

119 FERC ¶ 61,133
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.

Colstrip Energy Limited Partnership

Docket Nos. QF84-377-014
QF84-377-013

ORDER ON COMPLIANCE AND DENYING REHEARING

(Issued May 15, 2007)

1. On January 3, 2007, NorthWestern Corporation, doing business as NorthWestern Energy (NorthWestern), filed a request for rehearing of the Commission's December 5, 2006 Order¹ in the captioned proceeding. The December 5 Order granted recertification of Colstrip's small power production facility (Facility), based on its use of rib coal as fuel, subject to the condition that Colstrip make a showing that the rib coal it receives from Western Energy Company (Western) and burns as a primary fuel source in its Facility is in fact "so contaminated with dirt" that it is "waste." Colstrip made a compliance filing in this proceeding on December 15, 2006.² In this order, the Commission denies rehearing and accepts the compliance filing.

I. Background

2. Colstrip owns a 42 megawatt coal-fired small power production facility located in Rosebud County near Colstrip, Montana. The Facility was originally certified as a qualifying cogeneration facility on December 11, 1984.³ On October 9, 1987, the

¹ *Colstrip Energy Limited Partnership*, 117 FERC ¶ 61,265 (2006) (December 5 Order).

² Docket No. QF84-377-013.

³ *AEM Corp.*, 29 FERC ¶ 62,254 (1984).

Commission certified the Facility as a qualifying small power production facility.⁴ The primary energy source of the Facility continues to be waste in the form of subbituminous coal refuse. Colstrip receives subbituminous coal refuse from Western pursuant to a long-term supply contract. Western extracts the subbituminous coal refuse from the Rosebud mine located in the Powder River Basin in Rosebud County, Montana. The Commission has determined subbituminous coal refuse produced at Western's Rosebud mine to be waste material.⁵

3. In its initial filing on May 3, 2006, Colstrip submitted an application for recertification as a qualifying small power production facility and stated that the primary purpose for the recertification application was to obtain Commission approval of an additional waste fuel for the Facility.⁶ Specifically, Colstrip sought Commission approval to use what is known as rib coal or wedge coal⁷ from the Rosebud mine as an additional form of waste to be used as an alternate primary energy input to its Facility.⁸

4. The December 5 Order found that the U.S. Bureau of Land Management (BLM) Letter submitted in the initial proceeding supported a determination that only rib coal "so contaminated with dirt that it can not be economically upgraded for [sale in] the existing markets" was waste pursuant to section 292.204(b)(5) of the Commission's regulations.

⁴ *AEM Corp.*, 41 FERC ¶ 62,031 (1987). The Facility was last certified on March 18, 1998 in 82 FERC ¶ 62,195 (1998). The purpose for the recertification application was to ensure that the Facility would retain its qualifying status following a change in ownership and fuel supply.

⁵ *See Big Horn Energy Partners*, 38 FERC ¶ 61,265 (1987); *order on reh'g*, 40 FERC ¶ 61,305 (1987).

⁶ The recertification application also updated the Commission regarding the operator and current upstream ownership of the Facility.

⁷ Rib coal, also known as wedge coal, is produced as a result of Western's surface mining operations. To ensure the stability of the spoil and the safety of the mining seam, Western leaves a safety wedge of coal along the spoil side of the pit. When all the marketable coal has been mined from a strip, and before starting to fill the pit with the overburden from the next strip, Western determines whether the safety wedge of coal or rib coal can be safely recovered.

⁸ Colstrip stated that the primary energy input to the Facility would continue to be waste in the form of subbituminous coal refuse produced by Western.

However, the Commission determined that Colstrip had not shown that the rib coal it intended to burn in its Facility as a primary fuel source would be “so contaminated with dirt” as to qualify as waste coal. Without such a showing, the Commission found that it could not be certain that the Facility was burning at least 75 percent waste material pursuant to its regulations. The December 5 Order required that, if Colstrip wished to pursue recertification based on the use of rib coal, Colstrip must submit a written verification from Western that the rib coal Western delivers to Colstrip is waste as certified by BLM.

A. Compliance Filing

5. In response to the December 5 Order, Colstrip submitted a written verification from Western that the rib coal it delivers to Colstrip is waste.⁹ Western’s letter stated that “rib coal that can be salvaged, cleaned and upgraded for existing coal markets will not be sold to [Colstrip] as rib coal refuse. Only rib coal that is so contaminated with dirt that it cannot be economically upgraded for existing coal markets will be sold to [Colstrip] as rib coal refuse.”¹⁰

B. Request for Rehearing

6. NorthWestern states in its request for rehearing that the December 5 Order errs in three ways. First, NorthWestern argues that the Commission is shifting BLM’s waste determination role to Western, and that this action is arbitrary and capricious, a failure to exercise reasoned decision-making, not supported by the evidence on the record, and not in accordance with law. Second, NorthWestern states that the Commission erred in permitting Colstrip to satisfy the regulatory requirement of showing that the coal used was determined by BLM to be waste with a one-time verification from Western. Third, NorthWestern states that the Commission failed to address its due process issues raised in NorthWestern’s October 10, 2006 protest of Colstrip’s original filing.

II. Notice and Responsive Pleadings

7. Notice of Colstrip’s compliance filing was published in the *Federal Register*, 72 Fed. Reg. 765 (2007), with comments, protests or motions to intervene due on or before January 11, 2007. NorthWestern filed a protest to the compliance filing on

⁹ *Colstrip Energy Limited Partnership*, 117 FERC ¶ 61,265 at P 21.

¹⁰ Colstrip’s December 15, 2006 Compliance Filing, Exhibit A.

January 10, 2007. Colstrip filed answers to NorthWestern's protest and to NorthWestern's request for rehearing on January 16, 2007.

8. In its protest, NorthWestern argues that Colstrip's compliance filing should be rejected because it fails to demonstrate that the rib coal Colstrip intends to burn in its Facility will be waste coal. NorthWestern further states that Western's verification fails to explain any distinguishing characteristics, locations, or the quantities of rib coal it proposes to deliver to Colstrip.

III. Discussion

A. Procedural Matters

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We are not persuaded to accept Colstrip's answer to NorthWestern's protest, and will, therefore, reject it. In addition, Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2006), provides that the Commission will not permit answers to requests for rehearing. We will, accordingly, reject Colstrip's answer to the rehearing.

B. Compliance Filing

10. The Commission accepts Colstrip's compliance filing. In the December 5 Order, the Commission conditioned Colstrip's recertification upon Colstrip's making a showing that the rib coal it receives from Western and burns as a primary fuel source in its Facility is in fact "so contaminated with dirt" that it is waste. The Commission established that Colstrip could satisfy this condition by receiving a written verification from Western that the Rib Coal Western delivers to Colstrip is waste rib coal. Because Western stated that only rib coal that is "so contaminated with dirt that it cannot be economically upgraded for existing coal markets will be sold to Colstrip as rib coal refuse," the Commission finds that Colstrip has satisfied the condition specified in the December 5 Order.¹¹

¹¹ Neither the Commission's regulations, nor the December 5 Order required Western in its verification to explain "any distinguishing characteristics, locations, or even the quantities of rib coal it proposes to deliver to Colstrip," as NorthWestern's protest argues.

C. Rehearing

11. For the reasons discussed below, the Commission denies rehearing on all issues.

12. NorthWestern's first argument is that the Commission impermissibly shifted BLM's waste determination role under its regulations to Western by asking Western to verify that the rib coal delivered to Colstrip is rib coal that has been contaminated. A small power production facility, like Colstrip's, must satisfy the fuel use criteria set forth in section 292.204(b) of the Commission's regulations to obtain qualifying status. Pursuant to section 292.204(b) of the Commission's regulations, the primary energy source of the facility must be biomass, waste, renewable resources, geothermal resources, or any combination thereof. The Commission defines "waste" as:

[A]n energy input that is listed below in this subsection, or any energy input that has little or no current commercial value and exists in the absence of the qualifying facility industry....^[12]

13. One of the energy inputs specifically listed in 292.202(b) is coal refuse produced on federal or Indian lands that has been determined to be waste by BLM.¹³ In order to avoid possible conflicts between this agency and BLM, the Commission accepts waste coal determinations made by BLM for coal produced on federal or Indian lands.¹⁴ BLM's letter, dated August 14, 2006, stated in relevant part:

Under the approved Resource Recovery and Protection Plan (R2P2), the Rosebud Mine routinely recovers wedge coal where spoil and pit conditions allow. The wedge coal is then delivered along with other conventionally mined coal to the Colstrip power generating facilities or to Minnesota Power and Light. On occasion some wedge coal is salvaged but in the removal process it becomes so contaminated with dirt that it can not be economically upgraded for the existing markets. It is the opinion of this office that federal coal so contaminated with dirt that it can not be economically upgraded for existing coal markets is waste coal. An opportunity to salvage contaminated coal which otherwise would be left

¹² See 18 C.F.R. § 292.202(b) (2006).

¹³ BLM is the principle agency regulating and supervising the mining of coal owned by the federal government and by Indian tribes.

¹⁴ See 18 C.F.R. § 292.202(b)(5) (2006); see also *Big Horn Energy Partners*, 40 FERC ¶ 61,305 (1987).

buried in the pit furthers the principle of Maximum Economic Recovery and should be encouraged.

The Commission recognized in the December 5 Order that BLM made a determination, in relation to the Rosebud Mine, that only rib coal that is “so contaminated with dirt that it cannot be economically upgraded for the existing markets” is waste coal.¹⁵ That determination satisfies section 292.202(b)(5), and NorthWestern has failed to point to any provision that requires BLM to make a finding of “what percentage of rib coal [is waste coal], or to establish additional “standards for objectively determining which rib coal . . . cannot be economically upgraded.”¹⁶ The Commission’s acceptance of a letter from Western specifying that the rib coal it will deliver to Colstrip will meet the standard articulated by BLM is not contrary to Commission regulations,¹⁷ nor is it allowing BLM’s responsibility to be “impermissibly shifted” to Western.¹⁸

14. NorthWestern’s second argument is that the Commission erred in allowing Colstrip to make its showing that the coal it receives is waste with a “one time verification” from Western. NorthWestern states that the process for determining which rib coal is waste is so subjective that Western should be required “to certify that each load of rib coal provided to [Colstrip] meets BLM’s waste determination and to specifically state the basis on which the objective determination was made.”¹⁹ As stated previously, Commission regulations state that “waste” is “an energy input that is listed below in this subsection, or any energy input that has little or no current commercial value and exists in the absence of the qualifying facility industry,” and one of the energy inputs specifically listed in 292.202(b) is coal refuse produced on federal or Indian lands that has been

¹⁵ *Colstrip Energy Limited Partnership*, 117 FERC ¶ 61,265 at P 20.

¹⁶ NorthWestern’s January 10, 2007 Protest, at 7.

¹⁷ If NorthWestern wishes to challenge the manner in which BLM makes its waste determinations, this is not the proper venue for that challenge.

¹⁸ NorthWestern has also failed to articulate what interest Western would have in falsely stating that certain coal is waste. Presumably, Western would make more profit selling the rib coal as non-waste coal to one of its other customers than it would by selling the same coal as waste coal to Colstrip.

¹⁹ NorthWestern’s January 10, 2007 Protest, at 10.

determined to be waste by BLM.²⁰ Nowhere in the regulations is there a requirement for a waste determination to be made on a truckload by truckload basis, nor has NorthWestern cited one. Many types of fuels are regularly delivered pursuant to standing contracts which specify quality or grade without requiring certifications for each unit or shipment of fuel. This fact does not reduce the burden on Colstrip to ensure that it is in fact procuring waste rib coal, but rather simply provides that it may do so through reasonable contractual terms if it chooses to do so in lieu of certifications for each shipment of fuel.

15. NorthWestern's final argument on rehearing is that it has been denied its due process rights in this proceeding. NorthWestern states that since

[it] did not have the opportunity to review the facts and details upon which the request for determination [from BLM that rib coal was waste] was based or to provide comments on the request, . . . The Commission's decision to accept the BLM determination without permitting NorthWestern to rebut it, violated NorthWestern's due process rights.^[21]

NorthWestern has been an active participant in every stage of this proceeding, and thus has had every "opportunity to be heard." NorthWestern has not been denied any documents in the record or otherwise been precluded from fully participating.²² Furthermore, if NorthWestern argues that it has been denied the "opportunity to be heard" because the Commission did not establish a hearing before accepting the BLM determination, then this argument too must fail. Colstrip's submission of the BLM certification that the rib coal is waste is sufficient to show that the rib coal satisfies the regulatory standard contained in 18 C.F.R. § 292.202(b)(4). Moreover, the Commission has held that "an evidentiary trial-type hearing is only necessary where material issues of fact are in dispute that cannot be resolved on the basis of the written record."²³ The

²⁰ *Supra*, note 11.

²¹ NorthWestern's January 10, 2007 Protest, at 11.

²² NorthWestern was given a copy of the letter sent to BLM by Western requesting a determination of waste status, a copy of the information provided to BLM along with that letter, and a copy of BLM's determination.

²³ *Tennessee Gas Pipeline Co.*, 70 FERC ¶ 61,244 (1995); *accord, e.g., Cerro Wire & Cable Co. v. FERC*, 677 F.2d 124, 128-129 (D.C. Cir. 1982); *Public Serv. Co. of New Hampshire v. FERC*, 600 F.2d 944, 955 (1979).

Commission finds that the written record in this proceeding has provided more than enough information for it to make an informed determination.

16. Finally, to make a procedural due process argument under *Matthews v. Eldridge*,²⁴ there must be an analysis and a balancing of three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.²⁵

NorthWestern has not explained the private interest it has that was affected by its lack of involvement in the BLM determination process, nor has it provided an analysis or a balancing of the three factors specified in *Matthews v. Eldridge*. If NorthWestern believes that there should be "additional procedural safeguards" and an administrative requirement that allows a party to rebut a BLM determination, then it should challenge the regulations themselves, not make a collateral attack in this proceeding.

The Commission orders:

(A) Colstrip's December 15, 2006 compliance filing in this proceeding is hereby accepted.

(B) The Commission denies NorthWestern's request for rehearing, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁴ 424 U.S. 319 (1976).

²⁵ *Id.* at 334.