

133 FERC ¶ 61,052
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Eugene Water and Electric Board

Project No. 2496-222

ORDER DENYING REHEARING

(Issued October 21, 2010)

1. The Eugene Water and Electric Board (Eugene) has filed a request for rehearing of the Commission's June 17, 2010 order granting the Oregon Department of Fish and Wildlife's (Oregon DFW) request for rehearing of a Commission staff order approving a fish screen hydraulic evaluation report with the respect to Eugene's Leaburg-Waltermville Hydroelectric Project No. 2496.¹ For the reasons discussed below, we deny rehearing.

Background

2. The 22.5-megawatt Leaburg-Waltermville project includes two developments, Leaburg and Waltermville, both located on the McKenzie River, in Lane County, Oregon. A new license for the continued operation and maintenance of the project was issued in 1997,² and as pertinent here, was amended in 2001.³ The issue before us concerns the fish screens at the Leaburg development.⁴

¹ *Eugene Water and Electric Board*, 131 FERC ¶ 61,249 (2010) (June 2010 Order).

² The 22.5-megawatt project was relicensed in 1997. *Eugene Water and Electric Board*, 78 FERC ¶ 62,207 (1997).

³ *Eugene Water and Electric Board*, 97 FERC ¶ 62,248 (2001). The amendment implemented provisions of a settlement agreement among Eugene, the U.S. Department of Commerce, and the U.S. Department of the Interior that resolved fish passage issues at the project.

⁴ The post-relicensing history of Commission actions related to this proceeding is set forth in more detail in the June 2010 Order. 131 FERC ¶ 61,249 at P 3-13.

3. The fish screens, which are located in the Leaburg Canal, downstream of the canal's headgate, include a combination of older and new panels.⁵ The new screen panels were added in 2004 to protect juvenile fish, while allowing the licensee to divert its full water right of 2,500 cubic feet per second.⁶ The new panels are fully baffled, while the older ones are only partially baffled.⁷

4. Article 418 of the amended license required the licensee to file for Commission approval a plan (to be prepared in consultation with the U.S. Department of Commerce (Commerce), within which the National Marine Fisheries Service (NMFS) is located; the U.S. Department of the Interior (Interior), within which the U.S. Fish and Wildlife Service (FWS) is located; and Oregon DFW to conduct both hydraulic and biological evaluations of the effectiveness of a number of the project's fish protection devices, including the Leaburg fish screens.⁸ It further required that "[t]he licensee shall consult with Interior and Commerce with respect to any deficiencies identified as a result of the evaluations and undertake corrective actions in a time and manner appropriate to the scope and nature of the deficiencies."⁹

⁵ Fish screens are devices that prevent fish from being drawn, or from swimming, into water intake structures. One issue regarding fish screens is approach velocity: screens must be designed such that as fish approach them, high water velocities do not force the fish to be impinged against (collide with) the screen, lest the fish be injured. A related issue is deviation in water velocity at different portions of a screen. Ideally, approach velocity would be completely consistent across a screen. In practice, however, there may be some variation in velocity due to factors such as debris clogging in portions of a screen. It is not desirable to allow too much variation, because, in some circumstances, as where a substantial portion of a screen is clogged, water pressure through the remaining portion of the screen may increase such that it speeds up approach velocity, with resultant increased fish injury.

⁶ *Eugene Water and Electric Board*, 111 FERC ¶ 62,058, at 64,090 (2005).

⁷ *Id.* at 64,090, 64,092. Baffles installed behind the screens can be adjusted to help regulate flows and thus approach velocity.

⁸ *Eugene Water and Electric Board*, 97 FERC at 64,475. The effectiveness of fish screens can be tested on both a hydraulic and a biological basis. Hydraulic tests involve measuring water velocity, while biological tests involve examination of fish.

⁹ *Id.* In addition to the revised license articles, the 2001 amendment order appended to the project license the terms and conditions jointly submitted by NMFS and FWS as the result of consultation under the Endangered Species Act with respect to the

(continued)

5. In 2004, after installing the newer fish screens in the Leaburg Canal,¹⁰ Eugene filed a plan for the hydraulic evaluation of the screens as required by Article 418 (2004 plan). Commission staff approved the plan by order dated April 18, 2005.¹¹ A goal of the plan is to “have a uniform flow through the entire screen area and to reduce “hotspots” exceeding the approach value velocity criteria to the extent practicable.”¹² The plan requires that Eugene submit final reports on the results of the hydraulic evaluation with the Commission, NMFS, Interior, and Oregon DFW, and then “file copies of any communications with the resource agencies regarding the hydraulic evaluations with the Commission as soon as they are available, so that the Commission can monitor the resolution of any issues.”¹³

6. In November 2006, the Commission approved Eugene’s plan for the biological evaluation of the Leaburg fish screens and other project fish passage facilities. The plan required the filing of a final report on the evaluation. In September 2007, Eugene filed the final report, with which NMFS, FWS, and Oregon DFW concurred. The report indicated that the Leaburg fish screens posed little risk to juvenile salmonids.¹⁴

7. On October 30, 2009, Eugene filed its report on the hydraulic evaluation (October 2009 report). Eugene concluded in the report that, because screen performance met standards on average, and because the earlier biological evaluation had shown acceptable survival rates among the tested fish, no further adjustments need be made to the screens. Included with the report were comments from Oregon DFW, NMFS, and FWS and Eugene’s responses to the comments.

impacts of the revised license on two threatened species: the Upper Willamette River Chinook salmon and the Columbia River bull trout. The two agencies submitted eight “reasonable and prudent measures” to reduce incidental take of these species, as well as eight terms and conditions to implement the measures. *See id.* at 64,472.

¹⁰ *See Eugene Water and Electric Board*, 114 FERC ¶ 62,298 (2006) (approving as-built exhibits).

¹¹ *Eugene Water and Electric Board*, 111 FERC ¶ 62,058 (2005) (April 2005 Order).

¹² Leaburg Fish Screen Hydraulic Evaluation Plan, filed on January 22, 2004, at 8.

¹³ April 2005 Order, 111 FERC ¶ at 64,093, Ordering Paragraph (D).

¹⁴ *See Eugene Water & Electric Board*, 121 FERC ¶ 62,116 (2007).

8. On April 15, 2010, Commission staff issued an order approving the October 2009 report on the results of the hydraulic evaluation (April 2010 staff order).¹⁵ The order found that, although the Leaburg fish screens did not meet design parameters with respect to approach velocity and distribution of flows, Eugene appeared to have fulfilled its obligations to ensure the reduction of adverse impacts to threatened fish species,¹⁶ as it had adjusted screens to best ensure protection of migrating fish, despite the presence of hotspots. The order concluded that the results of the biological evaluation of the screens, which had been accepted by the reviewing agencies, demonstrated that the modified Leaburg fish screens provided safe passage conditions for juvenile salmonids.

9. Oregon DFW filed a motion to intervene and a request for rehearing of the April 2010 staff order, arguing that Eugene should be required to adjust the fish screens to provide additional protection to aquatic species by meeting the fish screen evaluation plan's standards for approach velocities and uniform distribution of flows.¹⁷

10. On June 17, 2010, the Commission issued its order granting rehearing, finding that the Leaburg fish screens had failed to meet the approved fish screen evaluation plan's target levels for maximum approach velocity and allowable approach deviation. The Commission concluded that the positive results of biological evaluation of the screens had not obviated the need for fish screen compliance with the evaluation plan's specified criteria. It therefore directed Eugene to consult with NMFS, FWS, and Oregon DFW to develop measures to bring the Leaburg fish screens within the parameters established for it. Eugene afterward filed a timely request for rehearing of the June 2010 Order.¹⁸

Discussion

A. Procedural Objection

11. Seeking rescission of the June 2010 Order, Eugene contends that Oregon DFW is not entitled to party status in the proceeding involving the April 2010 staff order, and that

¹⁵ June 2010 Order, 131 FERC ¶ 62,042.

¹⁶ *See, supra* note 9.

¹⁷ NMFS filed a request for rehearing and a late motion to intervene, raising the same arguments as Oregon DFW. However, its late motion to intervene was denied, and its rehearing was thus rejected. *See* June 2010 Order, 131 FERC ¶ 61,249 at P 17.

¹⁸ Because our June 2010 Order on rehearing imposed new obligations on Eugene, its request for rehearing of the order is proper.

the Commission therefore should have rejected Oregon DFW's motion to intervene and request for rehearing.

12. As we explained in our June 2010 Order,¹⁹ only parties to a proceeding may seek rehearing of an order issued in that proceeding.²⁰ In order to become a party to a proceeding, an entity must intervene.²¹ Intervention in a licensing proceeding does not carry over to post-licensing proceedings.²² Rather, each post-licensing proceeding is a separate matter requiring separate intervention.²³ Moreover, the Commission does not allow intervention to all entities in all post-licensing proceedings. To give rise to an opportunity to intervene, the licensee's filing or the Commission's order must involve, among other things, an appeal by an agency or other entity specifically given a consultation role with respect to the filing at issue.²⁴

13. In its June 2010 Order, the Commission concluded that Oregon DFW's rehearing request was properly before it for consideration because Oregon DFW was given a consultation role in the implementation of Article 418. Thus, Oregon DFW's timely notice of intervention gave the agency party status in the post-licensing proceeding.²⁵

14. On rehearing, Eugene contends that Oregon DFW had a consultation role only with respect to Eugene's hydraulic evaluation plan required by Article 418 and not with the filing at issue here -- the October 2009 report on the results of the hydraulic evaluation. It therefore argues that Oregon DFW is not entitled to party status in the proceeding involving the April 2010 order and that the Commission therefore should have rejected Oregon DFW's request for rehearing.

¹⁹ See June 2010 Order, 131 FERC ¶ 61,249 at P 15-16.

²⁰ See section 313 of the Federal Power Act, 16 U.S.C. § 325l (2006), and section 385.713(b) of the Commission's regulations, 18 C.F.R. § 385.713(b) (2010).

²¹ See 18 C.F.R. § 385.102(c)(3) (2010).

²² See, e.g., *Merimil Limited Partnership*, 115 FERC ¶ 61,087 (2006).

²³ See, e.g., *City of Tacoma, Washington*, 89 FERC ¶ 61,058 (1999); *Indiana-Michigan Power Company*, 87 FERC ¶ 61,278 (1999).

²⁴ See, e.g., *Puget Sound Energy, Inc.*, 112 FERC ¶ 61,116, at P 6 (2005).

²⁵ See June 2010 Order, 131 FERC ¶ 61,249 at P 16.

15. We disagree. Oregon DFW was given a consultation role not only on the hydraulic evaluation plan required by Article 418, but also on the report required to be filed by that plan. As noted above, the April 2005 staff order approving the hydraulic evaluation plan required Eugene to send the final report to the agencies and to submit any agency comments on the report. Indeed, the report itself acknowledges that it would be submitted to the resource agencies “for review/approval, and then to FERC.”²⁶ The Commission thus properly accorded Oregon DFW party status in the proceeding and considered its timely request for rehearing of staff’s April 2010.²⁷ We therefore deny rehearing on this issue.²⁸

B. Substantive Arguments

16. Having found that the Leaburg fish screens fail to meet the approved fish screen evaluation plan’s criteria for maximum approach velocity and allowable approach deviation, the June 2010 Order concludes that Eugene must, as required by its license, work with resource agencies to develop appropriate corrective actions. The order therefore directs Eugene to file “a plan, prepared in consultation with [NMFS, FWS, and Oregon DFW] in the manner specified in license Article 418, for operating the fish

²⁶ October 30, 2009 Report, at section 1.1. The April 2005 Order provides that Eugene submit the report to the agencies and the Commission and later file with the Commission any agency comments. Although the sequence of these actions is somewhat different from our usual consultation requirement (i.e., submit the filing to the agencies and solicit their comments before submitting it to the Commission for approval), the practical result is the same: NMFS, FWS, and Oregon DFW were given an opportunity to comment on the report and their comments were filed with the Commission.

²⁷ Eugene cites *City of Tacoma, Washington*, 89 FERC ¶ 61,058; and *Pacific Gas and Electric Company*, 40 FERC ¶ 61,035 (1987), as holding that, where licenses do not specifically give an entity a consultation role with respect to licensee requests for extensions of time to submit license required filings, such entities may not appeal any later orders granting an extension of time. However, the Commission rejects such appeals, not because the appealing entity lacks a consulting role, but because the timing of a compliance filing such as a request for an extension of time is a housekeeping administrative matter between the licensee and the Commission that is not reviewable. See 89 FERC at 61,094, and 40 FERC at 61,099.

²⁸ In any event, the facts of this case make clear that the report is a necessary step in an implementation process in which FWS, NMFS, and Oregon DFW have a clear interest.

screens at Project No. 2496 in a manner consistent with the criteria established in [staff's April 2005 Order modifying and approving the hydraulic evaluation plan]."²⁹

17. Eugene objects to this directive, contending that it is inconsistent with the requirement of the hydraulic evaluation plan approved by staff's April 2005 Order. Apparently, Eugene believes that the requirements of our June 2010 Order impose additional obligations on it that were not contemplated by the license and prior orders.³⁰ In support, Eugene cites to its hydraulic evaluation plan (which was modified and approved by staff's April 2005 Order) as limiting its obligation to noting "[a]reas with high or suspect velocities" and making recommendations, "as appropriate," "for additional measures or other actions." Suggesting that further improvements to operation of the Leaburg screens are impracticable, it also asserts that the June 2010 Order fails to take into account that the older Leaburg fish screens are only partially baffled, and their adjustment is therefore limited. Eugene requests that, if the Commission does not rescind the June 2010 Order, it revise the order to be consistent with the above language from its hydraulic evaluation plan and recognize the physical limitations of the Leaburg fish screens.

18. We find no good cause to revise our June 2010 Order. Neither Article 418 nor the approved hydraulic evaluation plan precludes resource agencies from having a consultative role in any potential additional measures to improve fish screen operation. Indeed, Article 418 requires Eugene to consult with the agencies "with respect to any deficiencies identified as a result of the evaluations and undertake corrective actions in a time and manner appropriate to the scope and nature of the deficiencies."³¹ We do not see a significant difference between this requirement and the revision requested by Eugene. Rather, the June 2010 Order's directive complements the requirements for corrective measures by requiring additional input from Oregon DFW, NMFS, and FWS.

19. As to Eugene's concern that the June 2010 Order failed to recognize the physical limitations of the older Leaburg screens, the Commission was aware of these limitations and that, as a result, the older fish screen panels (which are only partially baffled) would

²⁹ June 2010 Order, 131 FERC ¶ 61,249 at Ordering Paragraph (C).

³⁰ In support, Eugene cites to its hydraulic evaluation plan (which was modified and approved by staff's April 2005 Order) as limiting its obligation to noting "[a]reas with high or suspect velocities" and making recommendations, "as appropriate," "for additional measures or other actions." See hydraulic evaluation plan filed on January 22, 2004, at 12.

³¹ *Eugene Water and Electric Board*, 97 FERC at 64,475.

lack the ability to modify flows and approach velocity.³² Although it may not be possible to control flow distribution through the project's older, partially baffled fish screen panels, as the hydraulic evaluation report indicates, reasonable adjustments of other aspects of fish screen design and operation could be explored with the agencies.³³

20. For the above reasons, we deny Eugene's request for rehearing.

The Commission orders:

Eugene Water and Electric Board's request for rehearing, filed on July 16, 2010, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

³² See June 2010 Order, 131 FERC ¶ 61,249 at P 4.

³³ These and other conditions of the license submitted by NMFS and FWS to reduce adverse impacts on listed Chinook salmon and bull trout require Eugene to provide safe and effective passage pursuant to plans that ensure fish passage facilities function according to their design objectives. *See Eugene Water and Electric Board* 97 FERC at 64,479 (Condition No. 2.a (7)). A failure to comply could result in violations of the Endangered Species Act by Eugene.