140 FERC ¶ 61,209
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony T. Clark.

Exelon Generation Company, LLC Project No. 405-104

ORDER DENYING REHEARING

(Issued September 20, 2012)

1. On May 21, 2012, the Director, Office of Energy Projects (Director), issued a letter regarding proposed changes to Exelon Generation Company, LLC (Exelon)'s study plan for the relicensing of its 573-megawatt (MW) Conowingo Hydroelectric Project No. 405, located on the Susquehanna River. On June 20, 2012, the Maryland Department of Natural Resources, Power Plant Research Program (Maryland DNR), and Maryland Department of the Environment (Maryland Department of the Environment) filed a joint request for rehearing of the Director's letter. On July 18, 2012, the Commission's Secretary issued a notice rejecting the request for rehearing. On August 3, 2012, Maryland DNR and Maryland Department of the Environment (collectively, petitioners) filed a request for rehearing of the Secretary's notice. As discussed below, we deny the rehearing request.

Background

2. The Conowingo Project is the 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. Located 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 Conowingo Project at RM 10. The 800-MW Muddy Run Pumped Storage 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.[1]

[1] The 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 also expire in 2014. The licenses for the Safe Harbor and Holtwood projects will expire in 2030.

3. On March 12, 2009, Exelon filed with the Commission notices of its intent to apply for new licenses for the Conowingo and Muddy Run Projects, pursuant to the integrated licensing process (ILP),[2] and also filed pre-application documents (PAD) regarding these projects.[3] Maryland DNR filed comments on the PAD for the Conowingo Project, including a request that Exelon conduct a study on sediment and nutrient loading and distribution.[4] In response, Exelon proposed to conduct a literature-based analysis of the existing cumulative impacts of sediment loading into the Chesapeake Bay, and to discuss best management practices and sediment management options (Sediment and Nutrient Loading study).[5] Maryland DNR objected to Exelon's proposed study, stating that it failed to include "a detailed and comprehensive investigation of the project's affect on sediment nutrient accumulation, loading, and transport."[6]

4. On July 10, 2009, Exelon filed a revised study plan, but did not change the proposed Sediment and Nutrient Loading study.[7] Maryland DNR commented on the

[2] 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, 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) (ILP Preamble).

[3] 18 C.F.R. § 5.6 (2012) (requiring filing of PAD). A PAD is intended to provide existing information (as opposed to that later developed by new studies) regarding an applicant's proposal.

[4] July 10, 2009, Requested Study Number 3: Sediment and Nutrient Loading and Distribution. Sediments, which may contain nutrients such as phosphorus and nitrogen, can be trapped behind dams. If the sediments are released, they can affect the downstream aquatic environment, as by encouraging the growth of algae, which in turn can decrease the amount of dissolved oxygen in affected water.

[5] *See* Exelon's Proposed Study Plan for the Conowingo Project, filed August 24, 2009, at section 3.15, 3-98.

[6] Maryland DNR's comment letter on the Conowingo Project, filed November 23, 2009, at section 3.15 Sediment Introduction and Transport (Sediment and Nutrient Loading).

[7] *See* Exelon's Revised Study Plan for the Conowingo Project, filed December 22, 2009, at Table 1-1, and section 3.15.

revised study plan, stating that the proposed study was inadequate, and it recommended that Exelon "be required to complete all portions of [Maryland DNR's] requested study relating to this issue . . . ."[8]

5. On February 4, 2010, the Director issued a letter establishing a study plan for the Conowingo relicensing proceeding.[9] With regard to the Sediment and Nutrient Loading study, the letter concluded that Exelon's proposal to use existing studies to develop a cumulative impact analysis, best management practices, and proposed environmental measures satisfied Maryland DNR's concerns.[10] The letter required Exelon to include in its study report

> a sediment management plan that includes projections of sediment accumulation; benchmarks for potential impacts and actions; and options to manage, mitigate, and remove accumulated sediment. If . . . the results of the study do not adequately characterize the geographic and temporal cumulative effects, Exelon may be required to conduct a sediment transport modeling study during the second field season (2011).[[11]]

6. On May 6, 2011, Exelon submitted its 204-page Sediment and Nutrient Loading study.[12] In this study, Exelon explained that the U.S. Army Corps of Engineers (Corps) "convened a Sediment Task Force" that will be conducting a "Sediment Behind the Dams Study" together with the States of Maryland and Pennsylvania to "examine management measures that could be undertaken to address the sediment behind the dams on the lower Susquehanna River."[13] Exelon stated that the two major components of the Corps' "Sediment Behind the Dams Study" are sediment transport modeling and the

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[8] Maryland DNR's comment letter on the Conowingo Project, filed January 20, 2010, at section 3.15 Sediment Introduction and Transport (Sediment and Nutrient Loading).

[9] *See* 18 C.F.R. § 5.13(c) (2012) (study plan determination); Director's Study Plan Determination letter, issued February 4, 2010.

[10] *Id*. at Appendix A, pp. 13-16.

[11] *Id*. at Appendix A, p. 16.

[12] Exelon's Initial Study Report—Sediment Introduction and Transport Study (RSP 3.15) for the Conowingo Project, filed May 6, 2011.

[13] *Id*. at section 4.3 "US Army Corps 'Sediment Behind the Dams Study.'" According to a press briefing on September 27, 2011, the Corps and the State of Maryland launched a modeling study to better understand sediment deposition and transport in the lower Susquehanna River. *See*

(continued…)

development of a regional sediment management plan.[14] Exelon noted that the study's goals include: (1) determining sediment management measures that will maintain or increase the sediment and nutrient storage capacity at Conowingo Dam; (2) identifying sediment management measures that will reduce the volume of sediment and associated nutrients available for transport during high flow storm events from behind Conowingo Dam; and (3) examining adverse impacts of the loss of sediment and nutrient storage behind the Conowingo Dam. To achieve these goals, Exelon stated that the study will use a sediment transport analysis approach that integrates four different sediment models. Exelon further stated that the Corps' study may result in a need for benchmarks, and that Exelon would assist the Corps in developing those benchmarks, if necessary.[15]

7. On January 24, 2012, Exelon filed its updated study report, describing progress it made in implementing the study plan.[16] Further, on February 23, 2012, in support of its Sediment and Nutrient Loading study, Exelon filed a 62-page addendum describing the results of a 2011 bathymetric survey of the Conowingo Pond. Maryland DNR commented on the updated study report stating that the Sediment and Nutrient Loading study failed to include benchmarks for potential impacts and actions, and that Exelon's reliance on the Corps' future study was inappropriate because it was not authorized as part of the Sediment and Nutrient Loading study.[17] Exelon responded that it "has proposed to undertake a bathymetric survey every five years, at a minimum[,]" and those

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http://www.mde.state.md.us/programs/PressRoom/Pages/092711.aspx. The three-year study proposes to develop strategies to protect the Chesapeake Bay from sediment and other pollutants from the lower Susquehanna River watershed, including those that accumulate behind the Conowingo dam. The Corps' modeling study plans to use modeling techniques to simulate sediment transport and deposition through the river and the Chesapeake Bay system and evaluate structural and nonstructural strategies for sediment management. The modeling study is expected to provide insights into sediment transport through the lower Susquehanna River. The scope of the study includes assessment of regional sediment management alternatives for the watershed, including lower Susquehanna River reservoirs.

[14] Exelon's Initial Study Report, filed May 6, 2011, at section 4.3, "US Army Corps 'Sediment Behind the Dams Study.'"

[15] *Id*. at section 6.0 Sediment Management Plan.

[16] *See* 18 C.F.R. § 5.15(f) (2012) (updated study report); Exelon's Updated Study Report—Sediment Introduction and Transport Study (RSP 3.15) for the Conowingo Project, filed January 24, 2012.

[17] Maryland DNR's comment letter on the Conowingo Project, filed March 21, 2012, at pp. 12-13.

"periodic surveys will serve as a physical benchmarking method and can be used to monitor sediment accumulation . . . ."[18]

8. On May 21, 2012, the Director issued a determination letter on requests for modifications to the updated study report.[19] In the letter, the Director stated:

> Because sediment deposition in the [Conowingo P]ond will not affect project operation in the immediate future, we agree with Exelon's proposal to conduct regular bathymetric surveys and cooperate with the [Corps'] study to determine benchmarks. We recommend that Exelon, as part of its final license application, *include a sediment management plan with provisions for establishing benchmarks* and any potential actions that may be necessary for continued operation of the project.[[20]]

9. On June 20, 2012, petitioners filed a request for rehearing of the Director's determination letter, arguing that the Director incorrectly failed to enforce the study plan by not requiring Exelon to include benchmarks for potential impacts and actions in its Sediment and Nutrient Loading study. Petitioners claim the Director incorrectly permitted Exelon to develop benchmarks "at some undefined point in the future, based on studies to be conducted by other entities outside of the FERC relicensing process . . . ."[21] In addition, petitioners argued that the Director's letter erroneously permitted Exelon to rely on future modeling data by the Corps to fulfill its requirement to conduct a sediment transport modeling study.[22]

10. On July 18, 2012, the Commission's Secretary rejected the rehearing request as premature because the Commission had not yet issued an order as to which rehearing could be sought.[23] On August 3, 2012, petitioners filed a request for rehearing of the Secretary's notice.

Discussion

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[18] Exelon's response to agency comments letter on the Conowingo Project, filed April 20, 2012, at pp. 28-29.

[19] Director's Determination on Requests for Modification to the Conowingo Hydroelectric Project Study Plan letter, issued May 21, 2012.

[20] *Id*. at Appendix B, p. 6 (emphasis added).

[21] Petitioners June 20, 2012 rehearing request at p. 5.

[22] *Id*. at pp. 10-12.

[23] *Exelon Generating Co., LLC*, 140 FERC ¶ 61,050 (2012).

11. Petitioners argue that the Secretary's notice rejecting their request for rehearing as premature was in error because the notice was "at odds with the plain language of the Commission's regulations and the Commission's own interpretation of those regulations."[24] Specifically, they state that the Commission's regulations "establish a right to rehearing during the pre-application phase of the integrated licensing process."[25]

12. 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.[26] Thus, we have declined to accept requests for rehearing of a number of staff procedural actions.[27] We rely on our staff to run proceedings conducted

[24] Petitioner's August 3, 2012 rehearing request at p. 4.

[25] *Id*. at pp. 4-5. Petitioners cite section 385.1902 of the Commission's regulations, which states that: "Any staff action . . . taken pursuant to authority delegated to the staff by the Commission is a final agency action that is subject to a request for rehearing . . . ." 18 C.F.R. § 385.1902(a) (2012). Petitioners also reference section 375.301 of the Commission's regulations, which generally provides that actions taken under delegated authority may be appealed to the Commission. 18 C.F.R. § 375.301 (2012). These general provisions ensure that we retain authority to review any delegated actions at some point. They do not mean, however, that we must review such actions anytime any staff action is taken. As discussed below, where, as here, we find a request for rehearing to be interlocutory or otherwise inappropriate for Commission action, we may dismiss it.

[26] *Ketchikan Public Utilities*, 121 FERC ¶ 61,155, at P 9 (2007) (citing *City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003); *Papago Tribal Utility Auth. v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980)).

[27] *See, e.g., Exelon Generation Co., LLC*, 131 FERC ¶ 61,248 (2010) (denying request for rehearing of Director's amendment to a study plan determination letter); *Exelon Generation Co., LLC*, 131 FERC ¶ 61,166 (2010) (denying request for rehearing of Director's letter dismissing a notice of study plan dispute and the Director's study plan determination); *City of Wadsworth, Ohio*, 120 FERC ¶ 61,172 (2007) (dismissing requests 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 of information requests and for filing license amendment).

under delegated authority, just as we do administrative law judges with respect to trial-type hearings, and it is only in very unusual circumstances that we find it appropriate to intervene in those proceedings before we are asked to review a substantive decision. We prefer to abstain from involving ourselves in the details of licensing proceedings, absent a compelling reason to do so.[28] Otherwise, we would be required to spend substantial time rendering technical judgments at early stages of proceedings. It is the best use of our resources for our staff experts to make these initial determinations.

13. As we have previously explained in the pre-filing process for this project,[29] the record in this proceeding is still being developed. There will be ample opportunity for petitioners to comment on the completeness of the material filed by Exelon and of the Commission's environmental analysis. After the Commission accepts and publicly notices Exelon's application, which was filed on August 30 and August 31, 2012, petitioners may raise any issues they deem appropriate, including matters relating to the sufficiency of the record.[30] However, we decline to address such issues at this preliminary stage.

14. Petitioners reference a May 20, 2010 rehearing order in this proceeding[31] as supporting Commission intervention at this point. That case did not involve a Commission determination regarding the merits of a study, but rather the issue of whether petitioners were entitled to seek formal dispute resolution for a proposed study plan. Under the Commission's regulations, agencies with authority to issue Clean Water Act section 401 water quality certifications[32] may file a notice of study dispute for studies relating to their authority under section 401.[33] The Commission granted the rehearing request based on information not previously presented that Maryland DNR -- which does not have authority to issue water quality certifications and the studies requested by which were not included in the Director's study plan determination -- was working collaboratively with Maryland Department of the Environment, the water quality agency.

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[28] *Exelon Generation Co., LLC*, 131 FERC ¶ 61,166 at P 15 (citing *Public Utility District No. 1 of Douglas County, Washington*, 122 FERC ¶ 61,032 (2008)).

[29] *Id*. P 16.

[30] *See, e.g.*, 18 C.F.R. § 5.23(a) (2012) (accepting comments, protests, inventions, and recommendations on license applications).

[31] *See Exelon Generation Co., LLC*, 131 FERC ¶ 61,167 (2010) (granting rehearing of the Director's letter dismissing a notice of study plan dispute and also the Director's underlying study plan determination).

[32] *See* 33 U.S.C. § 1341(a)(1) (2006).

[33] 18 C.F.R. § 5.14 (2012).

By granting rehearing, we returned the issue of the merits of the proposed study plan to the Director.

15. Here, petitioners have not been erroneously excluded from any procedural remedy. Moreover, unlike the formal study dispute resolution process described above, our regulations do not provide a formal process to disagree with information provided in an applicant's updated study report.[34] Rather, as we have discussed, such disagreements can be raised after the Commission accepts and notices Exelon's application.

16. In any event, the Director fully considered petitioners' concerns in his May 21, 2012 determination letter on requests for modifications to the updated study report. In the letter, the Director acknowledged that Maryland DNR argued that Exelon did not fulfill the study plan requirement to develop benchmarks for potential impacts and actions in its Sediment and Nutrient Loading study, and that Maryland DNR asserted Exelon should have developed a sediment dynamics model.[35] However, the Director considered the ongoing Corps' regional modeling study of the lower Susquehanna River, Exelon's proposal to cooperate with the Corps' modeling study for establishing potential benchmarks, Exelon's in-kind contribution of $160,000 to the Corps' study, and Exelon's proposal to conduct regular bathymetric surveys for establishing physical benchmarks.[36] In light of these developments, the Director reasonably concluded that Exelon's proposed sediment management plan with provisions for bathymetric surveys and continued cooperation with the Corps leading to the identification of appropriate benchmarks would satisfy the need for information on this issue and ensure that a mechanism is in place for addressing future sediment issues at the project.[37]

17. For these reasons, we deny petitioners' request for rehearing.

The Commission orders:

The rehearing request filed on June 20, 2012, by the Maryland Department of Natural Resources, Power Plant Research Program, and Maryland Department of the Environment, is denied.

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[34] *See* 18 C.F.R. § 5.15 (2012).

[35] Director's Determination on Requests for Modification to the Conowingo Hydroelectric Project Study Plan letter, issued May 21, 2012, at Appendix B, p. 5.

[36] *Id*. at Appendix B, pp. 5-6.

[37] *Id*. at Appendix B, p. 6.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.