

170 FERC ¶ 61,136
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Grand River Dam Authority

Project No. 1494-447

ORDER DENYING REHEARING

(Issued February 20, 2020)

1. On March 26, 2019, the Secretary of the Commission (Secretary) issued a notice dismissing the City of Miami, Oklahoma's (City of Miami) request for rehearing of Commission staff's January 28, 2019 letter stating that the complaint filed by the City of Miami had been referred to the Office of Energy Projects, Division of Hydropower Administration and Compliance (DHAC).¹ On April 25, 2019, the City of Miami filed a request for rehearing of the March 26 Notice. For the reasons discussed below, we deny rehearing.

I. Background

2. On April 24, 1992, the Commission issued a new license to Grand River Dam Authority (GRDA) for the continued operation of the 105.18-megawatt Pensacola Hydroelectric Project No. 1494, located on the Grand (Neosho) River in Craig, Delaware, Mayes, and Ottawa Counties, Oklahoma.² Standard Article 5 of Form L-3 (October 1975) requires GRDA to acquire all property rights for the construction, operation, and maintenance of the project.³

3. On December 26, 2018, the City of Miami filed a complaint alleging that GRDA is in violation of Article 5 of its license for failing to obtain property rights in areas repeatedly flooded due to operation of the project.⁴ In response, Commission staff issued a letter stating that, consistent with Commission practice, the allegations of non-compliance had been referred to DHAC and that formal complaint procedures under

¹ *Grand River Dam Auth.*, 166 FERC ¶ 61,218 (2019) (March 26 Notice).

² *Grand River Dam Auth.*, 59 FERC ¶ 62,073 (1992).

³ *Id.* at ordering para. (D) (incorporating the articles in Form L-3 into the license).

⁴ City of Miami December 26, 2018 Complaint at 2.

Rule 206 of the Commission's Rules of Practice and Procedure would not apply.⁵ The City of Miami requested rehearing of the January 28 Letter, which was dismissed by Secretary's notice on March 26, 2019. Specifically, the March 26 Notice stated that the January 28 Letter was an initial procedural step and not a final action subject to rehearing.

4. On April 25, 2019, the City of Miami filed a request for rehearing of the March 26 Notice, arguing that the January 28 Letter was a final order subject to rehearing.⁶ Additionally, the City of Miami contends that: (1) DHAC did not have authority to issue the January 28 Letter, and (2) the January 28 Letter violated the City of Miami's due process rights and the Administrative Procedure Act.⁷

II. Discussion

5. The City of Miami argues that the January 28 Letter was a final order subject to rehearing.⁸ Specifically, the City of Miami alleges that because the January 28 Letter states that the Commission's formal complaint procedures will not apply, the letter denied the City of Miami's right to be heard at a meaningful time and in a meaningful manner with respect to its complaint.⁹

6. Rule 713 of the Commission's Rules of Practice and Procedure provides that rehearing may be sought of a final Commission decision or other final order.¹⁰ An order is final when it "imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process."¹¹ The January 28 Letter does none of

⁵ January 28, 2019 Letter from Robert J. Fletcher, Chief, DHAC Land Resources Branch (January 28 Letter).

⁶ City of Miami April 25, 2019 Request for Rehearing at 9-10.

⁷ *Id.* at 6-8, 10-12.

⁸ *Id.* at 9 (stating that because the January 28 Letter was a final order, the Secretary did not have authority to issue the notice).

⁹ *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

¹⁰ 18 C.F.R. § 385.713(a) (2019).

¹¹ See *City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003); *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980).

these things. Rather, it is an initial procedural step informing the City of Miami and GRDA how the Commission will process the complaint and is not subject to rehearing.¹²

7. We disagree with the City of Miami's assertion that the January 28 Letter denies it the right to be heard at a meaningful time and in a meaningful manner. The January 28 Letter referred the City of Miami's non-compliance allegations to DHAC, a division charged with ensuring license compliance, and states that Commission staff will review the complaint, request additional information if necessary, and provide a written response regarding the allegations.¹³ Neither DHAC's compliance investigation process nor Rule 206's procedures provide a prescribed timeframe for addressing complaints. Moreover, the City of Miami will have an opportunity to raise on rehearing any issues, including procedural issues,¹⁴ it deems appropriate after Commission staff's action on the merits of the non-compliance allegations.¹⁵

8. Next, the City of Miami contends that DHAC did not have authority to issue the January 28 Letter and that the letter violated the Administrative Procedure Act.¹⁶ Specifically, the City of Miami asserts that neither the Commission's regulations nor a Commission order delegated to DHAC the authority to issue the January 28 Letter.¹⁷ The

¹² *Shetek Wind Inc. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 138 FERC ¶ 61,250, at P 155 (2012) (rehearing of interlocutory Commission actions does not lie); *see also Public Utility District No. 1 of Douglas County, Washington*, 122 FERC ¶ 61,032, at P 7 & n.9 (2008) (enumerating examples in which the Commission has dismissed requests for rehearing of Commission action as interlocutory).

¹³ January 28 Letter at 2.

¹⁴ In its request for rehearing, the City of Miami asks the Commission to clarify whether it would have an opportunity to seek rehearing of the DHAC findings and whether it could raise procedural arguments. City of Miami April 25, 2019 Request for Rehearing at 12-14.

¹⁵ March 26 Notice at 2; *see also* 18 C.F.R. §§ 385.102(c), 385.713(b) (2019); *S. Cal. Edison*, 167 FERC ¶ 61,243 (2019) (denying on the merits rehearing of a delegated order addressing a complaint alleging non-compliance with the license); *PPL Montana, LLC*, 139 FERC ¶ 61,231 (2012) (denying an untimely request for rehearing of a delegated order addressing a complaint alleging non-compliance with the license), *aff'd sub nom. Andersen v. FERC*, 583 F. App'x 747 (9th Cir. 2014) (unpublished opinion).

¹⁶ City of Miami April 25, 2019 Request for Rehearing at 6-8, 10-12.

¹⁷ *Id.* at 8.

City of Miami further contends that the procedure used to address allegations of non-compliance violates the Administrative Procedure Act because the procedure has not been published in the *Federal Register*, the Commission's regulations, or the January 28 Letter.¹⁸ Therefore, the City of Miami concludes that any subsequent action by DHAC would be unlawful.¹⁹ Because the January 28 Letter was not a final order subject to rehearing, these procedural arguments are outside the scope of this rehearing but, as noted above, may be raised on rehearing of Commission staff's action on the merits of the non-compliance allegations.

9. Nonetheless, we note that we have broad discretion to determine how best to deal with the matters that come before us²⁰ and our regulations provide that we may prescribe any alternative procedures that we determine to be appropriate.²¹ The Commission's practice is to refer allegations of non-compliance by hydropower licensees to DHAC.²² Because DHAC has the responsibility to examine hydropower compliance matters, it is generally most efficient to treat comparable allegations of non-compliance the same, whether styled as complaints or not.²³ Moreover, the January 28 Letter provides the procedure for addressing the complaint – that Commission staff would review the

¹⁸ *Id.* at 10-11 (citing 5 U.S.C. §§ 552(a)(1)(B), 706(2)(D) (2018)).

¹⁹ *Id.* at 11 (citing *N. Cal. Power Agency v. Morton*, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd*, 539 F.2d 243 (D.C. Cir. 1976) (unpublished mem. opinion)).

²⁰ *See Andersen*, 583 F. App'x at 749 ("FERC has regulatory authority, for good cause, to 'prescribe any alternative procedures that it determines to be appropriate.'" (quoting 18 C.F.R. § 385.101(e) (2019))); *Appalachian Power Co.*, 153 FERC ¶ 61,299, at P 18 (2015) ("Because [DHAC] has the responsibility to examine hydropower compliance issues, it is generally most efficient to treat similar allegations of non-compliance the same, whether or not they are styled as complaints."); *see also Mobil Oil Explor. & Prod. Se Inc. v. United Distrib. Cos.*, 498 U.S. 211, 230 (1991) ("An agency enjoys broad discretion in determining how best to handle related, yet discrete, issues in terms of procedures . . . [such as] where a different proceeding would generate more appropriate information and where the agency was addressing the question."); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 81 (D.C. Cir. 2014) (per curiam) (affirming the Commission's discretion in how to manage the proceedings before it).

²¹ 18 C.F.R. § 385.101(e).

²² *Jeffrey Lake Dev., Inc.*, 161 FERC ¶ 61,184, at PP 6-7 (2017); *Appalachian Power Co.*, 153 FERC ¶ 61,299 at P 18; *PPL Montana, LLC*, 139 FERC ¶ 61,231 at P 28 & n.87.

²³ *Appalachian Power Co.*, 153 FERC ¶ 61,299 at P 18.

complaint, request additional information if necessary, and provide a written response regarding the allegations.²⁴

10. Last, the City of Miami argues that because its complaint raises substantial legal and policy issues, the Commission should act on the complaint in the first instance²⁵ and that it was inappropriate to refer the matter to technical staff in DHAC.²⁶ A complaint that raises substantial legal or policy concerns may, in some instances, lead the Commission to act in the first instance; however, the Commission is not required to do so.²⁷ Here, while the complaint raises legal issues regarding the flood control jurisdiction of the U.S. Army Corps of Engineers, the complaint asks the Commission to find a violation of Article 5 of the license and mandate that GRDA come into compliance.²⁸ Commission staff in DHAC is most familiar with the technical details of the project, including how the project operates and GRDA's compliance with various license requirements. Finally, as noted above, the City of Miami will have the opportunity to raise with the Commission in due course any legal and policy issues that it feels were not properly resolved by Commission staff.

The Commission orders:

The City of Miami's April 25, 2019 request for rehearing is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁴ January 28 Letter at 2.

²⁵ City of Miami April 25, 2019 Request for Rehearing at 10 (quoting *Pac. Gas & Elec. Co.*, 115 FERC ¶ 61,324, at 62,155 (2006) (Kelliher, Chairman, concurring)).

²⁶ *Id.* at 7.

²⁷ See *Pac. Gas & Elec. Co.*, 115 FERC at 62,155 (Kelliher, Chairman, concurring) ("We of course retain the discretion to take up at the Commission level any matters that we deem warrant our immediate attention.").

²⁸ City of Miami December 26, 2018 Complaint at 35.