

109 FERC ¶ 61,028
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Allegheny Energy Supply Company, LLC

Project Nos. 2516-029
2517-015

ORDER DENYING REHEARING

(Issued October 7, 2004)

1. On May 12, 2004, Commission staff issued to Allegheny Energy Supply Company, LLC (Allegheny), a new license for the 1.9-megawatt (MW) Dam No. 4 Hydro Station Project No. 2516, located on the Potomac River in Berkeley and Jefferson Counties, West Virginia, 107 FERC ¶ 62,131, and a subsequent license for its 1.21-MW Dam No. 5 Hydro Station Project No. 2517, located on the Potomac River in Berkeley County, West Virginia. 107 FERC ¶ 62,130. On June 14, 2004, Maryland Department of Natural Resources (MDNR) timely filed requests for rehearing of the May 12, 2004 Orders, asking that the Commission include in the license orders a requirement that Allegheny provide for compensatory mitigation for fish entrainment at the two projects sites or, in the alternative, direct Allegheny to conduct further studies to conclusively determine the effects of the project on fish entrainment mortality. For the reasons set forth below, we deny rehearing. This order is in the public interest because it is consistent with longstanding Commission policy.

Background

2. In its December 2001 license applications for Dam Nos. 4 and 5, Allegheny noted that, in response to entrainment concerns raised by resource agencies during pre-filing meetings and discussions, it had asked its consultant, Normandeau Associates Inc., to reanalyze entrainment studies previously conducted by Allegheny in 1986 and 1992 at Dam No. 4.¹ Normandeau's 2001 reevaluation extrapolated entrainment and mortality rates for both projects, and included new calculations for unsampled portions of the Dam No. 4 data collected in the 1986 and 1992 entrainment studies. Normandeau concluded

¹ The resource agencies involved in the pre-filing meetings with Allegheny included MDNR, U.S. Fish and Wildlife Service, and the West Virginia Department of Natural Resources.

that, although some fish are killed at the project from entrainment and turbine mortality, such losses were “probably not significant.” December 2001 License Application for Dam No. 4 at E-41.

3. Notwithstanding Normandeau’s findings, the resource agencies asked Allegheny to provide for compensatory mitigation of resident fishes lost to entrainment, and at a November 29, 2001 pre-filing meeting, the resource agencies agreed to Allegheny’s proposal to provide compensatory mitigation based on estimated fish losses determined by Normandeau’s 2001 study and by the American Fisheries Society’s (AFS) cost values for fish species. License Applications at E-41-43. Accordingly, Allegheny proposed in its December 2001 license applications to pay compensatory mitigation to MDNR for estimated fish losses at Dam Nos. 4 and 5 combined due to turbine passage in the amount of \$9,015.17 annually, and agreed that the value of the compensation for fish losses would be adjusted every 5 years based on the previous five-year Consumer Price Index values and incorporation of any newly published AFS values for the species involved. *Id.*

4. In the January 2004 Environmental Assessment (EA) prepared for the proposed relicensings of Dam Nos. 4 and 5, Commission staff determined that, as shown by Normandeau’s 2001 findings, fish losses caused by project entrainment at both project sites are not significantly affecting the fish populations of the Potomac River, and therefore staff recommended that the Commission not include compensatory mitigation payments by Allegheny to MDNR as a condition for any licenses issued for the projects. In the May 12, 2004 Orders issuing licenses for Dam Nos. 4 and 5, the Director, Office of Energy Projects, followed the EA’s recommendation.

5. In its June 12, 2004 rehearing request, MDNR argues that compensatory mitigation should be required because the studies cited in the EA indicate substantial fish entrainment and mortality resulting from the projects, and that disallowing a condition that the resource agencies and licensee agreed upon is inconsistent with the Commission’s policy to promote and encourage voluntary settlements. Accordingly, MDNR asks that compensatory mitigation be included as a license requirement for Dam Nos. 4 and 5 or, in the alternative, that the Commission direct Allegheny to conduct further studies to “conclusively determine the effects of the project on fish entrainment and mortality.” Rehearing request at 7.

Discussion

6. It is well-established that the Commission cannot require funding of compensatory mitigation where it has not been shown by substantial evidence that entrainment mortality has had a significant adverse effect on the fishery population.² As noted in the licensing orders, while Commission staff found in the EA that some fish are killed at Dam Nos. 4 and 5 from entrainment and turbine mortality, fish entrainment and mortality are not significant because of the relatively small annual numbers of fish killed,³ coupled with the facts that fish populations in the vicinity of the project are relatively large and in good health, and that there is a sport fishery for smallmouth bass in the project-affected reaches. EA at 25-26.

7. MDNR argues that the EA's findings on the numbers of fish killed show that "fish in fact are being entrained and killed on a regular and long term basis, due to the operation of the turbines." Rehearing request at 6. However, MDNR fails to explain how such losses result in significant adverse effects on the fish population as a whole, or why Commission staff's determination that there are not significant adverse effects on the fish population is erroneous. Accordingly, we conclude that there is nothing in the record of this proceeding that indicates that Dam Nos. 4 and 5 have a significant adverse effect on the fish population. Therefore, there is no substantial evidence to require Allegheny to provide compensatory mitigation.

8. MDNR also asserts on rehearing that the compensatory mitigation requirement was based upon an agreement among the licensee and resource agencies, and that by not including it as a license condition, the Commission has acted inconsistently with its general policy of supporting settlement agreements. While we do encourage settlements, we also have an independent obligation to find that a license is conditioned in a manner we conclude will best serve the public interest. Accordingly, the Commission is not

² See *City of New Martinsville v. FERC*, 102 F.3d 567 (D.C. Cir. 1996); *City of Jackson, Ohio*, 105 FERC ¶ 61,136 (2003); *Tower Kleber Limited Partnership*, 91 FERC ¶ 61,172 (2000); *City of New Martinsville v. FERC*, 81 FERC ¶ 61,093 (1997).

³ See EA at 25 (explaining that, from among the 13,652 fish entrained annually at Dam No. 4, and 10,047 fish entrained at Dam No. 5, about 13 and 14.8 percent, respectively, were estimated to have been killed by turbine passage at each project). We note that a large percentage of fish entrained at both projects were American eel and that the new licenses require alteration of project operation to enhance downstream eel passage. Thus, entrainment mortality at the projects will be reduced.

obliged to accept all negotiated proposals presented to it, particularly where, as here, such proposals are not supported by substantial evidence. *See City of New Martinsville v. FERC*, 102 F.3d 567, 673 (D.C. Cir. 1996).

9. Finally, MDNR states that as a result of prefiling negotiations, it agreed to compensatory mitigation “in lieu of further studies,” and asks that, in the event we do not require compensatory mitigation, we direct Allegheny to conduct further studies to conclusively determine the effects of Dam Nos. 4 and 5 on fish entrainment and mortality. Rehearing request at 6. As explained above, there is no finding in this proceeding of significant adverse impacts to the fish population at Dam Nos. 4 and 5 and relevant studies on entrainment and turbine mortality have been conducted. Where evidence of a problem has not been shown, the licensee does not have a duty to perform post-license studies to determine whether a problem exists. *See City of Centralia, WA v. FERC*, 213 F.3d 742, 749 (D.C. Cir. 2000).

10. Accordingly, we will not require Allegheny to undertake additional studies.⁴

The Commission orders:

The request for rehearing filed by the Maryland Department of Natural Resource on June 14, 2004, is denied.

By the Commission. Commissioner Brownell dissenting with a separate statement attached.

Linda Mitry,
Acting Secretary.

⁴ MDNR suggests that insufficient data exist to reasonably infer that the projects do not cause significant mortality to fisheries, because no additional entrainment studies were done at Dam 4 as part of the relicensing for Dam Nos. 4 and 5, and that, instead of conducting entrainment studies at Dam 5, projections were made regarding Dam 5 based on older (1986 and 1992) studies at Dam 4. MDNR fails to explain why this renders the fish entrainment data inadequate; moreover, we note that there have been no significant changes in the management of the fishery resources in the relevant sections of the Potomac River since Allegheny’s 1992 study which would invalidate the data, that there is no evidence in the record of significant changes in fish species diversity or abundance in the affected reach of the Potomac River, and that the use of entrainment studies conducted at other projects with similar salient characteristics is appropriate. *See Tower Kleber Limited Partnership*, 91 FERC ¶ 61,172.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Allegheny Energy Supply Company, LLC

Project Nos. 2516-029
2517-015

(Issued October 7, 2004)

Nora Mead BROWNELL, Commissioner *dissenting*:

Upon further consideration, I have concluded that the Commission erred in rejecting this proposed license condition. The Commission has historically encouraged settlements. I believe this practice is particularly critical in the area of hydropower relicensing, given the multiplicity of competing interests, the complexity of scientific issues, and the fragmentation of jurisdictional authority. Therefore, I believe we should have accepted this uncontested negotiated proposal.

The case on which the majority relies, *City of New Martinsville v. FERC*, 102 F.3d 567 (D.C. Cir. 1996), is inapposite. *City of New Martinsville* addressed a scenario in which the licensee and one resource agency had agreed on a \$40,000-per-year compensatory mitigation requirement, the other resource agencies protested the agreement, and the Commission chose to replace the agreement with its own \$157,000-per-year compensatory mitigation requirement. The licensee challenged the Commission's requirement, and the court struck it down as unsupported by substantial evidence. In contrast, the \$9,000-per-year compensatory mitigation requirement at issue here was agreed to by the licensee and was not protested.

I think acceptance of this proposed license condition would have been consistent with the public interest. Therefore, I respectfully dissent.

Nora Mead Brownell