

124 FERC ¶ 61,252
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.

Consolidated Water Power Company

Project Nos. 2192-028
2192-030

ORDER LIFTING STAY AND ON REHEARING

(Issued September 18, 2008)

1. On December 18, 2006, Consolidated Water Power Company (Consolidated) timely filed a request for rehearing, and George Mead and Susan Feith (Mead and Feith) timely filed a motion for clarification or, in the alternative, for rehearing,¹ of an order

¹ As required by Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(c)(2) (2008), Consolidated included in its rehearing request a section separate from its arguments, entitled "Statement of Issues," listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and Court precedent on which it is relying. The Mead and Feith submission did not include this required separate statement of issues section. Accordingly, to the degree that the Mead and Feith submission constitutes a request for rehearing, it is deficient, the issues raised on rehearing are waived, and the rehearing request is dismissed. *See, e.g., Wellesley Rosewood Maynard Mills, L.P.*, 117 FERC ¶ 61,282 (2006), *Duke Power Company, LLC*, 116 FERC ¶ 61,171 (2006), and *South Carolina Electric & Gas Company*, 116 FERC ¶ 61,218 (2006). Those matters raised by Mead and Feith that constitute requests for clarification are discussed, *infra*.

Mead and Feith also filed an answer to Consolidated's rehearing request. Answers to rehearing requests are not permitted, and the answer is therefore rejected. 18 C.F.R. § 385.213(a)(2) and 713(d) (2008). In addition, the Biron Licensee Group, LLC and the Village of Biron filed submissions styled as answers to the Mead and Feith clarification request. These submissions were filed after the 15 day period for filing answers (18 C.F.R. § 213(d)(1) (2008)), and they appear to address portions of the Mead and

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issued by the Commission on November 17, 2006.² The November 17th order amended the license for Consolidated's 6,232-kilowatt Biron Hydroelectric Project No. 2192 (Biron Project) to authorize a land exchange. On April 25, 2007, the Commission stayed the November 17th Order pending the resolution of certain flooding issues related to some of the lands involved in the exchange.³ As discussed below, the flooding issues have been resolved, so we are lifting the stay. In addition, we are denying Consolidated's rehearing request, and making certain clarifications requested by Mead and Feith.

Project Description

2. The Biron Project, located on the upper Wisconsin River, in Wood and Portage Counties, Wisconsin, includes a dam, a 2,078-acre reservoir, and a powerhouse. In addition, project dikes line the northern shore of the project reservoir and underlie the shoreline side of portions of North Biron Drive,⁴ which runs, in part, along the southerly edge of the project reservoir.⁵ The 100-year floodplain covers most of the area within the project boundary, and Consolidated has flowage rights on all privately-owned lands within the boundary.

Background

3. Consolidated owns in fee only about two miles of the project's total of 35 miles of shoreline and, it has stated, the only licensee-owned shoreline currently suitable for developing public recreation access is a narrow strip between North Biron Drive and the

Feith request that have either been dismissed as a request for rehearing or determined to be matters not ripe for adjudication. *See* discussion, *infra*. For this reason, we dismiss the filings.

² 117 FERC ¶ 61,208 (2006).

³ 119 FERC ¶ 61,087 (2007).

⁴ North Biron Drive is considered a county road and is also known as County Trunkline Highway U (Highway U) from Huffman Road on the west to a point just past Consolidated's pond, where Highway U turns inland, running in a north-south direction, while North Biron Drive continues east along the reservoir shoreline.

⁵ The dikes, constructed sometime between 1912 and 1922, were built to permit the water level of the river to be raised while preventing the reservoir from flooding the lands behind the dikes. *See Rocheleau v. Consolidated Water Power & Paper Company*, 189 Wis. 290 (1926).

reservoir's southern shoreline.⁶ Within this strip, Consolidated owns 26 lots, which together comprise about 3.14 acres of land, and cover about 3,000 linear feet of reservoir shoreline.⁷

4. For 50 to 60 years, Consolidated leased the 26 lots to private leaseholders pursuant to what it calls "annual residency occupancy licenses." The leaseholders constructed permanent structures, ranging from boat docks and boat houses to recreational cabins and primary residences. While the leases stipulate that the public has a right of access to the river, the structures have, in effect, eliminated public access to the shoreline at these locations.

5. Initially, with a view to providing additional public access to the project's shoreline for recreational purposes, Consolidated notified the leaseholders on the 26 lots of its intention to terminate their leases and require removal of the permanent structures the leaseholders had built. Some of the leaseholders, opposing the termination, formed the Biron Licensee Group, LLC. (Biron Group) and, in concert with Classic Development, approached Consolidated with a counter-proposal that would allow the leaseholders to take ownership of the lots they are leasing (subject to Consolidated's flowage rights) in exchange for conveyance to Consolidated of private land within the project boundary, which could then be used to provide public access. The exchange was to be dependent on the obtaining of state and local authorization to relocate inland the segment of North Biron Drive that runs along the stretch of shoreline on which 21 of the 26 lots are situated. Consolidated agreed to the counter-proposal and submitted a request to amend its license in accordance with it.

6. The Commission's order authorized Consolidated to convey in fee, subject to retention of its flowage rights, the 26 lots of land, located between North Biron Drive and the southern shoreline of the Biron Project's reservoir.⁸ The authorization was conditioned upon Consolidated: (1) acquiring two private parcels within the project boundary designated as Parcels 1 and 2; (2) acquiring the entire roadbed of North Biron Drive and its right-of-way between the east side of lot 21 (on the west) and the north-south section of County Trunkline Highway U (on the east) for development as a shoreline trail for public use; (3) establishing a 100-foot-wide buffer zone along the

⁶ This area is located along a two-mile stretch of shoreline, beginning about 1.5 miles upstream from Biron Dam.

⁷ See 117 FERC ¶ 61,208 at P 6.

⁸ *Id.* at P 19 and Ordering Paragraphs (B) and (J).

shoreline of the project's reservoir from the west end of Parcel 1 to the north-south section of County Trunkline Highway U; and (4) acquiring lands needed to ensure access to Parcel 2.⁹

7. The order also provided that there is to be no development in the 100-foot corridor except for certain specifically-enumerated recreational trails and facilities.¹⁰

Furthermore, since the Commission's approval of the land exchange was premised on Consolidated being able to provide access to Parcels 1 and 2 and other recreational facilities in the area, as well as developing the trail in the roadbed, the order provided that Consolidated not convey title to the 26 lots until after the North Biron Drive segment is relocated to an inland route thereby enabling Consolidated to acquire the abandoned road bed and to construct access roads connecting its parking lots to the relocated road.

8. On November 29, 2006, the State of Wisconsin, Division of Hearings and Appeals (Wisconsin), issued an order permitting abandonment and relocation of the segment of North Biron Drive related to this proceeding.¹¹ The Wisconsin order conditioned the state's approval on the adoption of 27 requirements intended to ensure that the proposed replacement of public access at the site of the abandoned highway will be equivalent or superior to the public access currently provided by the highway.

Stay of November 17 Order

9. While rehearing of the November 17th Order was pending, the Commission's Regional Engineer, Division of Dam Safety and Inspections – Chicago Regional Office (D2SI), notified Consolidated by letter dated April 5, 2007, that, given the project's Inflow Design Flood (IDF) of 187,850 cubic feet per second (cfs) (i.e., the flow above which the incremental increase in water surface elevation due to the failure of a dam or

⁹ See Ordering Paragraph (B). The order also required: (1) documentation of various improvements to the leased properties prior to conveyance (Ordering Paragraph (D)); (2) submission of plans to: (a) develop the shoreline trail (Ordering Paragraph (E)), and (b) construct access roads connecting parking areas to the relocated road (Ordering Paragraph (F)); and (3) construct a parking area and a trail linking it to the reservoir (Ordering Paragraph (G)), and a public boat launch and parking area (Ordering Paragraph (H)).

¹⁰ See 117 FERC ¶ 61,208, at P 24, n.23, and Ordering Paragraph (I).

¹¹ Wisconsin referred to North Biron Drive as County Trunkline Highway U. See note 4, *supra*.

other water-impounding structure is no longer considered to present an unacceptable threat to downstream life and property), the spillway capacity of the project's dam was inadequate. The letter therefore required Consolidated to provide a detailed plan and schedule to address these matters, including construction measures to provide the necessary spillway capacity to pass the project's IDF. On April 25, 2007, the Commission stayed the November 17th Order until the matter was resolved.

10. On February 6, 2008, Montgomery Watson Harza (Harza), Consolidated's consultant, filed a report titled "Inflow Design Flood – 2008 Summary Report" (2008 Report), recommending a revised IDF for the project of 138,000 cfs. The licensee endorsed this recommendation in its letter of February 22, 2008, and on May 20, 2008, Commission staff accepted the revised IDF.¹²

11. The new IDF is based on the current project reservoir rim hydraulic conditions, one of which is the existence of the "low spot" on the reservoir's rim in vicinity of Lot No. 15 (one of the lots to be conveyed by Consolidated) that will allow water to flow overland at the IDF.¹³ So, while Consolidated may convey the lots in question (subject of course to flooding easements to be retained by Consolidated), as explained in the May 20, 2008 letter to Consolidated accepting an IDF of 138,000 cfs, if any land disturbing activities occur on the lots that alter their elevation or otherwise affect the hydraulics of the area, Consolidated will have to reassess the project's IDF. Such reassessment could result in a different IDF, in which case Consolidated could be required to undertake planning, design, and construction of measures necessary to provide the necessary spillway capacity to pass a revised IDF for the project.

12. For the above reasons, we lift the stay of the November 17, 2006 Order.

Discussion

A. Consolidated's Rehearing Request

13. On rehearing, Consolidated alleges that the requirements of Wisconsin's order permitting abandonment and relocation of North Biron Drive may conflict with the Commission's requirement for creation of a shoreline buffer zone in the abandoned road-

¹² Acceptance of the IDF of 138,000 cfs is contingent on Consolidated removing two structures downstream of the right embankment and raising the left seawall to prevent it from being overtopped up to a flood of 138,000 cfs.

¹³ Lot No.15 and the "low spot" on CTH-U are located about 10,000 feet upstream of the Village of Biron.

bed. It requests that the Commission resolve any potential conflicts by revising Ordering Paragraph (I) of the Commission's order¹⁴ to provide for development of a management plan for the buffer zone, including provisions that allow Consolidated to: (1) grant licenses for docks within the buffer zone; and (2) grant non-exclusive, low-impact foot path easements across the buffer zone. Consolidated also requests that the Commission allow the buffer zone to be reduced to a fifty-foot width along the 303-foot portion of the shoreline adjacent to land owned by North Biron Properties LLC, immediately east of the Commission-ordered public boat launch and parking area in Parcel 2.¹⁵

14. Consolidated's request for rehearing is denied. Consolidated has made no argument that the facts, analysis, or conclusions upon which our order is based are in error. Nor has it identified or discussed specific conflicts between Wisconsin's requirements and those of our order.¹⁶ Rather, Consolidated's request for revision of Ordering Paragraph (I) appears to be an effort to further amend its license to permit additional boat docks and foot paths within the no-development shoreline buffer zone

¹⁴ Ordering Paragraph (I) states:

Upon completion of the land exchange, the licensee shall establish a 100-foot-wide buffer zone along the shoreline of the project's reservoir from the upstream end of the Northland Cranberry Ditch extending upstream to the north-south section of Trunkline County Highway U. There shall be no development in the 100-foot-wide buffer zone, except for the required shoreline trail, trail from the parking area in the 48-acre parcel to the shoreline, relocated Aqua Skiers site, boat launch, access roads, and any future recreational facilities that may be proposed by the licensee and approved by the Commission.

The licensee shall develop, and file for Commission approval, a resource conservation plan for the long-term monitoring and protection of vegetation and wildlife in the 100-foot-wide buffer zone, including revegetation of the unpaved area of the buffer zone with native vegetation.

¹⁵ Consolidated states that North Biron Properties' land is situated between the Commission-ordered boat launch parking facility and the pond that lies near the eastern end of the existing county highway.

¹⁶ Even if the requirements of the two orders were in conflict, that fact alone would not be sufficient reason to change our requirements, since our authority, based in the Federal Power Act, supersedes that of a state, as regards license requirements.

without following the usual process for amendments pursuant to the Commission's regulations. In the order, we determined that the 100-foot-wide no-development buffer zone is in the public interest because it will provide numerous important resource benefits.¹⁷ Nevertheless, Consolidated is free -- after consultation, and in compliance with the terms of the Commission's rules and regulations¹⁸ -- to request such an amendment to its license, which the Commission will then consider. In the meantime, if it desires to make the authorized land exchange, Consolidated must comply with the requirements of the Commission's November 17th Order.¹⁹

15. Consolidated has requested the Commission to allow the shoreline buffer zone to be reduced to a fifty-foot width along the 303-foot portion of the shoreline adjacent to land owned by North Biron Properties LLC because North Biron Properties has recently constructed on its land a restaurant/bar that is within 100 feet of the shoreline. In support, Consolidated states only that it "believes" that the buffer zone can be reduced in this area without impairing flowage, public recreation, shoreline control, and protection of environmental resources, and that Wisconsin Department of Natural Resources (Wisconsin DNR) visited the area and determined that a 50-foot buffer zone will adequately protect the public interest values in that area. Consolidated has not provided sufficient information to permit us to make a determination on the propriety of its request.²⁰ If Consolidated desires to exclude a 50-foot wide strip of land along 303 feet

¹⁷ These resource benefits include shoreline erosion protection; water quality and aquatic habitat protection; vegetative cover and riparian habitat protection and enhancement; shoreline control, including providing an adequate building setback restriction and limiting uses and occupancies to appropriate recreational facilities; and protection and enhancement of the natural visual character and quality of the shoreline landscape. *See* 117 FERC ¶ 61,208 at P 24.

¹⁸ 18 C.F.R. § 4.200 *et seq.* (2008).

¹⁹ We note that the prior order does not require Consolidated to complete the exchange, but only authorizes it to do so, under the conditions the order sets.

²⁰ Consolidated has not even identified precisely where on North Biron Properties' land the restaurant/bar is located, the dimensions of the structure, or why a reduction to a fifty-foot width buffer should extend for 303 feet of shoreline. Nor has it proffered evidence to support its position that flowage, public recreation, shoreline control, and environmental resources would not be impaired. Furthermore, while Consolidated states that Wisconsin DNR made a determination that a 50-foot buffer would adequately protect public interest values in the area, and attaches a one-page e-mail memorandum from a

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of the buffer zone, it must file a license amendment in accordance with the Commission's rules and regulations, fully setting out its proposal and associated support for it.²¹

B. Mead and Feith Clarification Requests

16. Mead and Feith note that while ordering paragraph (B) characterizes the location of the 26 lots of land to be conveyed as "between County [Trunkline] Highway U and the southern shoreline of the Biron Project's reservoir," four of the lots are located to the east of County Trunkline Highway U. Mead and Feith are correct. The order inadvertently referenced County Trunkline Highway U because County Trunkline Highway U and North Biron Drive are the same road for a segment of highway running along the river. The four lots to which Mead and Feith refer are located along a portion of North Biron Drive beyond the point where the two roads diverge, with County Highway U running inland and North Biron Drive continuing east along the river. The reference in Ordering Paragraph (B) will be corrected to refer to North Biron Drive.

17. Mead and Feith also note that Ordering Paragraph (C) refers to Ordering Paragraph (B)(2)(a)-(c), but that Ordering Paragraph (B) contains no (B)(2). Ordering Paragraph (C) should have referred to Ordering Paragraph (B)(a)-(d), and will be corrected accordingly.

18. Mead and Feith maintain that, in the Final EA (Appendix A, response to Comment 10), staff agreed that the buffer zone should run from Huffman Road to the north-south section of County Trunkline Highway U, while the order only required Consolidated to acquire the segment between the east side of lot 21 to the north-south section of County Trunkline Highway U. They request clarification of the apparent discrepancy. We clarify that the language of the order -- that Consolidated must acquire the roadbed between the east side of lot 21 and the north-south section of County Trunkline Highway U on the east -- was indeed the intended requirement.²²

Wisconsin DNR employee (*see* Consolidated's December 18, 2006 rehearing request, attachment 2), Wisconsin DNR, an intervenor in this proceeding, has not filed a request for rehearing asking that we change our requirement.

²¹ *See* 18 C.F.R. § 4.200 *et seq.* (2008).

²² Mead and Feith have argued that the longer buffer is needed so that the trail to be built along it can form a piece of a longer trail that might be built in the future, providing greater area-wide recreational benefits. We note that the required buffer zone, which will extend to the north-south section of County Trunkline Highway U, could

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19. As requested by Mead and Feith, we confirm that where the Commission's order states that the licensee must acquire the 100-foot-wide no-development buffer zone, "acquire" means acquisition of ownership in fee of the land underlying the buffer zone. We also confirm that the standard land-use provisions of Article 412 of the Biron license do not apply to the buffer zone,²³ and that, except for development explicitly excepted in the Commission's order, no development (including construction of piers, docks, pathways to the shoreline, or view corridors) may occur in the acquired buffer zone without prior Commission review and approval.

20. Noting that the restaurant/bar recently constructed by North Biron Properties on its own land will—if the land exchange is consummated—be located within what is to become the 100-foot-wide no-development buffer zone, Mead and Feith request the Commission to clarify that, under the Commission's order, any development in the 100-foot-wide buffer zone that was not specifically listed in the November 17th Order, even if already constructed, must be removed.

21. The licensee's acquisition of the 100-foot-wide no-development buffer zone is a condition of our authorization of the land exchange. The acquisition was required in order to provide for an adequate shoreline buffer along the project reservoir, and resource benefits, including a limitation of uses and occupancies to appropriate recreational facilities. Therefore, for the exchange to go forward, Consolidated would have to acquire fee ownership of the buffer zone. Given the order's requirements concerning the buffer zone, if and when Consolidated acquires it in fee, Consolidated would have to remove the restaurant/bar to the degree it is located within that buffer zone. However, as previously explained,²⁴ if Consolidated desires to exclude the restaurant/bar from the buffer zone, or obtain permission for it to remain within the buffer zone, Consolidated may file a license amendment in accordance with the Commission's rules and regulations, fully setting out its proposal and associated support for it. Any amendment application would be noticed for intervention and comment.

serve as such a connection point. As for the other end, any extension of the buffer beyond that required in the November 17 order would leave a large portion of the exchanged lots with no connecting road. In any event, to the extent Mead and Feith are asking us to require the longer buffer zone, the request is one for rehearing and is dismissed. *See* n.1, *supra*.

²³ Article 412(b) sets out the types of use and occupancy of project lands and waters for which the licensee may grant permission without prior Commission approval.

²⁴ *See* discussion in P 17, *supra*.

Other Matters

22. Mead and Feith raise a number of issues that constitute neither requests for clarification nor for rehearing, but rather, for Commission action on matters not previously raised and/or not ripe for adjudication. They ask the Commission to find that no fees can be charged for use of the park, boat launch, or trail without the Commission's prior approval. Fees to be charged for use of recreational resources within the buffer zone were not raised as an issue in the proceeding and therefore are not a subject for rehearing, but we do note that, pursuant to section 2.7 of the Commission's regulations,²⁵ licensees generally are permitted to charge reasonable fees to users of a project's recreational facilities.

23. Mead and Feith ask the Commission to require that: (1) any future proposal to abandon a portion of County Trunkline Highway U overlying project dikes be submitted to the Commission for review and approval before the abandoned roadway is transferred to private property owners, and (2) Classic Development submit a request to the Commission for any necessary authorizations before it proceeds with residential development on its lands within the project's boundaries.

24. Possible future proposals, whether for abandonment or for residential development, are not matters before the Commission in this proceeding. As noted in the November 17th Order, Commission staff will determine what authorizations may be needed and what environmental review may be required if and when residential development is proposed.²⁶ In any event, while the Commission has jurisdiction to require or authorize actions by the licensee related to activities within the project boundary, it does not have jurisdiction over third parties and therefore could not compel Classic Development to submit a request for authorization.

25. The Commission's order states that, prior to conveyance of any of the leased properties containing permanent improvements, the licensee shall provide to the Commission documentation that those permanent improvements have been executed in compliance with the conditions specified in the existing annual leases, local land use regulations, Wisconsin DNR's permitting process, and all required state, county, and local permits for the improvements. Mead and Feith urge that the Commission require, as documentation, copies of contemporaneous permissions, permits, approvals, etc. and reject as insufficient a blanket document such as an affidavit, which merely avers that all

²⁵ 18 C.F.R. § 2.7 (2008).

²⁶ See 117 FERC ¶ 61,208 at P 16, n.17.

permanent improvements conform to applicable requirements. They also have asked that the Commission require the final design for Aqua Skiers' new practice area to include the types, size, location, and permanence of facilities, and parking limitations for equipment trucks and emergency vehicles at the site

26. Mead and Feith are asking the Commission to prejudge what is not yet before it. It is for the licensee to decide what it will file to comply with the Commission's order. Upon receipt, the Commission will review the filing on its merits to determine whether it is of a kind and quality sufficient to confirm that Consolidated has complied with the order.²⁷

The Commission orders:

(A) The April 25, 2007 stay of the November 17, 2006 Order is lifted.

(B) The request of Consolidated Water Power for rehearing of the order issued November 17, 2006, in this proceeding is denied.

(C) The request filed by George Mead and Susan Feith for rehearing of the order issued November 17, 2006, in this proceeding is dismissed.

(D) The answer filed by George Mead and Susan Feith to Consolidated Water Power's rehearing request in this proceeding is rejected.

(E) The answers of the Biron Licensee Group, LLC, and the Village of Biron, to George Mead and Susan Feith's request for clarification or in the alternative for rehearing, in this proceeding are dismissed.

(F) The order issued November 17, 2006, in this proceeding is clarified as discussed in the text of the order, and as set out in Ordering Paragraphs (F) and (G) below.

²⁷ Certainly, as relates to improvements, the items Mead and Feith suggest we require are of a kind that would tend to support documentation, and a blanket affidavit from a licensee would be less convincing. Furthermore, as relates to the Aqua Skier's practice area, final designs ordinarily would include the kinds of information referenced by Mead and Feith.

(G) The first sentence of Ordering Paragraph (B) of the November 17, 2006 Order in this proceeding is revised to read as follows:

(B) Upon completion of the relocation of a portion of North Biron Drive (running from Huffman Road on the west to a point just past the licensee's pond, where it intersects the north-south section of Trunkline County Highway U) to an inland route enabling the licensee to construct access roads connecting parking lots to the relocated road, the licensee is authorized to convey in fee, subject to the licensee's flowage rights, 26 lots of land, comprising 3.14 acres, located between North Biron Drive and the southern shoreline of the Biron Project's reservoir.

(H) Ordering Paragraph (C) of the November 17, 2006 Order in this proceeding is revised to read as follows:

(C) Prior to conveyance of the 26 lots, the licensee shall provide to the Commission documentation that it has acquired all properties enumerated in Ordering Paragraph (B)(a)-(d), above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.