

121 FERC ¶ 61,155
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.

Ketchikan Public Utilities

Project No. 11841-004

ORDER DISMISSING REQUEST FOR REHEARING

(Issued November 15, 2007)

1. Ketchikan Public Utilities (Ketchikan) has filed a request for rehearing of the denial by Commission staff of Ketchikan's request for a stay of the licensing proceeding for the Whitman Lake Project. Because the request for rehearing does not relate to a final action, we dismiss it as interlocutory.

Background

2. On November 16, 1998, Ketchikan requested permission to use the alternative licensing process¹ to prepare an application for license for the proposed 4.6-megawatt Whitman Lake project, to be located on Whitman Creek, in Ketchikan Gateway Borough, Alaska. Commission staff approved that request on February 10, 1999.

3. Some five-and-a-half years later, in September 2004, Ketchikan filed a license application. Processing of the application followed, including the filing in March 2006 of an application to amend the license application, which was rejected by Commission staff because it proposed that the licensee be authorized to construct the entire project, yet have the discretion to decide whether and when it would construct certain project works, which is precluded by the Commission's regulations.²

¹ See 18 C.F.R. § 4.34(i) (2007).

² See letter from Ann Miles (Commission staff) to Karl Amylon (Ketchikan) (dated April 19, 2006). Section 4.32(j) of the Commission's regulations, 18 C.F.R. § 4.32(j) (2007), states that "[a]ny application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected."

4. On June 19, 2007, Commission staff issued an environmental assessment (EA) of the proposed project, and provided that comments on the EA were due within 30 days, or by July 19, 2007. Ketchikan requested two extensions of the comment deadline, which staff granted, and ultimately filed comments on August 20, 2007. Ketchikan included in its comments a request that the Commission stay the proceeding for a six-month period, during which Ketchikan and other parties would attempt to reach a settlement agreement.³

5. By letter dated September 25, 2007, Commission staff denied the stay request.⁴ Staff explained that the Commission had developed the alternative licensing process in order to foster a collaborative process that would lead to settlements.⁵ Given that Ketchikan and other stakeholders had not been able to reach a settlement in the almost nine years since the Commission authorized use of the alternative process in these proceedings, “[a]ny further delay in the licensing proceeding would not support the Commission’s commitment to processing license applications in an efficient and timely manner.”

6. On October 10, 2007, the Commission held a public conference, via telephone, to discuss the comments it had received regarding the EA. Staff determined, based on the written comments and those received during the teleconference, that, although it had initially planned to only issue a single EA in the proceeding (*i.e.*, not to prepare draft and final EAs), it had decided to prepare a final EA, scheduled to be issued in February 2008.⁶

7. On October 25, 2007, Ketchikan filed what it styled an “appeal from staff denial of motion for stay and motion to defer consideration of appeal.”

Discussion

8. As an initial matter, we note that Ketchikan styles its pleading as an appeal from staff action, citing to section 1902 of our regulations.⁷ Section 1902 provides that staff actions under delegated authority are “subject to a request for rehearing.” The

³ Ketchikan comments at 1, 10-11.

⁴ See letter from J. Mark Robinson (Commission staff) to Karl Amylon.

⁵ See *Regulations for the Licensing of Hydroelectric Projects* (Order No. 596), FERC Stats. & Regs., Regulations Preambles July 1996 – December 2000 ¶ 31,057.

⁶ See letter from Kenneth J. Hogan (Commission staff) to Karl Amylon (dated October 11, 2007).

⁷ 18 C.F.R. § 385.1902 (2007).

Commission at one time provided for appeals from staff action as a separate form of pleading, but later determined that this was inefficient, because a party would first appeal a staff decision to the Commission and then, if dissatisfied, seek rehearing before the Commission, resulting in two-stage appeals. We therefore eliminated appeals from staff action, by providing that final staff actions under delegated authority were essentially the equivalent of a Commission order, so that the proper avenue for redress would be a request for rehearing.⁸ Thus, we will consider Ketchikan's filing as a request for rehearing, rather than the defunct form of an appeal from staff action.

9. Moreover, we do not consider procedural decisions, such as the one complained of here, to be final orders subject to rehearing. As we have explained elsewhere, 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.⁹ Thus, we have declined to accept requests for rehearing of a number of staff procedural actions.¹⁰ Indeed, just as we have held that staff decisions granting extensions of time are

⁸ See *Streamlining Commission Procedures for Review of Staff Action* (Order No. 530), FERC Stats. & Regs., Regulations Preambles 1986 - 1990 ¶ 30,906.

⁹ 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).

¹⁰ See, e.g., *City of Wadsworth, Ohio*, 120 FERC ¶ 61,172 (2007) (dismissing request 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); *City of Hamilton, Ohio* (82 FERC ¶ 61,349 (1998) (finding requests for rehearing of order setting matter for trial-type hearing properly dismissed); *California Department of Water Resources*, 70 FERC ¶ 61,115 (1995) (concluding that staff decision to prepare EA, rather than environmental impact statement, not subject to rehearing).

not subject to rehearing,¹¹ so a staff action like this one, relating to the processing of a license application, is not the fit subject of a request for rehearing.¹²

10. We rely on our staff to run proceedings conducted 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. This is not such a case.

11. In any event, Ketchikan does not present a convincing case for reversing staff's decision. Ketchikan argues "that it was legal error for the Staff to deny its very reasonable request for a stay to enable it to conclude settlement negotiations necessitated in part by an erroneous EA"¹³ This is a non sequitur. Whether a settlement can be reached here is a matter purely within the control of Ketchikan and the other stakeholders. Ketchikan has not shown that staff's EA, whether erroneous or not, has caused any delay here, or in any way blocked an otherwise viable settlement.¹⁴ Parties before us reach settlements at all phases of proceedings, up to and during judicial review. As staff stated, the stakeholders have had some nine years to settle this case. The parties here have had a more than fair chance to reach an agreement, and, while we hope that they will in the end do so, we cannot conclude that staff's actions have in any way hindered that possibility. Moreover, as we note above, staff's action in declining to halt the proceeding is preliminary and procedural, and thus cannot by its nature constitute an error of law.

12. Ketchikan further alleges that staff's decision not to stay the proceeding runs afoul of the Commission's policy favoring settlements and the purposes of Part I of the Federal Power Act.¹⁵ Again, Ketchikan is incorrect. We do indeed strongly favor settlements, as a general rule. However, we have never allowed this to override the need for timely, efficient decision-making. Indeed, in the rulemaking establishing the integrated licensing process, we rejected the request of some commenters to build "time outs" for settlement discussions into our procedural schedules, expressing concern that suspending the

¹¹ See *Wisconsin Valley Improvement Co.*, 80 FERC ¶ 61,319 (1997).

¹² Our analysis would have been no different at the time that our regulations provided for appeals from staff actions.

¹³ Request for rehearing at 5.

¹⁴ Ketchikan and other parties will be free to point out to the Commission on rehearing of a license order any alleged errors in the EA that have led to results to which they object.

¹⁵ Request for rehearing at 5-9.

licensing process for settlement negotiations would encourage parties to view negotiations as a way to delay the process.¹⁶ Our reasoning then, as it is here, was that staying proceedings may in fact provide a disincentive to timely settlements, and that providing parties firm deadlines may be the best way to encourage them to reach agreement. Ketchikan has not demonstrated that moving forward here will preclude a settlement.

13. Ketchikan complains that it was unreasonable of Commission staff to deny Ketchikan time to correct misunderstandings in the EA.¹⁷ Commission staff has been more than reasonable in this regard. Staff allowed Ketchikan two extensions of time to file comments on the EA, convened a meeting to discuss the comments, and has decided to further refine the EA based on the information it received. To the extent that Ketchikan feels that there are flaws in the EA that affect its negotiations with other stakeholders, it has already had the opportunity to point these things out to them. If Ketchikan has failed to present a convincing case, this is not the fault of Commission staff, nor is there any assurance that six months of further delay will resolve matters.¹⁸

The Commission orders:

The request for rehearing filed on October 25, 2007 by Ketchikan Public Utilities is dismissed.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁶ See *Hydroelectric Licensing Under the Federal Power Act*, FERC Stats. and Regs., Proposed Regulations 1999 - 2003 ¶ 32,568 at P 161 (adding that “we see no evidence that suspending Commission actions in the licensing process is more likely to result in a settlement agreement. Rather, our experience indicates that the prospect of near-term Commission action in the form of a draft or final NEPA document, or a license order, is more likely to spur the parties to resolve their differences”).

¹⁷ Request for rehearing at 9-11.

¹⁸ Ketchikan asks us to delay acting on its request for rehearing until February 2008, by which time it hopes to file a settlement. While, as we have said, we hope that Ketchikan succeeds, we see no reason not to act now. Ketchikan elected to file its rehearing request, and the issues are clear.