

126 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

McCallum Enterprises I, Limited Partnership

Project No. 6066-034

ORDER DENYING REHEARING

(Issued February 19, 2009)

1. On November 20, 2008, the Commission, in an order granting rehearing, denied McCallum Enterprises I, Limited Partnership's application to amend the Project Recreation and Public Safety Plan (recreation plan) for its Derby Dam Hydroelectric Project No. 6066 to relocate a shoreline fishing area and canoe portage.¹
2. On December 22, 2008, the licensee filed a request for rehearing of the November 20 Order. The filing also requested, pending action on the rehearing request, deferral of any Commission action on whether the licensee must remove a fence it had erected preventing public access to the fishing and canoe portage area.
3. For the reasons discussed below, we deny the licensee's request for rehearing. In addition, we dismiss as moot its request for deferral of Commission action regarding the fence and direct the licensee to document that it has restored public access to the project's shoreline fishing and portage recreation area required by the project's recreation plan.

Background

4. The Derby Dam project is located on the Housatonic River in the cities of Shelton and Derby in New Haven and Fairfield Counties, Connecticut. The project's powerhouse is located on the west bank of the Housatonic, on a strip of land lying between the river and the historic Shelton Canal. The Commission issued the current license for the project

¹ See *McCallum Enterprises I, Limited Partnership*, 125 FERC ¶ 61,194 (2008) (November 20 Order).

in 1986.² The project's mandated recreation plan requires the licensee to maintain within the project a shoreline fishing and canoe portage area in the City of Shelton near the project, dam, powerhouse and tailrace.³ The area is located on land between the river and the canal. The licensee also maintains a fishing area on the opposite side of the river, in the City of Derby.

5. On March 27, 2008, the licensee filed a two-page application setting forth a proposal to relocate the Shelton fishing area and canoe portage to an area further to the south and downstream of the project dam. The licensee asserted that planned residential development would increase foot traffic near the access area, presenting safety and security issues; that the canal has proven to be a safety hazard, with a number of drownings there; and that swift water at the tailrace presents a hazard to canoeists and fisherman, which would not be the case at the proposed new site. The licensee also asserted that the current fishing and canoeing area is hundreds of feet from a public parking lot, whereas the proposed new area would be immediately adjacent to the parking area. The licensee explained that the changes on the Shelton side of the river would not affect access on the Derby side, which the licensee stated has better amenities.

6. On May 30, 2008, the Commission issued public notice of the licensee's proposal.

7. On June 30, 2008, the Connecticut Department of Environmental Protection (Connecticut DEP) filed comments. Connecticut DEP stated:

The Department does not fully support the proposed amendment to the recreation plan because it will significantly diminish recreational opportunities and public access at the project site. The proposed plan amendment will eliminate public access to nearly 1,000 linear feet of the western bank of the Housatonic River, an area highly utilized by anglers during the recreation season. While the Department is not directly commenting on the safety issues identified by the licensee, it does proffer that there may be alternative means to address this matter and preserve the existing level of recreational opportunities and public access to the Housatonic River at the project site.

² 34 FERC ¶ 62,578 (1986).

³ In 1987, pursuant to Article 32 of the license, the licensee filed with the Commission and supplemented a report on public access and recreational facilities (recreation plan) to be constructed at the project. These filings included the area at issue here. *See* filings of April 17 and August 5, 1987.

8. On August 14, 2008, the Housatonic River Estuary Committee, an entity representing the towns Shelton, Ansonia, Derby, Orange, Milford, and Stratford, Connecticut, filed comments. The Committee stated:

We were not made aware of this situation nor have we had time to study the ramifications for such proposed changes as there appears to have no notice of a public forum. . . . Our first concern is [that] the accessibility to the river be maintain[ed] and that fishing be located at the best location and accessibility for paddle craft be made with careful thought, as these sports [have] been undergoing dramatic growth. . . . [A]re there any options we can take so discussions could take place and we find reasonable compromise?

9. On August 25, 2008, the City of Shelton Conservation Commission filed comments objecting to the proposed amendment. The Conservation Commission stated that the existing access area is heavily used by both fishermen and kayakers, and has a reputation for the best fishing on the lower Housatonic because fish such as striped bass “stack up” at the dam, while the proposed new site does not provide the same quality of fishing. The Conservation Commission disputed the licensee’s assertion of fatalities in the area relating to public recreation, stating that the one fatality there was the result of a car driving into the canal. According to the Conservation Commission, future residential development not only would not be a basis for curtailing access, but in fact would a reason to grant greater access.

10. On September 3, 2008, Commission staff issued an order granting the amendment application.⁴ The order concluded that the amendment would provide the same recreational facility in a new location, would avoid hazards to fishermen and canoeists, and would limit access to the river for public safety reasons. Following issuance of that order, the licensee erected a fence preventing public access to the area.⁵

⁴ *McCallum Enterprises I, Limited Partnership*, 124 FERC ¶ 61,166 (2008) (September 3 Order).

⁵ On September 10, the City of Shelton Citizens Advisory Board, a group appointed by the mayor and town alderman to provide citizen input, filed comments. The Advisory Board asserted that the licensee’s proposal would deny the public access to the last remaining unaltered section of the canal. It disputed the licensee’s statements that the area is unsafe, stating that no accidents have occurred at the canal segment in question and that swift water has caused no reported accidents. The Advisory Board stated that closing the existing site would be inconvenient to the public. The Advisory Board also
(continued...)

11. On October 2, 2008, Connecticut DEP filed a request for rehearing of the September 3 Order.⁶ The agency contended that the relocation of the fishing and portage area would unnecessarily diminish recreational opportunities at the project in violation of section 2.7 of the Commission's regulations,⁷ which requires licensees to assure optimal development of recreational resources afforded by their projects. Connecticut DEP stated that, pursuant to the amendment, public access to approximately 1.50 acres of project lands along 1,000 feet of shoreline would be eliminated, with remaining access restricted to 0.15 acres. It also asserted that the licensee could ensure public safety at the existing fishing and portage area through use of appropriate signage and fencing.

12. On November 20, 2008, the Commission granted Connecticut DEP's request for rehearing, thus denying the amendment application. We concluded that the licensee had not produced sufficient evidence to support its application. Specifically, we found that the licensee had not shown that the new site would provide the same recreational opportunities as the existing site. We also noted that the licensee had not supported its claim that the existing area was unsafe for boaters and fishermen. We stated that Commission staff had previously concluded, consistent with Connecticut DEP's contention, that a combination of fencing, signs, boat barriers, and warning sirens should protect the public from hazards due to project operations. We found the licensee's concerns about future residential development to be speculative.

13. The licensee timely requested rehearing of the November 20 Order. Pending action on its rehearing request, the licensee also requested deferral of any Commission

stated that the licensee has made efforts to convert the recreation area into a development site or to sell it to the city. On September 17, 2008, the City of Shelton Office of Planning and Zoning filed comments noting that it had voted unanimously to report unfavorably to the Commission on the proposed amendment. It stated that the existing area is a community facility that provides year round recreational and scenic opportunities for fishermen, birdwatchers, boaters, and walkers, and that the alternative location is unacceptable because its steep topography would severely limit recreational activities. These comments were received after the initial order in this proceeding, and, while they tend to support the comments filed by Connecticut DEP and other commenters, we did not rely on them in the November 20 Order and do not do so here.

⁶ Also on October 2, 2008, the City of Shelton filed a motion to intervene out of time and request for rehearing. The motion to intervene was denied for failure to show good cause for late intervention, and the request for rehearing was accordingly rejected. See *McCallum Enterprises I, Limited Partnership*, 125 FERC ¶ 61,123 (2008).

⁷ 18 C.F.R. § 2.7 (2008).

decision on whether the fence preventing public access to the existing fishing and portage area should be removed.

Discussion

A. Licensee's Request for Rehearing

14. The licensee contends that the Commission erred in its November 20 Order denying the licensee's application to relocate the fishing and portage area by relying on inaccurate, unsupported factual assertions made in Connecticut DEP's rehearing request. It argues that its application should be granted because the proposed downstream site is safer and more accessible than the current site and will offer equivalent, and in some respects better, fishing conditions. The licensee includes with its rehearing request the sworn affidavits of its operations manager, its project plant operator, and a professional senior fisheries biologist to dispute Connecticut DEP's allegedly erroneous statements.⁸

15. The licensee misinterprets our previous order. In denying the application we did not rely upon the assertions in Connecticut DEP's rehearing request regarding the adequacy of recreational opportunities and public safety measures at the existing fishing and portage area. We denied the application because we concluded after a thorough examination of the record that the licensee had not provided sufficient evidence to support the application.⁹

16. Section 2.7 of our regulations expresses our long-term policy of seeking the "ultimate development" of the recreational resources of hydropower projects that we license.¹⁰ To that end, we require licensees "to acquire in fee and include within the project boundary enough land to assure optimum development of the recreational resources afforded by [each] project."¹¹

⁸ The individuals in these affidavits conclude on the basis of their observations and analysis that (1) the existing fishing area is rarely used for shoreline fishing and (2) the licensee's proposed relocation of the fishing and portage area will not materially diminish recreational opportunities for fishing (shoreline angling), will be safer, more accessible and environmentally friendly than the existing area and will provide better fishing than the existing area. *See* the affidavits of Andrew Hernandez, Brandon H. Kulik, and Carol Lacasee, attached to the licensee's rehearing request filed on December 22, 2008.

⁹ *See* November 20 Order, 125 FERC ¶ 61,194 at P 8.

¹⁰ 18 C.F.R. § 2.7 (2008).

¹¹ *Id.*

17. With respect to the Derby Dam Project, the licensee voluntarily proposed some 20 years ago to include the current fishing and canoeing area as part of the project. The record, including comment by Connecticut DEP and a number of local entities, confirms that the existing area near the project powerhouse is a valued recreational resource. This is buttressed by the most recent environmental inspection report conducted by staff of our New York Regional Office. That 2003 report noted that the project has “some recreational access in the form of fishing access to the tailrace” and that “the project area is a popular angling site.”¹² The prior inspection reached similar conclusions, stating “the licensee provides fishing access to both sides of the river, below the dam . . . The canal is a popular fishing site at this point.”¹³

18. The licensee’s amendment application was extremely summary. It did not address in any detail the current uses of the Shelton fishing and canoeing area and did not allege that the area was not well-used. It also did not explain how the need for public recreation would be met by the proposed new area. The application focused on allegations concerning public safety, which were generally unsupported and were refuted by comments from the various community organizations. The only other consideration raised in the application was a possible concern about public safety based on possible future development, which, as we stated in the November 20 Order, is speculative.

19. In sum, the licensee failed to support its amendment application and we properly denied it. A licensee seeking to alter an approved recreation plan carries the burden of demonstrating why the proposed alteration is in the public interest and McCallum did not meet that burden.¹⁴

20. McCallum appends to its request for rehearing three affidavits purporting to show that the existing fishing area is rarely used and the proposed new area will provide better fishing. As the licensee recognizes, the Commission “has repeatedly explained that the request for rehearing is not the time or place to introduce additional evidence, absent a compelling showing of good cause.”¹⁵ We have explained that “we cannot resolve issues with any efficiency or finality if parties are permitted to submit new evidence on

¹² See April 22, 2003 Environmental Inspection Report (filed June 19, 2003).

¹³ See April 29, 1998 Environmental Inspection Report (filed June 29, 1998).

¹⁴ We are also concerned that, notwithstanding conclusory assertions by the licensee to the contrary, the licensee did not fully and properly consult with the public and relevant agencies as to the proposed amendment.

¹⁵ *Nevada Power Company*, 111 FERC ¶ 61,111, at P 10 (2005).

rehearing and thus to have us chase a moving target.”¹⁶ An amendment application such as the one at issue here must rise or fall based on the material contained in it and any additional timely comments the applicant may make before we act. It is not appropriate to attempt to fill gaps in the application at the rehearing stage.

21. The licensee asserts that we should accept its new evidence because it is responding to misstatements by Connecticut DEP. We find this unconvincing. While Connecticut DEP also included an affidavit along with its request for rehearing, we did not rely on any information in it. Our determination that the licensee has not adequately supported its application was reached on the merits of the application and the record as it existed at the time the September 3 Order was issued. To the extent that we have noted that the fishing area appears to be popular, that the licensee’s contention that there have been fatal accidents there appears to be incorrect, and that the fishing area could be made safe for the public, we reached those conclusions with no reference to the statements by Connecticut DEP that the licensee considers erroneous.¹⁷

22. The licensee argues alternatively that its application to relocate the fishing and portage area should be granted because the currently planned installation of a fishway over the Derby Dam in 2009 or 2010 will ultimately require the existing fishing and portage area to be removed because the location of the area would be in violation of state law by likely being within 250 feet of the planned fishway.¹⁸ This argument is premature. As noted by the licensee, the precise location of the proposed fishway is still being negotiated.¹⁹ In the event that installation of a fishway is ultimately mandated for

¹⁶ *Northeast Utilities Service Company v. ISO New England*, 109 FERC ¶ 61,204, at P 17 (2004), citing *Southern California Edison Company*, 102 FERC ¶ 61,256, at P 17 (2003).

¹⁷ Even were we to accept the affidavits, we would not find them convincing, particularly to the extent that they claim the existing fishing is little-used. Being solely from employees or contractors of the licensee, they are self-serving, and are contradicted by the reports of our impartial environmental inspector, as well as by the comments of the City of Shelton and Connecticut DEP. To the extent that the affidavits purport to address the merits of the proposed new fishing area, they represent untimely efforts to fill holes in the amendment application, as discussed above.

¹⁸ See Conn. Gen Stat. § 26-137 (2008) which states that “[n]o person shall take or attempt to take any fish, with the exception of lamprey eels during the open season for same time, within two hundred fifty feet of any fishway, except that the commissioner when he deems necessary may extend or reduce such distance and shall indicate such distance by posting”.

¹⁹ See licensee’s request for rehearing at 11.

the project, we will address the need for relocation of any project facilities required by such installation. In the meantime, the Commission staff has asked the licensee to file regular reports with the Commission on the status of the efforts to install fish passage at the project until detailed plans for such fish passage are actually developed and filed for Commission approval.

23. Based on the above findings, we find no error in our November 20 Order in this proceeding and accordingly deny the licensee's request for rehearing.

B. Request to Defer Action on Fence

24. With our denial of the licensee's request for rehearing, its request to defer Commission action on whether its fence barring public access to the existing fishing and portage area must be removed is moot and will be dismissed. Having upheld our denial of the licensee's request to relocate the fishing and portage area, we direct the licensee to remove the fence and submit to the Commission documentation of its removal within 14 days of the issuance of this order.

The Commission orders:

(A) The request for rehearing filed by McCallum Enterprises I, Limited Partnership on December 22, 2008, is denied.

(B) McCallum Enterprises I, Limited Partnership's request for deferral of Commission action regarding the fence barring public access to its project fishing and portage recreational area in the City of Shelton, Connecticut, is dismissed as moot.

(C) McCallum Enterprises I, Limited Partnership is hereby directed to file with the Commission, within 14 days of the issuance date of this order, certification and proof, including photographs, that it has removed the fence along Shelton Canal and restored public access to the project's shoreline fishing and portage area within the City of Shelton, Connecticut.

By the Commission. Commission Kelliher is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.