

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Flambeau Hydro, L.L.C.

Project Nos. 2395-048
2421-048
2473-050

ORDER DISMISSING FILING AS DEFICIENT

(Issued August 18, 2006)

1. Wisconsin Department of Natural Resources (Wisconsin DNR) has filed a request for rehearing of a June 22, 2006 Commission staff order approving revised Exhibit G drawings for the Crowley Hydroelectric Project No. 2473, the Pixley Hydroelectric Project No. 2395, and the Lower Hydroelectric Project No. 2421 (collectively, the “Flambeau River Projects”).¹ The projects, licensed to Flambeau Hydro, L.L.C. (Flambeau Hydro), are located on the Flambeau River in Price and Ashland Counties, Wisconsin. In this order, we dismiss the rehearing request because Wisconsin DNR failed to include the statement of issues required by our regulations, and also explain that the concerns expressed by the agency are premature.

Background

2. Commission staff issued Flambeau Hydro’s predecessor, Fraser Papers, Inc., subsequent licenses for the Flambeau River Projects in 1997.² License Article 414 for the Crowley and Pixley Projects and license Article 415 for the Lower Project required the licensee to file, after consultation with Wisconsin DNR and others, a shoreline buffer zone and management plan with respect to licensee-owned lands at each project, in order to protect and enhance the aesthetic quality of the Flambeau River corridor and protect

¹ *Flambeau Hydro, L.L.C.*, 115 FERC ¶ 62,309. Exhibit G is a map of a hydroelectric project showing the project location, principal features, and boundary. *See* 18 C.F.R. § 4.41(h) (2006).

² *Fraser Papers, Inc.*, 78 FERC ¶¶ 62,082, 62,083, and 62,084.

riparian vegetation and wildlife habitat from uncontrolled development.³ The projects were transferred to Flambeau Hydro before the required plans were filed.⁴ In 2003, Flambeau filed a proposed shoreline buffer zone and management plan, which Commission staff approved.⁵

3. On rehearing of the staff order, the Commission determined that the 1997 relicense orders, while listing the reservoirs for the Flambeau River Projects as project facilities, had inadvertently failed to include them in the project boundaries.⁶ Further, although Fraser Papers had owned parcels of land around the reservoirs totaling about four miles of shoreline, and although the transfer order had been conditioned on the “transfer of title of the properties under license” and the application to Flambeau of “the terms and conditions of the license as though it were the original licensee,”⁷ Fraser had transferred to Flambeau only lands located within the project boundaries, and none of the lands around the project reservoirs.⁸ To remedy this situation, the Commission required Flambeau to file revised Exhibit G drawings that would include within the project boundaries the three project reservoirs, and, in addition, to file supplements to its shoreline buffer zone and management plans addressing the shoreline lands owned by Fraser Papers at the time of the transfer.⁹

4. On March 30, 2006 (supplemented on May 19, 2006), Flambeau filed revised Exhibit G drawings which showed within the boundaries of the Flambeau River Projects the project reservoirs and a 75-foot buffer zone on the shoreline lands that had been owned by Fraser Papers when the projects were licensed. On April 4, 2006, Flambeau filed what it styled a “shoreline buffer zone properties map.” Flambeau stated that seven

³ See *Flambeau Hydro, L.L.C.*, 113 FERC ¶ 61,236 at P 16 (2005).

⁴ See *Fraser Papers, Inc. and Flambeau Hydro, L.L.C., Order Granting Rehearing and Approving Transfer of Licenses*, 89 FERC ¶ 61,286 (1999).

⁵ *Flambeau Hydro, L.L.C.*, 110 FERC ¶ 62,246.

⁶ 113 FERC ¶ 61,236 at P 17.

⁷ 89 FERC at pp. 61,897-98.

⁸ *Id.* at P 18-19.

⁹ *Id.* at P 26. The Commission did not determine whether Flambeau would be required to acquire the shoreline lands from Fraser Paper, pending review of the supplemental plans. *Id.* at n.30.

parcels of shoreline land it owns are currently buffered and protected as required by the project licenses. With respect to 19 additional parcels of shoreline lands previously owned by Fraser Papers and now apparently held by that entity's successor, Flambeau asserted that, while it had depicted on the revised Exhibit G maps a 75-foot buffer zone on those lands, it would be unnecessary, unduly burdensome, and nearly impossible to implement on the parcels any measures beyond those required by existing county regulations.¹⁰

5. On June 22, 2006, Commission staff issued an order approving the revised Exhibit G drawings for the three projects. The order did not address the required supplemental shoreline buffer zone and management plans.

6. On July 24, 2006, Wisconsin DNR filed a timely notice of intervention,¹¹ along with a request for rehearing of the June 22 order. Wisconsin DNR objects to the width of the buffer zones depicted on the revised Exhibits G drawings, and asserts that Flambeau has not complied with the Commission's requirement that the company file supplemental buffer zone and management plans. The agency expresses puzzlement as to why the Commission is allowing Flambeau to avoid its land management responsibilities

Discussion

7. As an initial matter, Wisconsin DNR's rehearing request is deficient because it fails to include a Statement of Issues, as required by Order No. 663,¹² which became effective September 23, 2005. Order No. 663, *inter alia*, amended Rule 713 of the Commission's Rules of Practice and Procedure to require that a rehearing request must include a separate section entitled "Statement of Issues" listing each issue presented to the

¹⁰ See letter from Chuck Alsberg to Magalie R. Salas (filed April 4, 2006). The county regulations are appended to the filing.

¹¹ Because the motion to intervene was timely and unopposed, Wisconsin DNR became a party 15 days after the motion was filed. See 18 C.F.R. § 385.214(c) (2006).

¹² *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 70 *Fed. Reg.* 55,723 (September 23, 2005), *FERC Statutes and Regulations* ¶ 31,193 (2005) as amended by Order 663-A, effective March 23, 2006, to limit its applicability to rehearing requests. *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 71 *Fed. Reg.* 14,640 (March 23, 2006), *FERC Statutes and Regulations* ¶ 31,211 (2006) (codified at 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(2)).

Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.¹³ Under Rule 713, any issue not so listed will be deemed waived. In addition to not having the required Statement of Issues section, Wisconsin DNR's pleading does not clearly specify each issue and does not include Commission and court precedent on which it relies. Accordingly, Wisconsin DNR has waived the issues it seeks to address and we will dismiss its rehearing request.¹⁴

8. However, we note that the order in question did not address the issues of concern to Wisconsin DNR. While Commission staff approved the revised project drawings, it did not act on the supplemental buffer zone and management plan. That matter will be addressed separately. The June 22, 2006 order simply concluded that Flambeau had filed Exhibit G drawings that correctly depict the existing project features. This does not dispose of the land management issues and, indeed, if the Commission imposes additional requirements, such as extended buffer zones, in the land management proceeding, Flambeau may have to further revise the Exhibit G drawings. Thus, the issues Wisconsin DNR seeks to raise here are not ripe, and it will have the opportunity to address them in the future, in the proceeding reviewing the proposed amended buffer zone and management plan.¹⁵

¹³ As explained in Order 663, the purpose of this requirement is to benefit all participants in a proceeding by ensuring that the filer, the Commission, and all other participants understand the issues raised by the filer, and to enable the Commission to respond to these issues. Having a clearly articulated Statement of Issues ensures that issues are properly raised before the Commission and avoids the waste of time and resources involved in litigating appeals regarding which the courts of appeals lack jurisdiction because the issues on appeal were not clearly identified before the Commission. *See* Order No. 663 at P 3-4.

¹⁴ *Compare American Municipal Power-Ohio v. PJM Interconnection, L.L.C.*, 114 FERC ¶ 61,019 (2006) (dismissing complaint lacking Statement of Issues).

¹⁵ Because the license articles regarding the plan required Flambeau to consult with Wisconsin DNR, the agency may, upon filing a notice of intervention, become a party to the plan review proceeding.

The Commission orders:

The Wisconsin Department of Natural Resources' request for rehearing, filed in this proceeding on July 24, 2006, is dismissed.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.