

124 FERC ¶ 61,152
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.

Staff Guidance on Hydrokinetic Pilot Procedures
Staff FAQs on Conditioned Licenses

Docket Nos. AD07-14-002
PL08-1-002

ORDER DENYING REHEARING

(Issued August 8, 2008)

1. Elizabeth R. Mitchell and Fishermen Interested in Safe Hydrokinetics, jointly; Lincoln County, Oregon; the City of Fort Bragg; and the Recreational Fishing Alliance (collectively, petitioners) filed timely requests for rehearing of the Commission's May 21, 2008 notice rejecting their requests for rehearing of two Commission staff documents. For the reasons discussed below, we deny the requests for rehearing.

Background

2. On November 30, 2007, the Commission issued a Policy Statement on Conditioned Licenses for Hydrokinetic Projects (Policy Statement) in Docket No. PL08-1.¹ The Policy Statement set forth a new policy, applicable only to certain hydrokinetic projects, where the Commission will, in appropriate cases, and after the Commission completes its own licensing process, issue conditioned licenses pending action by other entities under federal law. On April 14, 2008, to address questions raised in response to the Policy Statement, Commission staff issued responses to frequently asked questions on conditioned licenses (FAQs) in Docket No. PL08-1. In clarifying the Commission's procedure, the FAQs reiterate that the Commission engages in a case-by-case review after considering the specific circumstances of each case.

3. On April 14, 2008, staff also issued Guidance on Hydrokinetic Pilot Projects (Guidance) in Docket No. AD07-14, which described circumstances where, in certain types of "pilot" project applications, it may be appropriate to seek waivers of various

¹ The Policy Statement was published in the *Federal Register* on December 7, 2007 (72 Fed. Reg. 68,887).

Commission licensing regulations. Similar to the FAQs, the Guidance notes that these procedures will vary with each applicant on a case-by-case basis.

4. The Concerned Citizens of Fort Bragg; Mendocino County, California; and the petitioners filed timely requests for rehearing of the FAQs and the Guidance.

5. On May 21, 2008, the Commission issued a notice rejecting the requests for rehearing. Citing to *City of Fremont v. FERC (City of Fremont)* and *Papago Tribal Utility Authority v. FERC*, the notice explained that 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 administrative process.² The notice further explained that the challenged Guidance and FAQs represent only general advice from Commission staff and do not apply to the specific facts of any particular case, nor do they purport to resolve any specific controversy. Because of the lack of finality surrounding the issued documents, the notice explained, no aggrievement exists; and, thus, rehearing does not lie.³

6. On June 19, 2008, the petitioners filed requests for rehearing of the May 21 rejection notice.

Discussion

7. Petitioners do not claim that the legal standard enunciated in *City of Fremont* is incorrect; rather, they claim that the Commission should not have cited to this case because *City of Fremont* concluded that the action at issue there did aggrieve the appellant. However, it is the test for finality established in *City of Fremont* that is relevant here, not whether the Commission's action there was deemed final. Applying the court's holding in *City of Fremont* to the facts of this case supports rejection of the rehearing requests.

8. The contended facts of the Commission's rehearing rejection differ greatly from those of *City of Fremont*, and thus the Commission's determination is consistent with the Ninth Circuit's legal test for finality. In *City of Fremont*, the Commission granted Pacific Gas and Electric Company (PG&E) incumbent preference in a competitive relicensing proceeding. Such a determination gave PG&E a distinct advantage over other potential applicants in obtaining the project license and influenced the outcome of the licensing

² See *City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003); *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980).

³ See *Project Decommissioning at Relicensing and Use of Reserved Authority in Hydropower Licenses to Ameliorate Cumulative Impacts*, 70 FERC ¶ 61,151, at 61,450 (1995) (dismissing requests for rehearing of policy statements).

competition. The court held that because the Commission's order affected specific legal rights and obligations of the competitors, the order constituted a final agency action.

9. In contrast, the Guidance and FAQs, while explaining the Commission's policy of case-by-case determinations, do not impose an obligation, deny a right, or fix a legal relationship of any party as the consummation of the administrative process in a proceeding concerning licenses. Rather, they represent only informal advice from Commission staff and do not apply to the specific facts of any particular case, nor do they purport to resolve any specific controversy. Because no rights or obligations are being altered, no final agency action is taking place. Interested parties to preliminary permit or license proceedings will have the ability to intervene and raise issues in those proceedings.

10. For the above reasons, we must deny the petitioners' requests for rehearing.

11. The rehearing requests also set forth arguments identical to those raised in petitioners' earlier rehearing requests: (1) that the Commission should have issued the Guidance and FAQs only after initiating a public notice and comment rulemaking pursuant to section 553 of the Administrative Procedure Act (APA);⁴ (2) that the Commission did not comply with the National Environmental Policy Act (NEPA) by failing to prepare a programmatic Environmental Impact Statement on the Guidance and FAQs;⁵ and (3) that the Commission's issuance of conditioned licenses does not comply with other laws applicable to the Commission's jurisdiction and its licensing process.

12. These arguments are, however, not relevant to the issue in this proceeding, i.e., whether the rejection of the earlier rehearing requests was proper. The arguments are, in any event, without merit. As to the assertion that public notice and comment on the Guidance and FAQs was required before they could be promulgated, the actions at issue are plainly not rulemaking, so the cited APA provision does not apply. Even were they "rules," they would at most be "interpretive rules" and thus exempted by section 553(b)(A) of the APA⁶ from the detailed notice procedures of section 553. Moreover, NEPA does not require the preparation of an environmental analysis in connection with the Commission's promulgation of rules which are clarifying, corrective, or procedural.⁷ The challenged Guidance and FAQs fall under the categories of clarification and procedure as expressed by the NEPA's implementing regulations.

⁴ 5 U.S.C. § 553 (2000).

⁵ 42 U.S.C. § 4332 (2000).

⁶ 5 U.S.C. § 553(b)(A) (2000).

⁷ 18 C.F.R. § 380.4(a)(2)(ii) (2008).

Finally, whether the Commission has complied with applicable laws and regulations when it issues a license is a matter to be dealt with in individual cases where it is raised.

The Commission orders:

The requests for rehearing filed June 19, 2008, in Docket Nos. AD07-14-002 and PL08-1-002 by Elizabeth R. Mitchell and Fishermen Interested in Safe Hydrokinetics, jointly; Lincoln County, Oregon; the City of Fort Bragg; and the Recreational Fishing Alliance are denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.