

137 FERC ¶ 61,127
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

FirstLight Hydro Generating Company

Project No. 2576-151

ORDER REJECTING MOTION FOR CLARIFICATION
AND REQUEST FOR REHEARING

(Issued November 17, 2011)

1. The Candlewood Lake Authority (Candlewood) has filed a motion for clarification and request for rehearing of a September 23, 2011 Commission staff order approving the request of FirstLight Hydro Generating Company to modify the nuisance plant monitoring plan for its Housatonic Project No. 2576. As discussed below, we reject the motion and request for rehearing but, for clarity, address Candlewood's substantive concerns.

Background

2. The 114.9-megawatt Housatonic project is located on the Housatonic River in Fairfield, New Haven, and Litchfield Counties, Connecticut. The project includes five developments and, as relevant here, three significant impoundments, Candlewood Lake, Lake Lillinonah, and Lake Zoar. On June 23, 2004, the Commission issued a new license to operate and maintain the project to FirstLight's predecessor, Northeast Generation Services Company.¹

3. Article 409 of the license required the licensee to file, within 12 months, a nuisance plant monitoring plan, to include annual monitoring of Candlewood Lake, Lake Lillinonah, and Lake Zoar for Eurasian watermilfoil and other invasive plants. The plan, to be prepared in consultation with the U.S Fish and Wildlife Service (FWS), Connecticut Department of Environmental Protection (Connecticut DEP), Candlewood Lake Authority, Lake Lillinonah Authority, and Lake Zoar Authority,² was to include a

¹ *Northeast Generation Services Company*, 107 FERC ¶ 61,305 (2004).

² The lake authorities operate under state law as agents for municipalities bordering lakes in the enforcement of boating laws, the control and abatement of aquatic

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provision for establishing a technical committee, composed of representatives of the groups listed above, with the exception of the U.S. Fish and Wildlife Service, to evaluate the results of the monitoring.³

4. The licensee filed the nuisance plant monitoring plan on June 27, 2005. By order dated February 3, 2006, the Commission approved the plan, which proposed to establish an annual program for monitoring invasive aquatic plants, especially Eurasian water milfoil, in Candlewood, Lillinonah and Zoar Lakes, and to include the Connecticut DEP and the three lake authorities in the technical committee.⁴ The order noted that Connecticut DEP and the Candlewood Lake Authority has recommended adding several plant species, as well as zebra mussels,⁵ to the plan, but concluded that these were matters to be considered by the technical committee; the Commission reserved the authority to modify the plan to include measures to control invasive species and the monitoring of zebra mussels and other species.⁶

5. On April 27, 2011, FirstLight filed a letter with the Commission in which it stated that zebra mussels had been detected in Lake Lillinonah and Lake Zoar. The company explained that stakeholders had asked it not to pump water into Candlewood Lake once water temperatures reached 50 degrees Fahrenheit, in order to prevent the introduction of the mussels into the lake. FirstLight said that it would continue to consult with stakeholders as it developed a plan, to be filed for Commission approval, to include zebra mussel monitoring in the Nuisance Plant Monitoring Plan. The company added that it expected to include the results of zebra mussel monitoring in the annual nuisance plant monitoring plan report.⁷ The company appended to the filing a public statement in which it explained that it could not guarantee that it would not pump water into Candlewood Lake when water temperatures reached 50 degrees due to license requirements, including

weeds and algae, and various other water management issues. 107 FERC ¶ 61,305 at P 40.

³ 107 FERC ¶ 61,305 at 62,438.

⁴ *See Northeast Generation Services Company*, 114 FERC ¶ 62,101 (2006).

⁵ Zebra mussels, which were brought to North America from Europe in ships' ballast water, have inflicted tremendous damage to native ecosystems and to facilities using water, like power plants and municipal water suppliers. <http://www.fws.gov/fisheries/ans/> (visited October 26, 2011).

⁶ 114 FERC ¶ 62,101 at 64,306-07.

⁷ Letter from Richard T. Laudenat (FirstLight) to Kimberly D. Bose (Commission Secretary) at 1-2.

the possible need to pump due to a rain event, as required by the Lower Housatonic River Flood Control Plan (part of the Emergency Action Plan for the project) and to meet required minimum lake levels established by the license for enhanced recreational boating. FirstLight also asserted that it might need to pump in order to assure that it could provide sufficient generation to meet its reliability obligations to the ISO New England electrical system.⁸

6. On August 2, 2011, FirstLight filed a request to modify the nuisance plant monitoring plan by including zebra mussel monitoring. The company proposed to survey for zebra mussel veligers (larvae), and, where adult mussels were discovered, to discuss with the technical committee management of nuisance aquatic species through manipulation of drawdown elevations.⁹ The filing also included an updated public statement, dated May 11, in which it indicated that it had not pumped any water from the Housatonic into Candlewood Lake since water temperatures reached 50 degrees, and that it had suspended pumping until it received [presumably negative] monitoring results or was required to pump as a result of energy generation requirements, regulatory constraints, or law.¹⁰

7. On September 23, 2011, Commission staff issued an order approving FirstLight's request to include zebra mussel monitoring as part of the nuisance plant monitoring control plan. The order noted FirstLight's voluntarily effort to restrict pumping, as well as its constraints in maintaining the pumping moratorium.¹¹

8. On October 20, 2011, Candlewood filed a motion for clarification and request for rehearing.

Discussion

9. An entity must be a party to a proceeding in order to file a motion or a request for rehearing.¹² Although we might have concluded that Candlewood was entitled to intervene here because Article 409 included it as an entity to be consulted on the nuisance plant monitoring control plan, it did not file a motion to intervene.¹³ Consequently,

⁸ *Id.* at Exhibit B.

⁹ August 2, 2011 Filing at 1-2.

¹⁰ *Id.* at Attachment D.

¹¹ 136 FERC ¶ 62,257 at P 6.

¹² *See, e.g., Appalachian Power Company*, 134 FERC ¶ 61,113, at P 17-18 (2011).

¹³ Candlewood also did not intervene when the initial nuisance plant monitoring

Candlewood is not a party to these proceedings¹⁴ and we must reject its pleading. We nonetheless discuss below the issues raised by Candlewood, for purposes of clarity.

10. Candlewood asks the Commission to clarify whether the Commission's approval of the revised monitoring plan was conditioned on FirstLight's agreement not to pump water into Candlewood Lake when river temperatures are above 50 degrees. If not, Candlewood asks the Commission to impose this condition, conditioned to minimize its impact on FirstLight's other operational requirements and responsibilities.¹⁵

11. The September 23 Order was not premised on the agreement to limit pumping. Rather, the order simply recited the nature of FirstLight's commitment. Therefore, we cannot grant the requested clarification.

12. In addition, given that FirstLight has not proposed to make the pumping limitation part of the license, the Commission could not unilaterally make it a license requirement without providing the company notice and opportunity for hearing.¹⁶ We also could not impose a new restriction on pumping into Candlewood Lake without revising those portions of the license that such a provision would alter. As FirstLight has mentioned, Article 403 of the project license requires the company to keep Candlewood Lake between elevations 425.1 and 427.6 feet National Geodetic Vertical Stratum during the summer recreation season (from Memorial Day through October 15), and also limits winter drawdowns to specified levels.¹⁷ Moreover, the Emergency Action Plan approved by the Commission for the project provides that in some circumstances the company will pump flows into Candlewood Lake as a flood control measure.¹⁸

plan was filed in 2005. Candlewood has, however, intervened in other proceedings involving the Housatonic Project and so is familiar with our regulations.

¹⁴ Although Candlewood was a party to the relicensing proceeding which resulted in the 2004 license order, each post-license matter is new proceeding, requiring a motion to intervene. *See, e.g., City of Tacoma, Washington*, 89 FERC ¶ 61,058 (1999).

¹⁵ *See* motion for clarification and request for rehearing at 4-5.

¹⁶ *See* FPA section 6, 16 U.S.C. § 799 (2006) ("Licenses . . . may be altered . . . only upon mutual agreement between the licensee and the Commission after thirty days' public notice"). *See also, e.g., Fall River Rural Electric Cooperative, Inc. v. FERC*, 543 F.3d 519 (9th Cir. 2008).

¹⁷ *See* 107 FERC ¶ 61,305 at 62,434.

¹⁸ It may also be the case, as FirstLight suggests, that it might need to pump flows into the lake in order to be able to generate at a level that will satisfy ISO New England's

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13. Finally, we think that Candlewood has misconstrued the nature of the current proceeding. The September 23 Order did not establish measures that might be required to control zebra mussels, but rather approved a process for studying the extent to which zebra mussels occur in the project area. Once that study is complete, the licensee, or any other stakeholder, can propose measures to resolve any problems that have been identified. It is premature to consider specific solutions to a problem that is still being studied.

14. Candlewood contends that the Commission erred in issuing the September 23 Order because the Commission had previously required that measures regarding nuisance species were to be discussed between the licensee and the technical committee, a discussion which Candlewood says did not occur.¹⁹ First, as discussed above, the licensee and the stakeholders are still at the stage of studying the zebra mussel issue, and there will be opportunities for consultation before any solutions are adopted. Second, FirstLight appended to its proposed zebra mussel study plan comments from a number of stakeholders, including Candlewood, as well responses from the company. It therefore does not appear that there was a lack of consultation here.

15. We are sympathetic with Candlewood's desire to prevent the spread of a zebra mussels, a goal that seems to be shared by FirstLight and other stakeholders. The record reflects that FirstLight has undertaken voluntary measures to deal with this issue, within the constraints of its license, and has proposed a viable plan for studying the mussel infestation and for consulting with stakeholders on possible measures. We trust that the stakeholders will continue to work together on this matter. If Candlewood, or any other stakeholder, feels in the future that FirstLight is not taking sufficient steps to prevent the

reliability requirements. There are, however, no license conditions dealing with this matter, so, while recognizing the potential significance of this issue, we will not address it here.

¹⁹ Candlewood mentions, motion for clarification and request for rehearing at 6-8, that the Commission, in acting on rehearing of the June 23, 2004 license order, revised license Article 403 to provide that Candlewood Lake winter drawdown levels would be set by the licensee in consultation with the technical committee, and asserts that FirstLight did not comply with this provision when it suggested that, as a "rapid response" measure, it might use drawdown elevations to help control nuisance species. *See P 6, supra*. While Candlewood is correct as to the substance of the rehearing order (*see Northeast Generation Services Company*, 109 FERC ¶ 61,217 at P 18-19 and Ordering Paragraph A), we do not believe that FirstLight has acted inconsistently with article 403. FirstLight only stated that it might discuss with the technical committee the use of drawdowns as a response measure, not that it would unilaterally impose drawdowns. *See August 2, 2011 zebra mussel monitoring plan proposal at 2.*

spread of zebra mussels, it can ask the Commission to revise the nuisance plant plan or to impose other appropriate measures.²⁰

The Commission orders:

The motion for clarification and request for rehearing filed by the Candlewood Lake Authority on October 20, 2011, is rejected.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁰ The fact that Candlewood has not intervened in the instant proceeding and that the issues it raises are premature at this time would not prevent such future requests.