

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

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Appalachian Power Company

Project No. 2210-248

ORDER DISMISSING RECONSIDERATION AND REJECTING REHEARING

(Issued November 20, 2014)

1. On September 15, 2014, the Commission issued a notice<sup>1</sup> denying the request for reconsideration and rejecting the request for rehearing by Automatic Boat Covers of VA & NC, LLC and Innovative Marine Technologies (ABC/IMT) of the Commission's approval of Appalachian Power Company's updated shoreline management plan (SMP) for the Smith Mountain Pumped Storage Project No. 2210.<sup>2</sup> On October 14, 2014, ABC/IMT filed a request for reconsideration and/or rehearing of the September 15 Notice, its fourth request of this kind.<sup>3</sup> We dismiss the request for reconsideration and reject the request for rehearing, as described below.

**Background**

2. In an order issued on January 30, 2014, the Commission approved the licensee's updated SMP. The updated SMP includes "automatic boat covers" within the definition

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<sup>1</sup> *Appalachian Power Co.*, 148 FERC ¶ 61,190 (2014) (September 15 Notice).

<sup>2</sup> *Appalachian Power Co.*, 146 FERC ¶ 62,083 (2014) (January 30 Order), *order den. reh'g*, 147 FERC ¶ 61,051 (2014) (April 17 Order), *order den. reconsideration and rejecting reh'g*, 148 FERC ¶ 61,026 (2014) (July 17 Order).

<sup>3</sup> See requests filed February 28 (Request for Rehearing), May 16 (Request for Reconsideration and/or Rehearing), August 15 (Renewed Request for Reconsideration and/or Rehearing), and October 14 (Renewed Request for Reconsideration and/or Rehearing).

of “structures” that may require permits from the licensee.<sup>4</sup> ABC/IMT, who manufacture and sell automatic boat covers, objected to the definition.

3. In its initial February 28 Request for Rehearing, ABC/IMT made no legal arguments. Its factual arguments<sup>5</sup> were considered in the Commission’s April 17 Order denying rehearing, which found the licensee’s inclusion of automatic boat covers within the definition of “structure” to be reasonable.<sup>6</sup>

4. In its second, May 16 Request for Reconsideration and/or Rehearing, ABC/IMT introduced several new legal and factual arguments. In the July 17 Order, the Commission rejected the request for rehearing because the April 17 Order did not modify the results of the January 30 Order.<sup>7</sup> On reconsideration, the Commission considered each of the factual arguments raised by ABC/IMT and found each to lack merit.<sup>8</sup> We also warned ABC/IMT that its unsupported ad hominem attacks against the licensee’s employee were inappropriate in filings before the Commission.<sup>9</sup>

5. In its third, August 15 Renewed Request for Reconsideration and/or Rehearing, ABC/IMT repeated its legal arguments and provided no new factual arguments. ABC/IMT made additional ad hominem attacks against employees of the licensee,<sup>10</sup> despite our previous warning. In the September 15 Notice, the Commission denied the request for reconsideration and rejected the request for rehearing.<sup>11</sup>

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<sup>4</sup> January 30 Order, 146 FERC ¶ 62,083, at P 65 (“Because automatic boat covers are permanent fixtures and may extend past the dock footprint, it is reasonable for the licensee to include them in the definition of structure.”).

<sup>5</sup> ABC/IMT argued (a) that the January 30 Order had mischaracterized the physical traits of automatic boat covers and (b) that the updated SMP places ABC/IMT at a severe competitive disadvantage and does not treat automatic boat covers equally with comparable, unregulated structures.

<sup>6</sup> April 17 Order, 147 FERC ¶ 61,051 at P 15 (because automatic boat covers “have the potential to restrict visibility and to pose a hazard to navigation. . . . the licensee’s inclusion of ‘automatic boat covers’ in the definition of ‘structure’ is reasonable because the licensee has an obligation to ensure public safety.”).

<sup>7</sup> July 17 Order, 148 FERC ¶ 61,026 at P 20.

<sup>8</sup> *Id.* PP 9-18.

<sup>9</sup> *Id.* P 19.

<sup>10</sup> August 15 Renewed Request for Reconsideration and/or Rehearing at 3.

<sup>11</sup> September 15 Notice, 148 FERC ¶ 61,190.

6. On October 14, 2014, ABC/IMT filed a request for reconsideration and/or rehearing of the April 17 Order, July 17 Order, and September 15 Notice.

### **Discussion**

7. ABC/IMT argues that the September 15 Notice misquotes the Federal Power Act. The September 15 Notice explained that “Petitions for judicial review *must* be filed within 60 days of the date of issuance of this notice, pursuant to section 313(b) of the Federal Power Act.”<sup>12</sup> ABC/IMT claims that the Notice attempted to “short-circuit the deliberative process” by using the mandatory language “must” rather than the statute’s permissive language “may.” ABC/IMT argues instead that the language of section 313(a) allows ABC/IMT, as a party still aggrieved by the outcome of the January 30 Order, to again file a request for rehearing within 30 days of the September 15 Notice, which ABC/IMT considers to be a “final order” triggering a new round of rehearing.

8. Section 313(a) of the Federal Power Act provides that a party aggrieved by an order issued by the Commission “may apply for a rehearing within thirty days after the issuance of such order.”<sup>13</sup> An aggrieved party is entitled to one opportunity to ask the Commission to reconsider a decision. Arguments that are not made then cannot be made later unless there is reasonable ground for failure to do so.<sup>14</sup> The Commission has explained that the successive rehearing of an order on rehearing lies only when the order on rehearing modifies the original order’s result in a manner that gives rise to a wholly new objection.<sup>15</sup> Without such a modification, an entity cannot properly seek rehearing

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<sup>12</sup> *Id* (emphasis added).

<sup>13</sup> 16 U.S.C. § 825l(a) (2012); implemented in Rule 713 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2014).

<sup>14</sup> *Southwest Pub. Serv. Co.*, 65 FERC ¶ 61,088, at 61,533 (1993) (citing *S. Natural Gas Co. v. FERC*, 877 F.2d 1066, 1072-73 (D.C. Cir. 1989)); *see, e.g., Fla. Power Corp.*, 66 FERC ¶ 61,200, at 61,452-53 (holding that attempts in a second request for rehearing to sharpen arguments that could have been raised earlier are an impermissible “second bite at the apple”) (citing *Tenn. Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1111-12 (D.C. Cir. 1989)). Section 19(b) of the Natural Gas Act is substantially identical to section 313 of the Federal Power Act. It is well established that decisions regarding both statutes may be cited interchangeably. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 n.7 (1981).

<sup>15</sup> *See, e.g., Union Elec. Co. d/b/a AmerenUE*, 114 FERC ¶ 61,230, at 61,745-46 (2006); *Duke Power*, 114 FERC ¶ 61,148, at P 1 (2006); *Gustavus Elec. Co.*, 111 FERC ¶ 61,424, at P 3 (2005); *Symbiotic, L.L.C.*, 99 FERC ¶ 61,064, at 61,300 (2002); and *PacifiCorp*, 99 FERC ¶ 61,015, at 61,052 (2002). *See also S. Natural Gas Co.*, 877 F.2d at 1073 (citing *Tenn. Gas Pipeline*, 871 F.2d at 1109-10).

of an order denying rehearing.<sup>16</sup> If it were otherwise, the Commission would be faced with countless successive requests for rehearing as parties raised argument after argument seeking a winner.<sup>17</sup>

9. As a preliminary matter, ABC/IMT raised no legal arguments in its initial February 28 request for rehearing. Beginning in its second, May 16 request for reconsideration and rehearing, ABC/IMT introduced legal arguments: (a) that the Commission has overreached its authority under the Federal Power Act and has improperly delegated federal power to a private licensee; and (b) that the licensee, Appalachian Power Company, has overreached its delegated authority. ABC/IMT repeated permutations of the same arguments in its August 15 and October 14 requests. These arguments could have been raised in ABC/IMT's first request for rehearing and, accordingly, are barred as untimely.

10. Neither the September 15 Notice, nor the July 17 Order, nor the April 17 Order modified the outcome of the January 30 Order approving the updated SMP.<sup>18</sup> In consequence, a successive request for rehearing did not lie. Once the Commission issued the first order on rehearing, the April 17 Order, ABC/IMT was not entitled to seek rehearing again. The Commission rejects ABC/IMT's fourth request for rehearing.

11. To the extent that ABC/IMT again seeks reconsideration in the October 14 pleading, ABC/IMT provides no new material factual arguments.<sup>19</sup> As we stated in the July 17 Order and September 15 Notice, the purpose of reconsideration is to provide an aggrieved party with an opportunity to alert the Commission to a situation in which the

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<sup>16</sup> See, e.g., *S. Co. Serv., Inc.*, 111 FERC ¶ 61,329 (2005); *AES Warrior Run, Inc. v. Potomac Edison Co. d/b/a Allegheny Power*, 106 FERC ¶ 61,181 (2004); *Sw. Pub. Serv. Co.*, 65 FERC at 61,533.

<sup>17</sup> *Sw. Pub. Serv. Co.*, 65 FERC at 61,533 (citing *S. Natural Gas Co.* 877 F.2d at 1072-73.).

<sup>18</sup> An "improved rationale" for the Commission's underlying decision, as appeared in the April 17 Order, does not support a second request for rehearing. See, e.g., *Erie Boulevard Hydropower, L.P.*, 118 FERC ¶ 61,196, at P 8 (2007) (citing *Londonderry Neighborhood Coal. v. FERC*, 273 F.3d 416, 423-24 (1st Cir. 2001), *S. Natural Gas Co.* 877 F.2d at 1073).

<sup>19</sup> ABC/IMT does elaborate on a pair of stakeholder votes about the SMP, October 14 request at 4-6, which ABC/IMT first mentioned in its May 16 request at page 10, but these votes are not material to the Commission's decision.

Commission may not have fully grasped the facts presented on rehearing.<sup>20</sup> Assertions that the licensee implements its SMP in a discriminatory and burdensome way are not facts, nor is this the first time that ABC/IMT has made these assertions. Because ABC/IMT provides no new factual arguments, the October 14 Renewed Request for Reconsideration and/or Rehearing is dismissed.<sup>21</sup>

12. As the D.C. Circuit has stated, in the context of motions to reopen the record, “at some point an agency must be able to say, ‘Enough is enough.’”<sup>22</sup> The Commission has given ABC/IMT more than sufficient due process here, and will entertain no further pleadings from either entity in this proceeding.

The Commission orders:

(A) The request for reconsideration filed by Automatic Boat Covers of VA & NC, LLC, and Innovative Marine Technologies on October 14, 2014, is dismissed.

(B) The request for rehearing filed by Automatic Boat Covers of VA & NC, LLC, and Innovative Marine Technologies on October 14, 2014, is rejected.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>20</sup> *Clifton Power Corp.*, 94 FERC ¶ 61,346, at 62,277 (2001); *see, e.g., Great Northern Paper, Inc.*, 86 FERC ¶ 61,184, at 61,635 (1999); *Racehorse Co.*, 59 FERC ¶ 61,170, at 61,612 (1992).

<sup>21</sup> We also note that, because the initial April 17 Order denying rehearing did not modify the outcome of the underlying January 30 Order “in a significant way,” ABC/IMT’s subsequent requests for rehearing and/or reconsideration did not toll the Federal Power Act’s 60-day period to petition for court review, and, accordingly, ABC/IMT appears to have waived the opportunity for judicial review. *See Smith Lake Improvement and Stakeholders Ass’n v. FERC*, No. 13-1074, 2014 WL 4810781, at \*4 (D.C. Cir. Sept. 26, 2014).

<sup>22</sup> *Cooley v. FERC*, 843 F.2d 1464, 1473 (D.C. Cir.), *cert. denied*, 488 U.S. 933 (1988).