121 FERC ¶ 61,279
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Alcoa Power Generating Inc. Project No. 2197-079

ORDER ON CLARIFICATION AND DISMISSING REQUEST FOR REHEARING

(Issued December 20, 2007)

1. Alcoa Power Generating Inc. (Alcoa) has filed a request for clarification or, in the alternative, rehearing of an October 18, 2007 letter in which Commission staff discussed Alcoa's request for discovery in the relicensing proceedings involving Alcoa's Yadkin Hydroelectric Project No. 2197. As discussed below, we grant clarification and dismiss the request for rehearing.

Background

2. On April 25, 2006, Alcoa filed an application for a new license for the 210-megawatt Yadkin Project, located on the Yadkin River, in Davie, Davidson, Montgomery, Rowan, and Stanly Counties, North Carolina.

3. In comments filed in the proceeding, the City of Salisbury, North Carolina, alleged that sedimentation and flooding caused by the project's High Rock Dam had adverse effects on the City's water intake and waste treatment facilities, and asked the Commission to impose measures to resolve these issues. The City filed several studies which it asserted supported its contentions.[1] Alcoa responded to the City's comments on March 28, 2007. The City filed a rebuttal on May 14, 2007, to which Alcoa replied on June 25, 2007.

4. On September 28, 2007, Commission staff issued a draft environmental impact statement (EIS) analyzing the environmental effects of relicensing the Yadkin Project. Among other things, staff recommended that Alcoa be required to: (1) develop a sedimentation and flood protection plan that includes specific measures to ensure sufficient dredging to keep the City of Salisbury's water intake clear of sediments; and (2) assess the feasibility of implementing measures, such as those proposed by Salisbury,

[1] *See* City of Salisbury's scoping comments and response to Commission staff request for study results (filed February 26, 2007).

to protect the City's pump station and Grant Creek wastewater treatment facility from flooding.[2]

5. On October 5, 2007, Alcoa filed a motion for discovery to allow it to obtain materials underlying Salisbury's submissions regarding sedimentation attributed to the construction, operation, and maintenance of the High Rock Dam. Alcoa appended to its motions a set of data requests, asked that Salisbury and its consultants make knowledgeable persons available for deposition, and requested that a Discovery Master be appointed to resolve potential disputes.

6. On October 15, 2007, Salisbury filed an answer opposing Alcoa's motion.

7. On October 18, 2007, Commission staff sent a letter to Alcoa (October 18 letter), noting the information in the record regarding Salisbury's study, explaining that the EIS had included an evaluation of information submitted by Alcoa and Salisbury, and concluding that the record included sufficient information for Alcoa to provide meaningful comment on staff's analysis of sediment deposition in High Rock Lake.[3]

8. On October 31, 2007, Alcoa filed a request for clarification or, in the alternative, rehearing with respect to the October 18 letter.

Discussion

9. Our regulations state that a party to a proceeding may seek rehearing of "a final Commission decision or other final order, if rehearing is provided for by statute, rule, or order."[4] 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 administrative process.[5] The October 18 letter is not a final decision or order. It does not render final judgment on any topic, but rather presents Commission's staff's conclusion that the record contains sufficient information for Alcoa to comment on staff's analysis of sediment deposition in High Rock Lake.

10. Moreover, even if the October 18 letter did purport to act on Alcoa's motion to permit discovery, we would reject Alcoa's pleading as premature.

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[2] *See* EIS at 233.

[3] *See* letter from J. Mark Robinson to David R. Poe (counsel for Alcoa).

[4] 18 C.F.R. § 285.713(a)(1) (2007).

[5] *See City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003); *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 239 (D.C. Cir. 1980); *Ketchikan Public Utilities*, 121 FERC ¶ 61, 155 at P 10 and n.10 (2007).

11. In *California Department of Water Resources (California DWR)*,[6] we rejected as interlocutory a request by Butte County, California, that we require the applicant for a hydropower license to provide information regarding the methodology it used to develop recreation studies. We stated that Commission staff would determine what information it would rely upon in performing its environmental analysis, and what weight particular evidence would be given. We explained that issues regarding the adequacy of the record would not be ripe until the environmental analysis had been completed and an order issued, at which time a party may seek rehearing from the Commission with respect to any matters it believes have been incorrectly decided.[7] We noted that the County could submit comments analyzing and pointing out deficiencies in the studies, and could develop and submit studies that it felt were more reliable.[8]

12. *California DWR* is dispositive of the issue here. Like Butte County, Alcoa has had the opportunity to file comments regarding the merits of the study, and also had the chance to prepare and file its own studies, which it apparently has chosen not to do. The time for Alcoa to raise with us any concerns it has about the state of the record or any conclusions reached in an order on the merits of its relicense application will be on rehearing of such an order. Its arguments are not ripe now.

13. In addition, Alcoa's suggestion that our discovery rules[9] apply to this proceeding is incorrect. Neither the Federal Power Act nor the Administrative Procedure Act[10] requires a trial-type hearing, with discovery, witnesses under oath, and cross examination.[11] Such hearings are only required where we cannot resolve issues through

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[6] 115 FERC ¶ 61,093 (2006).

[7] *See id.* at P 9.

[8] *Id*. at P 10.

[9] *See* 18 C.F.R. Part 385, Subpart D (2007).

[10] 5 U.S.C. § 551, *et seq.* (2000).

[11] *See Exxon Company, U.S.A. v. FERC*, 182 F.3d 30, 45-46 (D.C. Cir. 1999) (holding that Commission may resolve factual issues on a written record); *Louisiana Association of Independent Producers & Royalty Owners v. FERC*, 958 F.2d 1101, 1113 (D.C. Cir. 1992) (party may not complain of lack of fair hearing where it received notice of opposing expert testimony, and had the opportunity to review and criticize it, and to provide its own testimony). *See generally Pacific Gas and Electric Company v. FERC*, 746 F.2d 1383, 1397 (9th Cir. 1984) (the extent of discovery to which a party is entitled is determined primarily by the particular agency involved).

written submissions, which we are often able to do.[12] We have made clear that the discovery rules apply only to trial-type hearings established under Subpart E of our regulations,[13] and not to "paper" hearings such as this one.[14] Further, we have stated generally that "[t]he Commission does not provide for discovery in hydroelectric licensing proceedings."[15]

14. In *Transcontinental Gas Pipe Line Corporation* (*Transco*),[16] we recently explained the process in non-trial-type proceedings by which our staff, rather than other entities, gathers information in addition to that already filed. We stated that:

> in cases not set for hearing under subpart E of Part 385, interested members of the public are invited to file written comments or protests to the application or to our environmental analysis. To the extent our staff needs additional information to address these comments or protests or if intervenors seek information staff deems relevant to its analysis of a project that a company does not provide, staff will issue its own data requests seeking such information from the applicant. Our staff will review the comments or protests and information provided and will address these

[12] *See, e.g., ISO New England, Inc.*, 117 FERC ¶ 61,070 at P 39 (2006) (concluding that paper hearing involving brief containing affidavits and exhibits, and comment thereon "provided the Commission with a sufficient record to render a fully informed decision" on tariff issues); *City of Idaho Falls, et al.*, 109 FERC ¶ 61,040 at P 38 (2004), *citing Environmental Action v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993); *Sierra Association for the Environment v. FERC*, 744 F.2d 663-64 (9th Cir. 1984); *Enron Power Marketing, Inc. and Enron Energy Services, Inc, et al.*, 103 FERC ¶ 61,343 at P 33-34 (2003) (finding trial-type hearing unnecessary where record provides sufficient basis to take action).

[13] 18 C.F.R. Part 385, Subpart E (2007).

[14] *See, e.g., Kern River Gas Transmission Company*, 89 FERC ¶ 61,144 at p. 61,422 (1999); *Transcontinental Gas Pipe Line Corporation*, 84 FERC ¶ 61,160 at pp. 61,870-71 (1998), *on* reh'g, 87 FERC ¶ 61,136 at p. 61,549 (1999); *Pine Needle LNG Company, LLC*, 77 FERC ¶ 61,229 at pp. 61,915-16 (1996).

[15] *California DWR*, 115 FERC ¶ 61,093 at P 9 (2006). This obviously refers to hydropower licensing proceedings that, like this one, have not been set for trial-type hearings.

[16] 119 FERC ¶ 61,039, *order on rehearing*, 120 FERC ¶ 61,181 (2007).

> issues in the environmental analysis or the Commission order as appropriate.[17]

While *Transco* dealt with discovery requests by members of the public, rather than by the applicant, the principles enunciated there are equally applicable to this case. If staff decides that it needs more information to understand the issues or filings made by a commenter, it can request that information. However, there is no right to formal discovery as between participants in this proceeding.

15. In addition, Alcoa's pleading appears to be premised on the assumption that there will be a trial-type hearing in this proceeding. Thus, Alcoa states that the dispute regarding sedimentation "will require the Commission to institute a trial-type hearing" and discusses its rights to discovery "[o]nce a hearing is ordered."[18] Yet, the fact is that the Commission has not set this matter for a trial-type hearing, nor has Alcoa or any other party asked us to do so. Thus, Alcoa's assumption is false. And while we will not prejudge our response to any future request that we institute trial-type proceedings here, a party making such a request would bear a very high burden of proof, given that these proceedings have been underway for some 18 months, and that instituting a trial-type hearing now would most likely greatly delay the resolution of the proceeding.

16. Based on the foregoing, we dismiss Alcoa's request for rehearing.

17. In the alternative, Alcoa asks us to clarify three things with respect to Commission staff's October 18 letter: (1) that the letter does not constitute a ruling on Alcoa's discovery motion; (2) that the letter does not constitute a Commission determination as to the credibility, sufficiency, or merits of Salisbury's submissions regarding sedimentation, and (3) that the letter does not operate to deny Alcoa discovery at later stages of the proceeding.

18. As discussed above, the October 18 letter does not purport to be a ruling on Alcoa's motion, nor do we construe it as such. Rather, it represents Commission staff's explanation to Alcoa that staff believes the record to be sufficient for Alcoa to comment on the analysis of sediment deposition set forth in the draft EIS, and, by implication, that staff does not intend to seek further information on this issue from the City. That being the case, the letter neither grants nor denies Alcoa's motion. Further, the letter does not represent a determination, either by our staff or by the Commission, with respect to the "credibility, sufficiency, or merits" of any part of the record. We will reach no conclusions regarding any part of the record or any issues in the proceeding until such time as we issue an order on the merits of Alcoa's application. Finally, the letter does

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[17] 120 FERC ¶ 61,181 at P 26 (2007).

[18] Request for clarification or rehearing at 7.

not, and could not, dispose of any procedural requests that might be made by Alcoa in the future.

The Commission orders:

(A) The request for rehearing filed by Alcoa Power Generating Inc. on October 31, 2007, is dismissed.

(B) The request for clarification filed by Alcoa Power Generating Inc. on October 31, 2007, is granted to the extent set forth herein.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.