

136 FERC ¶ 61,042
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

City of Spearfish, South Dakota

Project No. 12775-002

ORDER DISMISSING FILING AS DEFICIENT

(Issued July 21, 2011)

1. On April 21, 2011, the Commission issued to the City of Spearfish, South Dakota, an original license to operate and maintain the existing 4.0 megawatt (MW) Spearfish Project No. 12775, located on Spearfish Creek in Lawrence County, South Dakota, partially on lands within the Black Hills National Forest.¹ On May 23, 2011, ACTION for the Environment (ACTION) filed a timely request for rehearing of the Commission's order.

2. ACTION's request for rehearing is deficient because it fails to include a Statement of Issues, as required by Rule 713 of the Commission's Rules of Practice and Procedure.² Rule 713(c)(2) requires that a request for rehearing include a separate section entitled "Statement of Issues" that lists each issue presented to the Commission on rehearing in a separately enumerated paragraph, which includes representative Commission and court precedent upon which the requester is relying. Under Rule 713, any issue not so listed is deemed waived. Accordingly, ACTION's rehearing request is dismissed.³

3. While as noted, ACTION has waived the issues raised in its request for rehearing, we will nonetheless address them below, for purposes of clarity. ACTION filed comments throughout the licensing process which were addressed in both Commission staff's November 8, 2010 environmental assessment (EA) and the Commission's order. On rehearing ACTION reiterates a number of previously considered comments and raises a

¹ *City of Spearfish, South Dakota*, 135 FERC ¶ 61,045 (2011) (*Spearfish*).

² 18 C.F.R. § 385.713(c)(2) (2011).

³ See, e.g., *South Carolina Electric & Gas Co.*, 116 FERC ¶ 61,218 (2006); *Duke Power Co., LLC*, 116 FERC ¶ 61,171 (2006).

few new assertions regarding elements of the Commission's decision. These arguments raised by ACTion are unpersuasive.

4. ACTion contends that the Commission erred in finding that the project power was needed. ACTion reiterates the claim that there is no need for power from the Spearfish Project within the Midwest Reliability Organization-U.S. sub-region, and that if additional power were required, wind generation could fulfill any needed new capacity.⁴ When examining whether a project will provide power needed under the public interest standard, the Commission looks to more than the power produced by the individual project, but to such factors as whether there is a regional need for power, and whether the project will provide diversification to the region's generation.⁵ The order, relying upon staff's EA, explained that this project will provide beneficial, dependable, and inexpensive energy from a renewable resource, thereby reducing atmospheric pollution; contributes to a diversified generation mix; and aids in supplying energy for the forecasted growing demand in the region.⁶ Even with increased wind power production, this project will continue to be a dependable source of electrical energy for its customers. Thus, we affirm that there is a need for the power the project will produce.

5. ACTion also believes that the Commission failed to accurately assess the project's economics because the Commission used a 2007-2008 estimate of alternative power at \$48.76/megawatt hours (MWh),⁷ rather than a 2009 estimate of \$35.49/MWh.⁸ The license order found that the value of the project power using a 2008 estimate was \$821,170, which yielded an estimate that project power would cost \$293,990 (\$17.46/MWh) less than the likely cost of alternative power. Even when using a power value of \$35.49/MWh, project power would still cost \$70,510 less than the likely cost of alternative power. In any case, project economics is not a determinative consideration

⁴ Rehearing Request at 2-5.

⁵ See *Boise Cascade Corp.*, 36 FERC ¶ 61,135, at 61,331 (1986); *Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,207, at 61,633 (1999).

⁶ EA at 3-4; *Spearfish*, 135 FERC ¶ 61,045 at P 72. Although there is projected need for power in the region, ACTion contends that the NERC report finds that there will be sufficient generation sources available to meet this need, even factoring in a 15-percent reserve margin. However, ACTion's contention does not undermine our finding that the project is a dependable and low-cost source of energy available for the region to meet its power needs.

⁷ *Spearfish*, 135 FERC ¶ 61,045 at P 78.

⁸ Rehearing Request at 5-12.

under the public interest standard under which we review license applications. Rather, licensees ultimately must make the decision whether or not to accept and proceed with a license in what appears to be the net economic costs of a project.⁹ Any change in alternative power value is irrelevant here.

6. ACTion also asserts that the Commission failed to adequately assess the benefits of project removal for public purposes such as recreation as an alternative to continued operation of the hydropower project by not applying current dollar estimates on recreation. In acting on license applications, sections 4(e) and 10(a)(1) of the FPA require the Commission to give equal consideration to the developmental and environmental uses of the waterway on which the project is located.¹⁰ However, the Commission has noted that “[t]he equal consideration requirement of Section 4(e) is not an ‘equal treatment’ requirement. Rather, this requirement is satisfied when the Commission considers the impacts of the project proposal and action alternatives on all affected developmental and non-developmental resources.”¹¹ Furthermore, in the context of balancing the public interest for non-power resources, it is not appropriate to rely on the accuracy of current dollar estimates which can be calculated using any number of reasonably disputable assumptions and methods.¹² Instead of applying current dollar estimates on the non-power resources, Commission staff in the EA thoroughly analyzed the value (including use and need for recreation) of non-power resources and the effects that project operation would have on such resources.¹³ In the order issuing license, the Commission adopted Commission staff’s recommended measures finding that they would best protect and enhance fish and wildlife resources, water quality, recreational resources, historic properties, and concluded that issuing a license, as condition in the order, was best adapted to a comprehensive scheme for improving or developing

⁹ See *City of Tacoma, Washington v. FERC*, 460 F.3d 53, 72-74 (D.C. Cir. 2006) (affirming Commission’s *Mead Corp.* economic policy); *Public Service Co. of Colorado*, 79 FERC ¶ 61,148, at 61,634 (1997).

¹⁰ 16 U.S.C. §§ 797(e) and 803(a)(1) (2006).

¹¹ *Midwest Hydro, Inc.*, 113 FERC ¶ 61,125, at P 14 (2005).

¹² See *City of Tacoma, Washington*, 84 FERC ¶ 61,107, at 61,572 (1998) (“Although dollar values can sometimes be used to compare potential benefits and impacts, when recreational, cultural, aesthetic, native plant and wildlife habitat, or other environmental values are present, such as here, the public interest cannot be evaluated adequately only by dollars and cents.”).

¹³ EA at 67-80.

Spearfish Creek.¹⁴ ACTion's assertions do nothing to undermine this conclusion. ACTion presents no new evidence that has not been fully considered by the Commission. Thus, we continue to find that the public interest is best served by issuing a license for this project.

7. Arguing in favor of an alternative to the project as licensed, ACTion contends that the minimum flow requirements of the license are not preferable to ACTion's proposed minimum flow.¹⁵ ACTion's rehearing request raises no new issues of fact, law, or policy to explain why the Commission should change the required minimum flows, but simply reiterates its previous comments which have all been previously analyzed and considered.¹⁶ Therefore, we have no need to elaborate on our previous discussions of this matter.

8. Last, ACTion restates its position that water losses in the project's penstocks are about 8-9 cfs rather than 2 cfs as estimated by the Commission.¹⁷ ACTion notes that Article 304 requires the licensee to inspect the penstocks and to submit a report on their condition to the Commission's Division of Dam Safety and Inspections. ACTion asks that the Commission require repairs to the penstock if it is determined to be necessary by the inspection, and if repairs are required, to reconsider the minimum flow regime in light of additional flows captured by such repairs.

¹⁴ *Spearfish*, 135 FERC ¶ 61,045 at P 82-83.

¹⁵ Rehearing Request at 13-15. ACTion also argues that Commission staff, in the EA, overestimated the cost of a weir and pipeline that would convey ACTion's proposed flows beyond a portion of the project's bypassed reach. Cost estimates for each of the components of the pipeline were obtained from the 2007 RSMeans Heavy Construction Cost Data report. The total cost for the weir and pipeline includes: (1) an excavation cost for a three-mile-long trench; (2) a material cost of three miles of steel pipe and associated bedding material; (3) a cost to backfill the three-mile-long trench to protect the pipeline and restore the stream bed; (4) administration, engineering, and contingency fees; and (5) installation costs for the weir and associated gages. These component costs resulted in a total estimated cost for construction and installation of the weir and pipeline to be \$2,147,990, a cost which the Commission reasonably concluded was not justified by the alternative minimum flow's benefits, noting that ACTion's alternative minimum flow would reduce the project's annual generation by about 4,814 MWhs, resulting in a levelized annual cost for the alternative flow of \$396,150. *Spearfish*, 135 FERC ¶ 61,045 at P 50.

¹⁶ See EA at 110-12; *Spearfish*, 135 FERC ¶ 61,045 at P 44-54.

¹⁷ Rehearing Request at 15-17.

9. In the license order, the Commission explained that staff's estimate of a 2 cfs leakage was supported by the record, and ACTION provides no information to cause us to doubt that conclusion.¹⁸ In any case, as discussed above, we have concluded that the project as licensed represents an appropriate public interest balance. Should in the future there prove to be significant, unanticipated environmental impacts caused by the project, we retain the authority to reopen the license to resolve those impacts and may impose whatever measures, including repairs to the penstock, we find necessary.

The Commission orders:

The request for rehearing filed on May 23, 2011, by ACTION for the Environment, is dismissed.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁸ See EA at B-2; *Spearfish*, 135 FERC ¶ 61,045 at n.44.