

126 FERC ¶ 61,245
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinohoff, Acting Chairman;
Suedeem G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Bangor Water District

Project No. 13164-001

ORDER ON REHEARING

(Issued March 19, 2009)

1. Bangor Water District (the District) filed a request for clarification or, in the alternative, rehearing of Commission staff's January 6, 2009 order granting the District an exemption from the licensing requirements of Part I of the Federal Power Act (FPA) for the Veazie Energy Recovery Project No. 13164.¹ The District asks the Commission to clarify the terms and conditions of its exemption. This order grants rehearing, in part.

Background

2. Section 30 of the FPA² provides that the Commission may grant an exemption from licensing for a small conduit hydroelectric project, i.e., a project that uses the hydroelectric potential of a manmade conduit that is operated primarily for agricultural, municipal, or industrial purposes. The exempted project includes only those facilities that are "constructed, operated, or maintained for the generation of electric power."³ It does not include the conduit on which the hydroelectric facility is located or any dam or impoundment.⁴

¹ *Bangor Water District*, 126 FERC ¶ 62,039 (2009).

² 16 U.S.C. § 823 (2006).

³ *Id.*

⁴ *See* 18 C.F.R. § 4.30(b)(28) (2008).

3. Under section 30(c) of the FPA,⁵ the Commission is required to include in the exemption such terms and conditions as the federal or state fish and wildlife agencies deem appropriate to prevent the loss of, or damage to, fish and wildlife resources and to carry out the purposes of the Fish and Wildlife Coordination Act.⁶ The conditions may either be submitted to the exemption applicant and included in the exemption application, or they may be submitted by the agency in response to the Commission's notice of the application.

4. On April 11, 2008, the District filed an application for a small conduit hydroelectric facility for the 75-kilowatt Veazie Energy Recovery Project, located on the District's municipal water supply conduit in the Town of Veazie, Penobscot County, Maine. The project will capture a portion of the hydraulic energy contained in the flow of the District's municipal water supply system by using an in-line micro turbine generating unit. The 75-kilowatt unit will be installed in an existing control valve building.

5. On April 23, 2008, U.S. Fish and Wildlife Service (FWS) sent the District comments and mandatory terms and conditions. FWS' mandatory conditions involve the treatment of Floods Pond, a reservoir that supplies water through a system of conduits to the District's municipal and individual customers. The District's conduit exemption is located approximately 13 miles downstream of Floods Pond. FWS' conditions require the District to: (1) consult with federal and state fish and wildlife agencies if the District changes current water withdrawal levels at Floods Pond; (2) insure that water withdrawals at Floods Pond are consistent with loon management; and (3) install fish screens at the inlet pipe of Floods Pond to prevent entrainment or impingement.⁷

6. On May 9, 2008, the District filed FWS' conditions with the Commission along with the District's response objecting to the conditions as being outside the scope of the exemption.⁸

⁵ 16 U.S.C. § 823(c) (2006).

⁶ 16 U.S.C. § 661, 667e (2006).

⁷ See District's May 9, 2008 filing, which it filed in Docket No. DI07-11-000 by mistake.

⁸ The District erroneously filed the comments in DI07-11-000, the docket in which it was determined that the District's proposed project needed a license or exemption.

7. On October 30, 2008, the Secretary issued a notice accepting the conduit application for filing and soliciting comments and motions to intervene.⁹
8. On January 16, 2009, Commission staff issued the District a small conduit exemption for the Veazie Energy Recovery Project. The order stated, “[t]his exemption requires compliance with the terms and conditions prepared by federal or state fish and wildlife agencies to protect fish and wildlife resources.”¹⁰ No specific federal or state terms and conditions were attached to the order.¹¹
9. On February 12, 2009, the District filed a request for rehearing or clarification, arguing that the FWS section 30(c) conditions should not apply to its exemption.

Discussion

10. The District argues that FWS did not properly submit its section 30(c) conditions because FWS neither timely notified the District of such conditions prior to the District filing its application nor did it file its conditions in response to the Commission’s notice. Since the District did not raise this argument as part of its statement of issues, it is deemed waived. The Commission’s regulations require any request for rehearing to contain a separate section entitled “Statement of Issues,” and provides that any issue not listed in this section will be deemed waived.¹²
11. In any event, we disagree with the District’s contentions that the conditions were not properly filed.
12. Under section 4.38(c) of the Commission’s regulations,¹³ a potential applicant, before filing its exemption application with the Commission, must provide the resource agencies with a copy of its draft application, and allow the agencies 90 days to comment thereon.

⁹ 73 Fed. Reg. 66,032 (November 6, 2008) (the deadline for filing comments was December 29, 2008).

¹⁰ *Bangor Water District*, 126 FERC ¶ 62,039 (2009).

¹¹ As a general rule, section 30(c) conditions are attached to the order as an appendix. The District’s exemption contained no appendix.

¹² 18 C.F.R. § 385.413(c)(2) (2008).

¹³ 18 C.F.R. § 4.38(c) (2008).

13. On February 8, 2008, the District provided the agencies with a draft of its conduit exemption application and asked the agencies to provide comments on the draft application within 30 days, instead of the 90 days required by our regulations. FWS did not respond within the 30-day period. On April 11, 2008, the District informed FWS that, since 60 days had elapsed since the District's request for comments, it was filing the application, but would forward any comments to the Commission that FWS might subsequently file. On April 23, 2008, (well within the 90 days allowed by our regulations) FWS sent its comments to the District. The comments contained section 30(c) conditions for inclusion in any exemption for the District's project.¹⁴ The District submitted the FWS letter on May 9, 2008. Under these circumstances, we find that FWS' conditions were properly submitted.

14. The District further argues that, even if the conditions were properly submitted, they are not valid because they attempt to control aspects of the District's water supply system that are not part of the exempted project and are in fact facilities many miles from the project.

15. FWS' terms and conditions indeed fall outside the scope of a small conduit exemption. The scope of a conduit exemption is narrow; it includes only those facilities that are constructed and operated for hydroelectric purposes. As explained above, the District's project consists of a micro turbine generating unit to be placed in one of the District's water supply pipes. It will not affect the rate or volume of water flow, but will simply be substituted for an existing energy-dissipating device.

16. With respect to exemptions from licensing, the Commission previously held that agency conditions unrelated to the exempted facilities are outside the Commission's authority and thus will not be included in the exemption.¹⁵

17. Because FWS' conditions concern Floods Pond, a facility that is not part of the conduit exemption, the conditions recommended by FWS are outside of our authority to require of the District and we will not include them in the exemption.

¹⁴ The District contends that the Commission should exclude FWS' conditions, since the conditions cited to section 4.106 of the Commission's regulations, which pertain to small hydroelectric exemptions rather than conduit exemptions. That FWS cited to the incorrect Commission regulation does not invalidate the conditions.

¹⁵ See *BMB Enterprises, Inc.*, 67 FERC ¶ 61,227, at 61,692 (1994). See also *Traverse City Light and Power Board*, 19 FERC ¶ 61,109 (1982) (finding that conditions regarding recreation are not valid section 30(c) conditions because they do not relate to fish and wildlife resources).

The Commission orders:

The request for rehearing by Bangor Water District on February 12, 2009, is granted, in part, as discussed herein.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.