

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.

Erie Boulevard Hydropower, L.P.

Project No. 2539-031

ORDER REJECTING REQUEST FOR REHEARING, MOTION FOR
CLARIFICATION, AND REQUEST FOR RECONSIDERATION

(Issued March 15, 2007)

1. This order involves procedural issues in the relicensing proceeding for Erie Boulevard, L.P.'s 38.8-megawatt School Street Project, located on the Mohawk River, in Albany and Saratoga Counties, New York. On November 16, 2006, the Commission issued an order denying rehearing with respect to several notices issued in that proceeding.¹ Green Island Power Authority (GIPA) and Adirondack Hydro Development Corporation (Adirondack) have filed a request for rehearing, motion for clarification, and request for reconsideration of the November 16 Order. As discussed below, because the Commission did not in the November 16 Order modify its previous holdings on any issue, we reject the pleading.

Background

2. Erie's predecessor filed an application for a new license for the School Street Project in 1991. Our action in the proceeding was delayed for various reasons, primarily because the State of New York did not until recently issue water quality certification for the project, a prerequisite to our acting on the license application. Some 13 years after Erie filed its application, Green Island Power Authority sought a preliminary permit from the Commission to study the proposed Cohoes Falls Project, which was incompatible with the School Street Project and therefore would compete with it. The Commission dismissed the permit application because the Federal Power Act, which required that all

¹ *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189.

applications with respect to the School Street site be filed in 1991, barred consideration of the Cohoes Falls Project.² GIPA sought judicial review of these orders, but subsequently voluntarily withdrew its appeal.³

3. On September 7, 2004, GIPA filed a motion to intervene in the School Street relicensing.⁴ GIPA based its motion on its desire to develop the Cohoes Falls Project. Thereafter, a number of other entities that supported the Cohoes Falls Project filed late motions to intervene in the School Street proceeding. Notwithstanding the Commission's final, no longer reviewable orders holding that it could not lawfully consider the Cohoes Falls Project, GIPA and Adirondack filed several pleadings – a so-called “offer of settlement,” comments on historic properties issues, and a motion to present evidence or to reopen the record – that included a purported draft application for the Cohoes Falls Project.

4. In a series of notices, the Commission denied the late motions to intervene and rejected GIPA's and Adirondacks' various attempts to place the Cohoes Falls project before the Commission. GIPA, Adirondack, and the entities whose late motions to intervene had been denied filed requests for rehearing.

5. In the November 16 Order, the Commission denied the requests for rehearing. With respect to the late motions to intervene, we concluded that the movants had not justified their tardiness and that allowing them to intervene would disrupt the proceeding, and would result in prejudice to, and additional burdens on, existing parties.⁵ We rejected the various motions that sought to put the Cohoes Falls Project before us as improper attempts to circumvent the law.⁶

6. On December 18, 2006, GIPA and Adirondack filed a request for rehearing, or, in the alternative, motion for clarification and request for reconsideration.

² See *Green Island Power Authority*, 110 FERC ¶ 61,034, *on reh'g*, *Green Island Power Authority*, 110 FERC ¶ 61,331 (2005).

³ *Green Island Power Authority v. FERC*, No. 05-1170 (D.C. Cir., *dismissed* Dec. 14, 2005).

⁴ The Commission had, by public notice, set April 12, 1993 as the intervention deadline.

⁵ See 117 FERC ¶ 61,189 at ¶ 36-46.

⁶ *Id.* at ¶ 49-78.

7. On February 15, 2007, we issued an order approving a settlement between Erie Boulevard and a number of parties to the relicensing proceeding, and issuing new license to Erie Boulevard for the School Street Project.⁷

Discussion

8. We have previously explained that rehearing of an order on rehearing lies only when the order on rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.⁸ Otherwise, the Commission does not allow rehearing of an order denying rehearing.⁹ Any other result would lead to never-ending litigation as every response by the Commission to a party's arguments would allow yet another opportunity for rehearing.¹⁰ As the U.S. Court of Appeals for the District of Columbia Circuit concluded, even "an improved rationale" does not justify a further request for rehearing.¹¹

9. In this case, GIPA and Adirondack had the opportunity to raise any objections they had to the notices, an opportunity of which they fully availed themselves in their requests for rehearing. The November 16 Order responded to the arguments made by GIPA and Adirondack and affirmed the notices in every respect. Thus, the results of the notices were not modified, and rehearing of the November 16 Order does not lie.

⁷ *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,101.

⁸ See, e.g., *Bridgeport Energy, LLC*, 114 FERC ¶ 61,262 at ¶ 8 (2006). See also *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999) (*Southern*) (citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988)).

⁹ See e.g., *Southern Company Services, Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Company d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Southwestern Public Service Co.*, 65 FERC ¶ 61,088 at 61,533 (1993).

¹⁰ See, e.g., *Canadian Association of Petroleum Producers v. FERC*, 254 F.3d 289, 296 (D.C. Cir. 2001) (rejecting the notion of "infinite regress" that would "serve no useful end").

¹¹ *Southern*, 877 F.2d at 1073. See also *Londonderry Neighborhood Coalition v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001).

10. GIPA and Adirondack in fact do not allege that the November 16 Order modified the notices, but rather that the order “contained completely new justifications for the original decisions . . .”¹² As noted above, that is not a basis for permitting rehearing of an order on rehearing. It is the very nature of an order on rehearing that it contain “new justifications” responding to arguments raised by the parties; this inevitable result does not open the door to further rounds of pleadings.

11. To the extent that GIPA and Adirondack seek clarification or reconsideration, styling an improper request for rehearing as a motion for clarification or motion for reconsideration cannot cure its deficiencies. Moreover, however they title their pleading, GIPA and Adirondack are simply seeking to reargue matters properly disposed of in the November 16 Order. We see no reason to revisit these issues.

The Commission orders:

The request for rehearing, motion for clarification, and request for reconsideration filed by Green Island Power Authority and Adirondack Hydro Development Corporation on December 18, 2006 is rejected.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.

¹² GIPA and Adirondack request for rehearing at 1.