

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

Southeast Oklahoma Power Corporation

Pushmataha County Pumped Storage Hydroelectric Project

P-14890-005

**CHICKASAW NATION AND CHOCTAW NATION OF OKLAHOMA’S JOINT
REQUEST FOR EXTENSION OF TIME TO FILE COMMENTS ON
PRE-APPLICATION DOCUMENT AND SCOPING DOCUMENT 1 AND
STUDY REQUESTS**

On July 8, 2024, the Federal Energy Regulatory Commission (Commission or FERC) issued the “Notice of Intent to File License Application, Filing of Pre-Application Document (PAD), Commencement of ILP Pre-Filing Process, and Scoping; Request for Comments on the PAD and Scoping Document, and Identification of Issues and Associated Study Requests” (Notice), eLibrary no. 20240708-3054, in the original licensing proceeding for the proposed Pushmataha County Pumped Storage Hydroelectric Project (Project). The Notice provided that, “[a]ny individual or entity interested in submitting study requests, commenting on the PAD or [Scoping Document 1 (SD1)] ... must do so by **September 6, 2024.**” *Id.* at 3 (emphasis in original). Pursuant to Rule 2008 of Commission Practice and Procedure, 18 C.F.R. § 385.2008, the Chickasaw Nation and Choctaw Nation of Oklahoma (collectively, Nations) hereby request that the Commission extend the comment deadline by 31 days to Monday, October 7, 2024.

Good cause exists to extend the comment deadline, as described below.

I. DESCRIPTION OF THE CHOCTAW AND CHICKASAW NATIONS

The Nations are both federally recognized Indian Tribes possessing sovereign powers and rights to self-government under federal law. *See* 89 Fed. Reg. 944, 946 (Jan. 8, 2024). The

Choctaw Nation governs a Reservation in southeast Oklahoma that includes all of Pushmataha County. That reservation was established as a permanent homeland for the Choctaw by treaty with the United States, *see* Treaty of Dancing Rabbit Creek, art. II, Sept. 27, 1830, 7 Stat. 333 (defining reservation boundaries to include present-day Pushmataha County); Treaty of Washington with the Choctaw and Chickasaw, arts I-II, June 22, 1855, 11 Stat. 611 (modifying those boundaries while maintaining Pushmataha County within the Reservation boundaries), and the continuing existence of the Reservation has been acknowledged by subsequent judicial decisions, *see Sizemore v. State*, 2021 OK CR 6, 485 P.3d 867, *cert. denied* 142 S. Ct. 935 (2022); *State ex rel. Matloff v. Wallace*, 2021 OK CR 21, ¶ 15, 497 P.3d 686, 689, *cert. denied sub nom. Parish v. Oklahoma*, 142 S. Ct. 757 (2022); *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 635 (2022) (citing *Wallace* and noting “the eastern part of Oklahoma ... is now recognized as Indian country”).

The Nations have significant interests in this proceeding because the proposed Project would directly impact their land, water and other natural resources, and communities. Those interests are recognized by federal law. The proposed Project, including the intake structure, all three reservoirs, associated penstocks and structures, and a significant portion of the proposed 99.96-mile-long transmission line, would be sited within the boundaries of the Choctaw Nation Reservation. The Project would divert water from the Kiamichi River within the Choctaw Reservation to fill and recharge three project reservoirs, stacked above the Kiamichi River, with a total surface area of 1530 acres and a total storage capacity of 118,116 acre-feet. The Choctaw Nation has sovereign, cultural, and community interests in the use and development of the land and resources within its Reservation, which are protected by treaty and by their inherent sovereign authority.

In addition, both Nations have an interest in the use of water from the Kiamichi River that is recognized and protected by the federal statute which implements a settlement that the Nations entered with the State, the City of Oklahoma City, the Oklahoma City Water Utilities Trust, the Oklahoma Water Resources Board, and the United States. *See* State of Oklahoma, Choctaw Nation, Chickasaw Nation, City of Oklahoma City Water Settlement Agreement of 2016¹ (Water Settlement Agreement); Choctaw Nation of Oklahoma and the Chickasaw Nation Water Settlement Act, *see* Pub. L. No. 114-322, § 3608 (Water Settlement Act) (stating that the purpose of the Water Settlement Act is to “approve, ratify, and confirm” the Water Settlement Agreement).² The Kiamichi River is part of the “Settlement Area Waters” which are subject to the Water Settlement Agreement, § 1.60, and Water Settlement Act, § (b)(19). And the proposed Project would also be located within the “Settlement Area” established by the Water Settlement Agreement, § 1.58, and the Water Settlement Act, § (b)(18). Due to these shared interests, one Nation cannot proceed without coordinating closely with the other. And for reasons we now describe, we have been unable to proceed to evaluate Southeastern Oklahoma Power Corporation’s (SEOPC or applicant) proposed Project because SEOPC has failed to provide information to the Nations in a timely manner. That failure obligates the Nations to collect, analyze, and provide information to the Commission in our comments and study requests, that should have been included in the PAD. That increases the burden on the Nations and requires an extension of the timeline for us to submit such comments and study requests.

¹ Available at <https://www.waterunityok.com/media/1075/agreement-160808.pdf> (last accessed Aug. 15, 2024).

² *See* Letter from Chief Gary Batton, Choctaw Nation to Acting Secretary Reese, eLibrary no. 20240705-5022 (July 3, 2024), pp. 1-2; Letter from Governor Anoatubby, Chickasaw Nation to Acting Secretary Reese, eLibrary no. 20240703-5013 (July 2, 2024), p. 1.

II. **THERE IS GOOD CAUSE TO EXTEND THE COMMENT DEADLINE**

Rule 2008 provides, “[e]xcept as otherwise provided by law, the time by which any person is required or allowed to act under any statute, rule, or order may be extended by the decisional authority for good cause, upon a motion made before the expiration of the period prescribed or previously extended.” The Commission should grant the Nations’ request for extension of time because it is timely and supported by good cause. The applicant’s anemic efforts to inform and work with the Nations on this Project has impeded them from developing timely comments and study requests to the Commission. The Nations should, therefore, have more time to do so. We are diligently working to prepare comments and study requests, and a short extension of one month will assist the Nations greatly in completing that task.

The Nations did not obtain enough information about the Project to meaningfully comment on it until very recently. The applicant did not reach out to the Nations as the Project was being developed; rather, the PAD shows SEOPC’s first attempt to reach the Nations was in late November 2023. Because the applicant failed to reach out directly to the Nations during development of the Project, the only information that the Nations received about the Project until very recently was the information that SEOPC decided to make available to the public, primarily through filings with FERC. And the information filed by SEOPC on the FERC docket has been general and lacked key data that the Nations need to provide informed comments and study requests, including shape files and maps showing the Project’s exact proposed location.

Although the Commission’s staff repeatedly directed SEOPC to comply with Commission regulations and provide notice to and engage with Tribes, SEOPC did not do so with respect to the Nations. The Nations did not receive adequate outreach or notice from the

applicant before the initial PAD was submitted. As the Commission later noted, the applicant's January 31, 2024 PAD failed to provide "sufficient documentation of consultation.... SEOPC's documentation of outreach to the Tribes and resource agencies is incomplete. For these reasons, SEOPC has not demonstrated due diligence in preparing its PAD." eLibrary no. 20240321-3018, p. 2 (Mar. 21, 2024) (Rejection of NOI).

In fact, contrary to what SEOPC reported in its "Supplemental Information Filing Amended Appendix A of Pre-Application Document," *see* eLibrary no. 20240220-5256 (Feb. 20, 2024), p. A-5, SEOPC did *not* "[s]en[d] Project shapefiles and .kmz of Project boundary as promised to the Tribes at the Tribal Engagement Listening Session." The Nations' representatives, including but not limited to the Choctaw Nation's Tribal Historic Preservation Officer (THPO), have no record or recollection of an email from SEOPC dated January 30, 2024 providing shapefiles. The materials attached to SEOPC's February filing show only that it provided a drawing of the reservoir location, not the location of the transmission lines that will slice through a significant portion of the Reservation. Although the Choctaw Nation's Historic Preservation Department made repeated efforts to obtain more information from SEOPC's contractor, SWCA, those efforts failed because of a lack of response from SWCA or because SWCA did not provide the correct contact information. *See* eLibrary no. 20240718-0002 (July 8, 2024) (THPO Letter).

The result was that SEOPC could not demonstrate due diligence in conducting outreach to the Choctaw Nation. In rejecting the initial PAD, Commission staff noted that

Limited information about the project was provided to the Tribes in the Tribal engagement letter, which included a drawing of the project area that did not clearly show the project boundaries. SEOPC included no feedback from Tribal members regarding existing information or anticipated effects of the potential project in its PAD filed on January 31, 2024. According to the amended Appendix A, filed on February 20, 2024, a

copy of the presentation and project shapefiles were distributed to the Tribes following the meeting; however, this information was not filed with the Appendix A. The PAD does not identify what issues were raised during the meetings, what, if any, comments were received from the Tribes following the meeting, or by what date Tribal comments were requested. This information must be included in any future PAD you may file for the project.

Rejection of NOI, p. A-2.

SEOPC did not make a good faith effort to resolve that deficiency before submitting a revised PAD shortly thereafter, on April 1. As the Commission noted in rejecting SEOPC's revised PAD,

while the revised PAD includes copies of letters sent to ... Tribes and agencies, dated March 25, 2024, SEOPC filed the revised PAD and NOI on April 1, 2024, *within one week of the dates of its letters requesting information. This is not sufficient time for the parties contacted to respond to the letters, and your PAD does not summarize how any responses were incorporated into the PAD*, pursuant to section 5.6(b)(5) of the Commission's regulations. Therefore, SEOPC has not demonstrated due diligence, and accordingly, the NOI and PAD are rejected.

eLibrary no. 20240419-3004 at 2 (Apr. 19, 2023) (Rejection of Revised NOI) (emphasis added).

Although SEOPC represented in the updated May 7 PAD, Appendix A, "Documentation of Consultation," *see* eLibrary no. 20240507-5119 (May 7, 2024), that it had sent some emails to the Choctaw Nation, notice was *not* properly addressed to, delivered to, or received by the Choctaw Nation Chief Executive Director, Executive Director, or Senior Business Analyst.³ Several key departments, including the Choctaw Nation's Historic Preservation Department and Environmental Protection and Water Resource Management Office, appear to have been excluded from SEOPC's Tribal contact list altogether.

³ The title, "Documentation of Consultation," is potentially misleading. While the applicant is required to conduct outreach to Tribes and other interested parties in preparing the PAD, SEOPC does not have authority to "consult" with Tribes for purposes of the National Historic Preservation Act, as was noted by the Acting State Historic Preservation Officer (SHPO). *See* Letter from Lynda Ozan to Acting Secretary Reese, eLibrary no. 20240805-0005 (July 25, 2024), p. 1 (SHPO Letter).

Further, SEOPC did not timely provide shape files and maps showing the Project's proposed location, which are necessary for the Nations to understand and evaluate the proposed Project. The PAD's "Tribal Communities Communications Log" (p. 6) states that "[a]ll tribal communities" were provided by email with:

[T]he shapefile and a .KMZ file that show the following:

- Pumped storage boundary polygon
- Complete transmission line linear feature
- 150-ft buffer of the entire proposed transmission line
- 0.25-mile buffer of entire proposed transmission line.

Neither Nation has any record of this email nor referenced attachments. *See, e.g.,* THPO Letter, p. 1. In actuality, the Choctaw Nation did not receive shapefiles from SEOPC until July 22, 2024, following multiple requests, including an email from the Director of Water Resources and the Choctaw Nation's THPO's Letter of July 8. The Chickasaw Nation still has not received shapefiles directly from SEOPC but has been able to obtain copies from the Choctaw Nation.⁴

The Nations' respective technical staffs are now undertaking analysis of those shapefiles, including evaluation of the proposed Project location given current land ownership and uses, to identify the Project's potential impacts and develop recommendations for scoping and studies. This analysis is critical to the Nations' ability to prepare comments and study requests and protect their interests during this proceeding, but it takes time. The Nations must also fully consider, and ensure adequate presentation of, the myriad Tribal interests which may be affected by aspects of the Project. SEOPC should have discussed Tribal interests in the PAD, *see, e.g.,* 18 C.F.R. § 5.6(d)(2)(ii), (3)(x)(A), (3)(xii), and in the normal course the Nations' comments would

⁴ The SHPO also commented that their office has not have received relevant maps from SEOPC yet: "we have not received adequate maps or location information to identify the project area of potential effect for review under Section 106 of NHPA." *Id.*

be focused on that information, as well as all the other available, existing information relevant to the Nations' interests provided by the applicant. But SEOPC's inadequate outreach and the Commission's initiation of scoping have effectively shifted onto the Nations the burden of providing this information *and* how it should be further evaluated in the context of this Project proposal. That has compounded the complexity and burden of preparing comments and study requests. The Nations should not be further penalized or otherwise disadvantaged as a result of the applicant's delay in providing critical information regarding the proposed Project's location. Instead, they should be given adequate time to undertake this work.

The Nations' request for a 31-day extension (calculated to avoid the new deadline falling on a Sunday), will not delay the proceeding at this early stage. SEOPC's Pre-Filing Process Plan and Schedule already contemplates that the "[c]omment period for PAD, Scoping Document 1, and study requests" could run to September 30, 2024. PAD, p. 2-1. The requested new deadline of October 7 would extend SEOPC's timeframe by only one week. Under the circumstances, this is a reasonable and modest request to ensure the Nations have an adequate opportunity to participate in this proceeding.

III. **CONCLUSION**

The Commission is responsible for ensuring that the Nations' sovereign interests and treaty rights are respected and protected throughout this proceeding. This includes, but is not limited to, taking affirmative steps to ensure the Nations have opportunities to meaningfully engage in this licensing proceeding, which would directly impact their rights and interests. Accordingly, the Nations request that the Commission promptly grant their request to extend the comment deadline by 31 days, to Monday, October 7, 2024.

Dated: August 15, 2024

Respectfully submitted,



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DECLARATION OF SERVICE**Southeast Oklahoma Power Corporation's Pushmataha County Pumped Storage
Hydroelectric Project (P-14890-005)**

I, Emma Roos-Collins, declare that I today served the attached "Chickasaw Nation and Choctaw Nation of Oklahoma's Joint Request for Extension of Time to File Comments on Pre-Application Document and Scoping Document 1 and Study Requests," by electronic mail, or by first-class mail if no e-mail address is provided, to each person on the official service list compiled by the Secretary in this proceeding.

Dated: August 15, 2024

By:



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