Kerr Project License calls into question the Tribes' assertion that they "intend to fully comply with the License obligations that pertain to the ownership and operation of the Kerr Project." *Id.* at 7.

The Tribes' argument that FERC should "refrain[] from initiating an Article 40(c) proceeding at this time" is also inconsistent with the clear language of both the 1985 Settlement and the Kerr Project License. *Id.* at 12 n.27. Both of those binding documents state that upon request, "**the Commission shall set such matters for hearing within twelve months of the date of the request.**" Article 40(c) (emphasis supplied). Additionally, in light of the impending Conveyance Date and the Tribes' assertions that they intend to begin entering into power sales agreements, if the Districts and FJBC had refrained from requesting the hearing to establish their rights after the Conveyance Date, they would have risked being accused of sitting on their rights to have the issue resolved.

The Tribes also claim that the transfer Application "is completely unrelated to the Article 40(c) option to request a hearing." Tribes' Answer at 10. That assertion ignores the fact that the Districts and FJBC explained the relationship for their request for a hearing and the transfer proceeding at pages 5-6 of their comments (*i.e.*, that the request is predicated on the need for EKI to begin entering into power purchase agreements, etc. and there is no assurance that those agreements will take into account the Districts' right to the output of the project). Rather than refuting the relationship, the Tribes' pleading confirms the uncertainty regarding the Tribes' obligations to deliver a low cost block of power to the Districts. *Id.* at 12 n.27. Given that the conveyance date is in a few months,

and the Tribes admit that they have not ratified the proposed water compact or otherwise agreed to continue to provide low cost power after the Conveyance Date, the assertions that the hearing “is likely unnecessary” is baseless and should be rejected. *Id.* at 11.

**II. The Districts and FJBC Are Not Seeking An Increase In the Amount of Low Cost Power.**

In footnote 26, the Tribes point out that any request by the Districts to seek an increase in the amount of low cost power they receive from the Kerr Project was required to be made by July 17, 1995, or is “forever barred.” The Districts and FJBC agree and confirm that they are not seeking an increase in low cost power, but rather are merely requesting that FERC institute the mandatory hearing to determine the Districts and FJBC’s rights to the existing low cost power amounts once the Tribes become the sole licensee for the Kerr Project.

**WHEREFORE**, the Flathead, Mission and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts respectfully request that the Commission establish the evidentiary hearing set out in Article 40(c) of the Kerr Hydroelectric Project License.

Respectfully Submitted,

The Flathead, Mission and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts

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Date: June 24, 2015

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding. Dated at Washington, DC, this 24th day of June 2015.

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