

131 FERC ¶ 61,166  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Exelon Generation Company, LLC

Project Nos. 405-096  
2355-012

ORDER DENYING REHEARING

(Issued May 20, 2010)

1. On February 4, 2010, the Director, Office of Energy Projects (Director), issued study plan determination letters to Exelon Generation Company, LLC (Exelon), licensee for the 573-megawatt (MW) Conowingo Hydroelectric Project No. 405, and the 800-MW Muddy Run Pumped Storage Project No. 2355, both located on the lower Susquehanna River. On February 24, 2010, the Susquehanna River Basin Commission (SRBC) filed a notice of study dispute of the two letters, which was dismissed on March 3, 2010, by the Director because SRBC is not an agency with mandatory conditioning authority under sections 4(e) and 18 of the Federal Power Act. On March 8, 2010, SRBC filed a request for rehearing of the Director's letter dismissing its notice of study plan dispute and, in the alternative, rehearing of the Director's study plan determination letters. In this order, we deny the rehearing requests.

**Background**

2. The Conowingo Project is the lowermost of five hydroelectric projects on the lower Susquehanna River; the Muddy Run Project is the second lowermost. Proceeding downstream from the 19.6-MW York Haven Hydroelectric Project No. 1888 (at river mile (RM) 55) are the 417.5-MW Safe Harbor Hydroelectric Project No. 1025 (at RM 33), the 107.2-MW Holtwood Project (at RM 25), and the Conowingo Project (at RM 10). The Muddy Run Project is located between the Holtwood and Conowingo Projects and uses the Conowingo Pond as its lower reservoir. Three of these projects, York Haven, Conowingo, and Muddy Run, are currently in the relicensing process.<sup>1</sup>

---

<sup>1</sup> The current license for the Conowingo Project was issued in 1980 (19 FERC ¶ 61,348 (1982)) and will expire in 2014. The license for the Muddy Run Project was issued in 1964 (32 FPC 826) and will expire in 2014. The license for York Haven was issued in 1980 (21 FERC ¶ 61,430 (1982)) and will expire in 2014. The licenses for the Safe Harbor and Holtwood projects will expire in 2030.

3. On March 12, 2009, Exelon filed with the Commission notices of its intent to apply for new licenses for the Conowingo and Muddy Run Projects, pursuant to the integrated licensing process (ILP),<sup>2</sup> as well as pre-application documents (PAD).<sup>3</sup> In its PAD for the Conowingo Project, Exelon proposed, in addition to a number of studies on various matters, to conduct an assessment of the environmental effects of coordinated flow releases at the Safe Harbor, Holtwood, and Conowingo Projects in the lower Susquehanna River and to complete literature reviews on American eel and American shad populations and the impact on these species of passage through the projects.<sup>4</sup> For its Muddy Run Project, Exelon proposed several studies, but none for water quality and fisheries issues, noting that it believed the existing information regarding these matters was adequate.<sup>5</sup>

4. On May 11, 2009, Commission staff issued a notice and scoping document for the purpose of obtaining public comment on its initial determination of the issues to be studied in the proposed environmental assessment in the two relicensing proceedings, and seeking comments and study requests from interested stakeholders for both projects.<sup>6</sup>

5. One of the participants who filed comments and requested studies was the SRBC. The SRBC was established by the Susquehanna River Basin Compact,<sup>7</sup> with duties and responsibilities for comprehensive planning, programming, and management of the water and related resources of the Susquehanna River Basin. In 1975 the Commission and SRBC entered into a Memorandum of Understanding (MOU). Under the November 5, 1975 MOU, the Commission and SRBC committed to cooperate in the processing of

---

<sup>2</sup> The ILP was established by the Commission in 2003 with the goal of creating efficiencies by integrating a potential license applicant's pre-filing consultation with the activities of the Commission and other agencies pursuant to the Federal Power Act, the National Environmental Policy Act (NEPA), and other applicable legislation. *See Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, 68 Fed. Reg. 51,070 (Aug. 25, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,150 (2003) (ILP Preamble).

<sup>3</sup> *See* 18 C.F.R. § 5.6 (2009) (requiring filing of PAD).

<sup>4</sup> *See* Conowingo PAD filed on March 12, 2009, at sections 5.1 and 5.2.

<sup>5</sup> Muddy Run PAD filed on March 12, 2009, at sections 5.1 and 5.2.

<sup>6</sup> A revised scoping document was issued on August 24, 2009, that reflected comments received during the scoping meetings.

<sup>7</sup> Pub. L. No. 91-575, 84 Stat. 1509 (1970). The Compact is a Federal interstate agreement among Maryland, Pennsylvania, and the United States.

license applications to the extent feasible and the Commission agreed to give due regard to any recommendations made by the SRBC.

6. Among other things, the SRBC requested that for the Conowingo Project Exelon (1) include a water quality model as part of the proposed water quality study (study 3.1); (2) include an on-site turbine mortality study of adult and juvenile American shad as part of the downstream fish passage effectiveness study (study 3.2); (3) include the entire 55-mile reach from the York Haven Project to the Conowingo Project in the hydrologic study of the lower Susquehanna River (study 3.11); and (4) include a separate river reach (reference reach) that could be used in comparison to the aquatic community downstream of the Conowingo Project (study 3.18).<sup>8</sup> For the Muddy Run Project, SRBC requested that Exelon conduct a turbine mortality study as part of the entrainment and impingement study (study 3.3).<sup>9</sup>

7. Exelon did not include most of these components in its proposed study plans.<sup>10</sup> On September 22 and 23, 2009, Exelon and numerous stakeholders, including SRBC, participated with Commission staff in a meeting to discuss the proposed study plans and try to resolve disagreements about what the plans should address.<sup>11</sup> The meetings did not result in the inclusion of SRBC's requested changes to the four studies.<sup>12</sup>

8. On February 4, 2010, the Director issued his study plan determination letters, which did not require Exelon to include the elements proposed by the SRBC. On February 24, 2010, SRBC filed a formal dispute notice of the two letters. On March 3, 2010, the Director dismissed SRBC's study dispute notice. On March 8, 2010, SRBC

---

<sup>8</sup> See letters filed by the SRBC regarding Conowingo Project No. 405 on November 23, 2009, at pp. 10, 13, and 23; and January 20, 2010, at pp. 2, 6, 10, and 18-19.

<sup>9</sup> See letter filed by the SRBC regarding Muddy Run Project No. 2355 on January 20, 2010, at p. 3.

<sup>10</sup> See Exelon's Proposed Study Plan for the Conowingo Project, filed August 24, 2009, at sections 3.1, 3.2, 3.3, 3.11, and 3.18, and Exelon's Proposed Study Plan for the Muddy Run Project No. 405, filed August 24, 2009, at section 3.3. Exelon did include an onsite balloon tagging study to address turbine-induced mortality of fish, though not at the sample sizes requested by SRBC and others.

<sup>11</sup> See Exelon's Revised Study Plan filed December 22, 2009, at section 6.

<sup>12</sup> See Exelon's Revised Study Plan for the Conowingo Project, filed December 22, 2009, at Table 1-1, and sections 3.1, 3.2, 3.3, 3.11, and 3.18, and Exelon's Revised Study Plan for the Muddy Run Project No. 2355, filed December 22, 2009, at Table 1-1 and section 3.3.

filed a request for rehearing of the Director's dismissal letter and, in the alternative, rehearing of the study plan determinations.

## **Discussion**

### **A. Participation in Formal Dispute Resolution Process**

9. Section 5.14 of the Commission's regulations<sup>13</sup> allows federal agencies with mandatory authority pursuant to sections 4(e) and 18 of the Federal Power Act (FPA)<sup>14</sup> to file a notice of study dispute with respect to studies pertaining directly to the exercise of their authority under FPA sections 4(e) or 18.

10. On rehearing, SRBC argues that it should be permitted to bring a formal dispute despite its lack of authority pursuant to section 4(e) or 18. It asserts that it has concurrent jurisdiction with the Commission and regulates hydroelectric projects pursuant to certain provisions of the Susquehanna River Basin Compact<sup>15</sup> and its own regulations.<sup>16</sup> It argues that the Director should have allowed it to participate in the formal dispute process to facilitate SRBC achieving its own statutory mandates, which include coordinating the planning, conservation, management, utilization, development and control of the basin's water resources among the public and private sectors. SRBC states that the study plan revisions that it proposed are necessary to maintain consistency with its Comprehensive Plan for the Water Resources of the Susquehanna River Basin and to assure compliance with federal requirements.<sup>17</sup>

11. In establishing the ILP, the Commission carefully limited the ability to initiate study dispute resolution to agencies with mandatory conditioning authority under FPA sections 4(e) and 18 or under section 401 of the Clean Water Act. While SRBC is a federal agency, it admits that it does not fit into the categories set forth in the regulations. Therefore, the Director properly dismissed its filing. Moreover, while the Commission expects that its staff will work with the SRBC as contemplated by the MOU, the Commission has no obligation to provide a record to support other agencies' decision

---

<sup>13</sup> 18 C.F.R. § 5.14 (2009).

<sup>14</sup> 16 U.S.C. §§ 797(e) and 811 (2006). State agencies or tribes with mandatory authority pursuant to section 401 of the Clean Water Act are also permitted by 18 C.F.R. § 5.14 to avail themselves of the formal dispute process.

<sup>15</sup> Pub. L. No. 91-575, 84 Stat. 1509 at Article 3, Section 3.10, and Article 10, Section 10.1.

<sup>16</sup> 18 C.F.R. Parts 801, 806, 807, and 808.

<sup>17</sup> Rehearing request at 11-12.

making or to require studies that it does not deem necessary to evaluate the merits of proposed projects.<sup>18</sup>

12. SRBC also argues that the Director's study plan determinations failed to consider the Commission's commitment under the 1975 MOU.<sup>19</sup> As noted above, under the 1975 MOU, the Commission and SRBC committed to cooperate in the processing of license applications to the extent feasible and the Commission agreed to give due regard to any recommendations made by the SRBC. However, that does not mean that the Commission must require a study on SRBC's behalf where the Commission does not believe it is necessary.

13. SRBC contends that the Director did not provide adequate due process because his letters were issued one day after Exelon filed its motion to dismiss SRBC's notice of dispute, allowing SRBC no opportunity to respond.<sup>20</sup> However, that Exelon made a filing one day prior to the issuance of the Director's decision was coincidental. The Director's action was independent of Exelon's filing, and there was no reason to delay it based on the filing. In any case, the SRBC has had the opportunity to fully respond to Exelon's arguments in SRBC's request for rehearing.

14. SRBC claims that the Director's determinations were arbitrary and capricious because he failed to waive any portions of Commission's rules necessary to allow SRBC to participate.<sup>21</sup> However, SRBC never asked the Director for such a waiver. As noted above, the formal dispute resolution process was established for the limited use of agencies with mandatory conditioning authority under FPA section 4(e) or 18 (or section 401 of the Clean Water Act) to have an opportunity to demonstrate how the study they are requesting is needed for them to set their mandatory conditions under those statutory provisions. Here, because SRBC is not a mandatory conditioning agency and has no mandatory conditions to support, the Director would have had to waive both the requirement that an agency have mandatory conditioning authority under FPA section 4(e) or 18 (or section 401 of the Clean Water Act) and that the agency must demonstrate how the study is needed for it to set mandatory conditions under FPA section 4(e) or 18 (or section 401 of the Clean Water Act). The Director has not waived these requirements for any other agency; there was no reason for him to do so here.

---

<sup>18</sup> ILP Preamble at P 92. *See also Curtis/Palmer Hydroelectric Company LP and International Paper Company*, 92 FERC ¶ 61,037 (2000). *See also United States Department of the Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992).

<sup>19</sup> Rehearing request at 12-14.

<sup>20</sup> Rehearing request at 14.

<sup>21</sup> Rehearing request at 14-16.

## **B. Rehearing of Study Plan Determination**

15. Alternatively, if the Commission does not permit SRBC to bring a formal dispute, SRBC seeks rehearing of the Director's study plan determination itself. As the Commission has stated in previous orders,<sup>22</sup> 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. Thus, the Commission has declined to accept requests for rehearing of a number of staff procedural actions.<sup>23</sup> The Commission relies on its staff to run proceedings conducted under delegated authority, just as administrative law judges do with respect to trial-type hearings, and it is only in very unusual circumstances that it would be appropriate to intervene in those proceedings before a substantive decision is before the Commission for review. We prefer to abstain from involving ourselves in the details of licensing proceedings, absent a compelling reason to do so.<sup>24</sup> There has been no suggestion that the studies at issue are of such great importance to the relicensing that we must intervene at this point.

---

<sup>22</sup> *Public Utility District No. 1 of Douglas County, Washington*, 122 FERC ¶ 61,032 (2008); *Ketchikan Public Utilities*, 121 FERC ¶ 61,155 (2007), citing *City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003); and *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980).

<sup>23</sup> *Public Utility District No. 1 of Douglas County, Washington*, 122 FERC ¶ 61,032 (2008) (dismissing request for rehearing of denial of study request). *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).

<sup>24</sup> *Public Utility District No. 1 of Douglas County, Washington*, 122 FERC ¶ 61,032 (2008).

16. In addition, the record in this proceeding is still being developed, and final determinations as to the nature of studies that will be requested are still in flux. If, after the first season, it is determined that the information SRBC seeks is needed for an understanding of the impacts of the projects, Commission staff may in fact require that the studies be conducted as SRBC suggested. In consequence, the issues raised by SRBC are not yet ripe.

The Commission orders:

The rehearing requests filed on March 8, 2010, by the Susquehanna River Basin Commission, are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,  
Secretary.