

131 FERC ¶ 61,248  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Exelon Generation Company, LLC

Project No. 2355-013

**ORDER DENYING REHEARING**

(Issued June 17, 2010)

1. On February 4, 2010, the Director, Office of Energy Projects (Director), issued a study plan determination letter to Exelon Generation Company, LLC (Exelon), licensee for the 800-megawatt (MW) Muddy Run Pumped Storage Project No. 2355, located on the lower Susquehanna River. On March 1, 2010, the Director issued an amendment to the study plan determination letter adding a radio-telemetry study to assess the potential for American eel entrainment at the Muddy Run Project. On March 29, 2010, Exelon filed a request for rehearing of the Director's amendment to the study plan determination letter. In this order, we deny the rehearing request.

**Background**

2. The Muddy Run Project is the second lowermost of five hydroelectric projects on the lower Susquehanna River. The most upstream of these projects is the 19.6-MW York Haven Hydroelectric Project No. 1888 at river mile (RM) 55. Proceeding downstream from the York Haven Project are the 417.5-MW Safe Harbor Hydroelectric Project No. 1025 (at RM 33), the 107.2-MW Holtwood Project (at RM 25), and the 573-MW Conowingo Hydroelectric Project No. 405 (at RM 10). The Muddy Run Project is located between the Holtwood and Conowingo Projects and uses the Conowingo Pond as its lower reservoir. Three of these projects, York Haven, Conowingo, and Muddy Run, are currently in the relicensing process.<sup>1</sup>

3. On March 12, 2009, Exelon filed with the Commission a notice of its intent to apply for a new license for the Muddy Run Project, pursuant to the integrated licensing

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<sup>1</sup> The current license for the Conowingo Project was issued in 1980 (19 FERC ¶ 61,348) and will expire in 2014. The license for the Muddy Run Project was issued in 1964 (32 FPC 826) and will expire in 2014. The license for York Haven was issued in 1980 (21 FERC ¶ 61,430) and will expire in 2014. The licenses for the Safe Harbor and Holtwood projects will expire in 2030.

process (ILP),<sup>2</sup> as well as a pre-application document (PAD).<sup>3</sup> In the PAD, Exelon provided general information about fishery resources in the area, including eel.<sup>4</sup> In its preliminary issues and study list, which is a required part of the PAD, Exelon did not propose to conduct a radio-telemetry study to assess the potential entrainment of adult American eel.<sup>5</sup>

4. On May 11, 2009, Commission staff issued a notice and scoping document for the purpose of obtaining public comment on its initial determination of the issues to be studied in the proposed environmental document in the relicensing proceeding, and seeking comments and study requests from interested stakeholders.

5. The Department of the Interior, Fish and Wildlife Service (FWS), filed comments and requested that Exelon conduct a radio-telemetry study to determine the potential impacts to out-migrating adult American eel resulting from potential entrainment or migratory delay from the pumping and generating operations at the Muddy Run Project.<sup>6</sup>

6. Exelon declined to propose the requested study, but did propose a desktop study that would provide a literature-based assessment of potential entrainment impacts on eel.<sup>7</sup> On September 22 and 23, 2009, Exelon and numerous stakeholders participated with

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<sup>2</sup> The ILP was established by the Commission in 2003 with the goal of creating efficiencies by integrating a potential license applicant's pre-filing consultation with the activities of the Commission and other agencies pursuant to the Federal Power Act, the National Environmental Policy Act (NEPA), and other applicable legislation. *See Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, 68 Fed. Reg. 51,070 (Aug. 25, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,150 (2003).

<sup>3</sup> *See* 18 C.F.R. § 5.6 (2009) (requiring filing of PAD).

<sup>4</sup> *See* PAD filed on March 12, 2009 at section 4.4.3. Exelon noted that until 1983 the catadromous American eel was stocked above Conowingo dam, and that since 1997 few eel have been captured during studies.

<sup>5</sup> *See* PAD at sections 5.1, and 5.2.

<sup>6</sup> *See* letters filed by FWS on July 11, 2009 at 9-11; November 20, 2009 at 7, and January 20, 2010, at 5.

<sup>7</sup> *See* Exelon's Proposed Study Plan, filed August 24, 2009 at sections 3.5 and 4.4.

Commission staff in a meeting to discuss the proposed study plans and try to resolve disagreements about what the plans should address.<sup>8</sup> The meetings did not result in the inclusion of FWS' eel study request.<sup>9</sup>

7. On February 4, 2010, the Director issued his study plan determination letter, which did not require Exelon to conduct a radio-telemetry study to assess the potential entrainment of adult American eel. On February 24, 2010, the Department of the Interior filed a formal dispute notice including as an issue the radio-telemetry eel study. On March 1, 2010, the Director amended his study plan determination letter to add the radio-telemetry eel study which he stated was inadvertently omitted from his original letter. He stated the study should be required because a literature-based assessment of impacts would not be able to predict the site-specific movement patterns of eels at the Muddy Run Project and, therefore, the vulnerability of eels to entrainment during pumping operations. On March 29, 2010, Exelon filed a request for rehearing of the Director's amendment to the study plan determination.

### **Discussion**

8. As we have previously stated,<sup>10</sup> an order is final, and thus subject to rehearing, only when it imposes an obligation, denies a right, or fixes some legal relationship as the consummation of the administration process. Thus, the Commission has declined to accept requests for rehearing of a number of staff procedural actions.<sup>11</sup> The Commission

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<sup>8</sup> See Exelon's Revised Study Plan filed December 22, 2009 at section 4.4.

<sup>9</sup> See Exelon's Revised Study Plan filed December 22, 2009 at Table 1-1.

<sup>10</sup> *Public Utility District No. 1 of Douglas County, Washington*, 122 FERC ¶ 61,032 (2008); *Ketchikan Public Utilities*, 121 FERC ¶ 61,155 (2007), citing *City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003); and *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980).

<sup>11</sup> *Public Utility District No. 1 of Douglas County, Washington*, 122 FERC ¶ 61,032 (2008) (dismissing request for rehearing of denial of study request). See, e.g., *City of Wadsworth, Ohio*, 120 FERC ¶ 61,172 (2007) (dismissing request for rehearing of notice of acceptance of applications); *Duke Power*, 117 FERC ¶ 61,303 (2006) (affirming dismissal as interlocutory of request for rehearing of environmental assessment); *Erie Boulevard Hydropower, L.P.*, 117 FERC ¶ 61,189, at P 75 (2006) (holding that staff letter transmitting historic properties appendix not subject to rehearing); *Duke Energy Corp.*, 110 FERC ¶ 61,376 (2005) (dismissing request for rehearing of staff decision not to extend environmental scoping process); *Granite County, Montana*, 101 FERC ¶ 61,062 (2002) (dismissing as interlocutory request for rehearing of notice granting late intervention); *PacifiCorp*, 90 FERC ¶ 61,325 (2000) (affirming notice dismissing as interlocutory request for rehearing of staff orders setting deadlines for filing of responses (continued...))

relies on its staff to run proceedings conducted under delegated authority, just as administrative law judges do with respect to trial-type hearings, and it is only in very unusual circumstances that it would be appropriate to intervene in those proceedings before a substantive decision is before the Commission for review. Rather, we prefer to abstain from involving ourselves in the details of licensing proceedings, absent a compelling reason to do so.<sup>12</sup> There has been no suggestion that the studies at issue present sufficiently important issues that we must intervene at this point. However, because we have not previously enunciated our policy in this context (i.e. where a licensee has objected to being required to do a study), we will address Exelon's request for rehearing so as to provide guidance. On an ongoing basis, we will defer to our staff on such matters, absent a showing of extraordinary circumstances.

**A. Holtwood Redevelopment**

9. The disputed study would involve radio tagging adult eel in migrating condition and releasing them into the tailrace of the upstream Holtwood Project during Muddy Run pumping operations. Both fixed and mobile radio monitoring would be deployed upstream and downstream of the project on the Susquehanna River and in the project's upper storage reservoir to detect radio-tagged fish, in order to estimate the percentage of out-migrating eel entrained at the Muddy Run Project.

10. On rehearing, Exelon argues that the study would be of limited value because it would be done before the upstream Holtwood Project's redevelopment would be completed. Exelon argues that a future change in flow management at Holtwood will alter the characteristics of the Holtwood tailrace, as well as the timing and duration of flows near the Muddy Run Project. Consequently, Exelon believes that it will be collecting data in conditions that will bear no relationship to conditions that will be present when the eel return.

11. The license for the Holtwood Project was amended in October 2009.<sup>13</sup> Pursuant to the amendment, the Holtwood licensee will increase the generating capacity of the

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of information requests and for filing license amendment); *City of Hamilton, Ohio*, 82 FERC ¶ 61,349 (1998) (finding requests for rehearing of order setting matter for trial-type hearing properly dismissed); *California Department of Water Resources*, 70 FERC ¶ 61,115 (1995) (concluding that staff decision to prepare EA, rather than environmental impact statement, not subject to rehearing).

<sup>12</sup> *Public Utility District No. 1 of Douglas County, Washington*, 122 FERC ¶ 61,032 (2008).

<sup>13</sup> *PPL Holtwood, LLC, Order Amending License and Revising Annual Charges*, 129 FERC ¶ 62,092 (2009).

project from 107.2 MW to 195.5 MW, by constructing, adjacent to the existing powerhouse, a new powerhouse containing two new generating units, and will be modifying equipment at its existing powerhouse. In addition, the licensee will be replacing the existing skimmer wall, expanding the forebay area of the project, and reconfiguring the existing fish lift to improve migratory fish passage.

12. While it is true that the Holtwood Project's expanded hydraulic capacity may affect the distribution of flows in the river below the Holtwood dam, this change would primarily affect the spring flow pattern, when flows usually exceed the existing hydraulic capacity. During the spring, some flows will typically be released on the powerhouse side of the river, while flows that exceed the project's ability to generate will be released on the other side. Because the project's capacity will be increased by the expansion, there may be more flows released on the powerhouse side of the river in the spring than was previously the case. However, the study would take place in the fall, when eel out-migrate. Because flows are generally below the project's capacity in the fall, they will continue to generally be released on the powerhouse side of the river, even after project expansion. The Holtwood redevelopment, therefore, is no reason to delay the study.

**B. Delay until closer to expected migration**

13. Eel are believed to out-migrate at ages ranging from 8 to 24 years. Eel out-migration in the Muddy Run area might not occur until 2023, if based solely on passage through a hypothetical upstream eel facility that Exelon postulates may be constructed in 2015. However, recent FWS elver stockings above the Conowingo dam in 2008 and 2009, as well as the likelihood that there is currently some remnant natural eel population above Conowingo dam, make it possible that out-migration could occur significantly sooner.

14. Exelon asserts that eel will not be out-migrating until at least 2023 and possibly as late as 2039, and therefore the study should be delayed until during the new license term, closer to 2023 when the eel might be travelling downstream, rather than now, arguing that data collected now will be stale in 2023. It states that requiring such a study now is inconsistent with the approach taken by the Commission in prior cases, such as Georgia Power's Morgan Falls relicensing, where the Commission denied a study to support a fish passage recommendation where the target species was found not to be present at the project.<sup>14</sup>

15. In the Morgan Falls case, the Commission concluded that the considerable distance between the project dam and any known population of the species of concern (over 100 miles), as well as the existence of several intervening dams, and the fact that the reaches about the project were not appropriate habitat for those species, rendered a

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<sup>14</sup> See rehearing request at 8.

study of them unnecessary.<sup>15</sup> Here, there is no question that some eel are present in the Conowingo Reservoir near the Muddy Run Project, and they have been deliberately stocked in that area,<sup>16</sup> although the population size and age distribution of eel above Conowingo dam is not well understood at this time.

16. In addition, by doing the study now, we are able to consider the measures as part of the total relicensing package. Eel behavior is not likely to change over time. As mentioned above, the flow distribution during the fall is not likely to change much with the expanded Holtwood Project hydraulic capacity. Information learned in the study about eel migration behavior and vulnerability to Muddy Run entrainment would, therefore, be applicable in both the present and future.

17. In light of the fact that there are some eel already in the vicinity, and there is no certainty that migration will occur at a specific time, we see no reason to defer the study until after any license is issued.

### C. Technical issues with study

18. Exelon argues that there are significant technical issues with the study that will undermine the reliability of the study results. For example, it states, eel are effectively absent from aquatic habitats above the project, and there are currently no migrating eel past the Muddy Run Project. Exelon argues that there are two options available to it: (1) to use adult eel from rivers below the Conowingo dam; or (2) to use adult eel from rivers in New York or Maine. With both options, Exelon believes that it will not be able to find enough eel.

19. As noted above, there are eel above the project, although there is evidence that they are significantly less abundant than they were historically. As the revised study plan notes, eel probably pass through the Conowingo fish lift or over the dam unobserved. FWS also traps juvenile eel below Conowingo dam and transports them above Conowingo dam,<sup>17</sup> and eel may live in the tributaries of the Susquehanna River above the Conowingo dam. If Exelon cannot find eel above the Conowingo dam, Exelon can collect eel, in active migrating condition, from below the Conowingo dam in the non-tidal portion of the Susquehanna River for the study. However, if Exelon has difficulty

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<sup>15</sup> *Georgia Power Co., Order on Rehearing*, 111 FERC ¶ 61,433, at P 43-45 (2005).

<sup>16</sup> See Exelon's PAD filed for the Muddy Run Project No. 2355 on March 12, 2009 at section 4.4.3; and Exelon's PAD filed for the Conowingo Project No. 405 on March 12, 2009 at section 4.4.2.3.

<sup>17</sup> See Exelon's Revised Study Plan for the Conowingo Project No. 405, filed on December 22, 2009 at pages 3-24 through 3-26.

locating sufficient eel, it may consult with Commission staff and the agencies to determine the best possible alternative.

**D. Wait until eel can pass through four projects**

20. Exelon argues that it should be allowed to complete its study assessing the relative benefits and consequences of passing eel upstream past the Conowingo, Holtwood, Safe Harbor, and York Haven dams on the lower Susquehanna River prior to performing the radio-telemetry study of out-migrating eel.<sup>18</sup>

21. The radio-telemetry study of adult out-migrating eel would help inform an assessment of the potential benefits and consequences of upstream eel passage. For example, if the radio-telemetry study of adult eel shows that a high percentage of adults are entrained at the project, then that could potentially lead to specific recommendations to avoid that potential impact, which in turn would change the potential benefits of upstream passage at the four dams on the lower Susquehanna River. There is no need to wait until the upstream passage study is completed before undertaking this study.

The Commission orders:

The rehearing request filed on March 8, 2010, by Exelon Generation Company, LLC, is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>18</sup> See rehearing request at 14.