

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Avista Corporation

Project Nos. 2545-095 and
12606-001

ORDER REJECTING REHEARING REQUEST

(Issued April 25, 2006)

1. This order rejects the request of the Sierra Club, Upper Columbia River Group, (Sierra Club) for rehearing of a December 21, 2005 letter from the Commission staff to Avista Corporation requesting additional information regarding two new license applications filed by Avista. We reject the request for rehearing because Sierra Club was not a party to the proceeding when its rehearing request was filed, because the rehearing request is interlocutory, and because Sierra Club failed to comply with our requirement to provide a statement of issues.

Background

2. The existing license for Avista's Spokane River Project No. 2545 expires on August 1, 2007. The project consists of five developments. From upstream to downstream, they are: Post Falls, Upper Falls, Monroe Street, Nine Mile, and Long Lake. On July 28, 2005, Avista filed two applications for new licenses with respect to the Spokane River Project. One application, in Project No. 2545-091, is to relicense the four lowermost developments. The other application, in Project No. 12606-000, is to separately relicense Post Falls.

3. Avista used the Alternative Licensing Process (ALP) set forth in our regulations to prepare its new license applications.¹ The ALP included circulation for comment of a draft license application. Sierra Club filed comments on the draft application requesting

¹ 18 C.F.R. § 4.34(i) (2005).

Avista to conduct certain additional studies. On July 7, 2005, Sierra Club filed a motion for dispute resolution² with the Commission regarding its study requests, pursuant to the ALP regulations.³ Avista answered in opposition.⁴ Sierra Club responded to Avista.⁵ On July 27, 2005, in view of the approaching deadline for filing a new license application, the Commission staff denied Sierra Club's request for dispute resolution, but stated that its unresolved additional information requests would be considered during review of Avista's application.⁶ Avista filed its license applications, and Sierra Club renewed its study requests.⁷ Avista responded in opposition.⁸

4. On December 21, 2005, the Commission staff issued a letter to Avista requesting that it file certain additional information (additional information request, or AIR).⁹ Staff had reviewed additional study and information requests from Sierra Club and other stakeholders, but was not requiring all of the information requested. Staff concluded that the information filed in the record as of the date of the letter, along with the additional information requested in the AIR, would be sufficient to evaluate Avista's applications. On January 13, 2006, the Commission issued a notice accepting Avista's applications and soliciting motions to intervene and protests.¹⁰

5. On January 19, 2006, Sierra Club filed a request for rehearing of the Commission staff's December 21, 2005 additional information request. On February 8, 2006, Avista

² Sierra Club motion for dispute resolution, filed July 7, 2005.

³ 18 C.F.R. § 4.34(i)(6)(vii) (2005).

⁴ Avista answer to Sierra Club motion for dispute resolution, filed July 22, 2005.

⁵ Sierra Club reply in support of motion for dispute resolution and request for expedited resolution, filed July 26, 2005.

⁶ Letter to Rick Eichstadt, Center for Justice, representing Sierra Club, from Ann Miles, Director, Division of Hydropower Licensing.

⁷ Sierra Club additional study request filed September 27, 2005.

⁸ Avista response to requests for additional information, filed October 27, 2005.

⁹ Letter to Bruce Howard, License Manager, Avista Corporation, from Jennifer Hill, Chief, Hydro West Branch 1.

¹⁰ 71 *Fed. Reg.* 3286 (Jan. 20, 2006).

filed a request for leave to file an answer and an answer opposing Sierra Club's request (Avista answer).¹¹

Discussion

6. Sierra Club's request for rehearing will be rejected for three reasons. First, party status is a prerequisite for an entity to file a request for rehearing.¹² When Sierra Club filed its rehearing request it was not a party because it had not moved to intervene, and it failed to include such a motion with its rehearing request. Sierra Club subsequently filed a timely motion to intervene in the relicense proceeding in response to our notice accepting Avista's application, but did not become a party to the proceeding until March 22, 2006, 15 days after its motion was filed and remained unopposed,¹³ and long after the January 20, 2006 deadline for rehearing requests.

7. Even if Sierra Club had been a party at the time it filed for rehearing, we would have rejected the request as interlocutory.¹⁴ Commission staff is now conducting the NEPA analysis necessary to develop an Environmental Impact Statement (EIS) for the project. In conducting that analysis, Commission staff will determine what information it will rely on, and the weight to be given particular parts of the record. While a party may file comments stating its views at this stage, issues regarding the adequacy of the environmental record will not be ripe for review until that analysis is completed and an order has been issued.¹⁵

¹¹ Our rules generally prohibit an answer to a request for rehearing unless otherwise ordered by the decisional authority. *See* 18 C.F.R. § 385.213(a)(2) (2005). Therefore, we will not accept Avista's answer.

¹² Federal Power Act section 313(a), 16 U.S.C. 825l(a) (2000).

¹³ *See* 18 C.F.R. § 385.214(c) (2005).

¹⁴ *See Duke Energy Corporation*, 111 FERC ¶ 61,489 (2005) (appeal of staff decision to issue scoping document is interlocutory).

¹⁵ Sierra Club cites various cases to the effect that an agency must explain its decisions with reference to the facts in the record. *See Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto Insurance Co.*, 463 U.S. 29, 43 (1983); *Ethyl Corp. v. EPA*, 541 F.2d 1, 34-35 (D.C. Cir. 1974), *cert. denied*, 426 U.S. 941 (1976); *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371, 1385 (9th Cir. 1994). The basis for our decision on the interlocutory status of the proceeding is plainly set forth above.

8. As to Sierra Club's assertion that the evidentiary record will be insufficient to support the "hard look" at environmental consequences of the federal action required by the National Environmental Policy Act of 1969,¹⁶ Sierra Club will have an opportunity to raise its concerns in a timely manner. The draft EIS, when issued, will identify what staff relies upon—the bases for its conclusions. At that time, parties, including Sierra Club, will have an opportunity to comment. If the draft EIS does not include information that Sierra Club considers necessary, or if the Sierra Club believes that the material relied on in the EIS is deficient, it will have an opportunity, in its comments on the EIS, to raise those alleged deficiencies. Should Sierra Club be unsatisfied with staff's response, and should, in Sierra Club's view, the order disposing of Avista's application not cover certain issues to its satisfaction, Sierra Club County may seek rehearing from the Commission.

9. Finally, even if Sierra Club had been a party when it requested rehearing, its rehearing request is deficient because it fails to include a Statement of Issues, as required by Order No. 663,¹⁷ which became effective September 23, 2005. Order No. 663, *inter alia*, amended Rule 713 of the Commission's Rules of Practice and Procedure to require that a rehearing request must include a "Statement of Issues" listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.¹⁸ Under Rule 713,

¹⁶ 42 U.S.C. § 4321, *et seq.* (2000). See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989).

¹⁷ *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 70 *Fed. Reg.* 55,723 (September 23, 2005), *FERC Statutes and Regulations* ¶ 31,193 (2005) (to be codified at 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(2)). Order 663-A, effective March 23, 2006, amends Order 663 to limit its applicability to rehearing requests. *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 71 *Fed. Reg.* 14,640 (March 23, 2006), *FERC Statutes and Regulations* ¶ 31,211 (2006) (to be codified at 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(2)).

¹⁸ As explained in Order 663, the purpose of this requirement is to benefit all participants in a proceeding by ensuring that the filer, the Commission, and all other participants understand the issues raised by the filer, and to enable the Commission to respond to these issues. Having a clearly articulated Statement of Issues ensures that issues are properly raised before the Commission and avoids the waste of time and resources involved in litigating appeals regarding which the courts of appeals lack jurisdiction because the issues on appeal were not clearly identified before the Commission. See Order No. 663 at P 3-4.

any issue not so listed will be deemed waived. Accordingly, there is a third basis on which to reject the rehearing request.¹⁹

The Commission orders:

(A) The request for leave to file an answer filed by Avista Corporation in Project Nos. 2545-095 and 12606-001 on February 8, 2006, is denied, and the answer is rejected.

(B) The request for rehearing filed by Sierra Club in Project Nos. 2545-095 and 12606-001 on January 19, 2006, is rejected.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁹ See *South San Joaquin Irrigation and Oakdale Irrigation Districts*, 115 FERC ¶ 61,008 (2006) (dismissing rehearing request for failure to include statement of issues pursuant to Rule 713).