

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Indian River Power Supply, LLC
Alternative Light and Hydro Associates

Project No. 12462-003
Project No. 12430-001

ORDER DENYING REHEARING
AND AMENDING EXEMPTION

(Issued June 15, 2006)

1. In this order, we deny the request by Alternative Light and Hydro Associates (Alternative L&H) for rehearing of our February 23, 2006, Order¹ issuing an exemption to Indian River Power Supply, LLC (Indian River) for the Indian River Project No. 12462 and dismissing with prejudice Alternative L&H's preliminary permit application to study a project at the same site. We also make a minor correction to the project description.

Background

2. On December 27, 2002, Alternative L&H filed a preliminary permit application to study the feasibility of rehabilitating the existing Russell Falls Project No. 12430, to be located on the Westfield River in the Town of Russell, Hampden County, Massachusetts. The Commission issued notice of the application on January 28, 2003, setting March 31, 2003, as the deadline for, among other things, filing a competing development application or a notice of intent to make such a filing. On March 3, 2003, Indian River, which owns the project site, filed a notice of intent to file an exemption² application for

¹ *Indian River Power Supply, LLC, et al.*, 114 FERC ¶ 62,175 (2006).

² The Commission is authorized to exempt from the licensing requirements of Part I of the Federal Power Act small hydroelectric projects with an installed capacity of 5 megawatts or less that use for the generation of electricity either an existing dam or a natural water feature without the need for any dam or impoundment. See section 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2705 and 2708

(continued)

the Indian River Project No. 12462, to be located at the same site. Pursuant to the Commission's regulations,³ the exemption application was due 120 days from the March 31, 2003 deadline, or by July 29, 2003. On July 28, 2003, Indian River filed an exemption application to construct a 700-kilowatt (kW) capacity facility at the project site using the existing turbines.⁴

3. Indian River's application was found to be deficient and, pursuant to our regulations, it was given an opportunity to correct the deficiencies, and was also asked to provide additional information.⁵ The deadline for curing the deficiencies was subsequently extended,⁶ and Alternative L&H sought rehearing. Alternative L&H's rehearing request was denied, and its appeal was dismissed for lack of finality.⁷

4. Indian River cured the deficiencies and, on December 22, 2004, the Commission issued a notice accepting its application for processing. On February 2, 2005, pursuant to longstanding policy favoring development applications over permit applications that fail to substantiate the technical, environmental, and economic aspects of the permit applicant's proposed project, the Commission dismissed Alternative L&H's permit application, subject to reinstatement should Indian River's exemption application be dismissed or denied.⁸

(2000), as amended by section 246 of the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 679.

³ 18 C.F.R. § 4.36(a)(3) (2005).

⁴ Application Section 3.3, at 18.

⁵ See letter from Vince Yearick, Commission staff, to Richard Lynch, Sr., Indian River (January 28, 2004).

⁶ See letter from Vince Yearick to Dr. Peter B. Clarke, Indian River (May 18, 2004).

⁷ *Indian River Power Supply, LLC*, 109 FERC ¶ 61,066 (2004), *appeal filed, Alternative Light and Hydro Associates v. FERC*, No. 04-1420 (D.C. Cir., Dec. 14, 2004), *dismissed for lack of finality*, April 29, 2005.

⁸ *Alternative Light and Hydro Associates*, 110 FERC ¶ 62,096 (2005), *reh'g denied*, 112 FERC ¶ 61,110 (2005). The Commission's policy in this regard was established in *Dennis V. McGrew*, 32 FERC ¶ 61,229 (1985).

5. As noted, on February 23, 2006, the Commission issued an exemption to Indian River for Project No. 12462 and, because Indian River's application was granted, dismissed Alternative L&H's permit application with prejudice. On March 28, 2006, Alternative L&H filed a timely request for rehearing. On April 14, 2006, Indian River filed a pleading in response to Alternative L&H's rehearing request.

Discussion

Procedural Matters

6. An answer is not permitted to a request for rehearing unless otherwise ordered by the decisional authority.⁹ Indian River states that its response is not an answer to Alternative L&H's rehearing request, but merely corrects certain inaccurate statements therein and identifies issues raised by Alternative L&H for the first time on rehearing. Indian River's response is in fact an answer to Alternative L&H's rehearing request. It does not assist us in resolving this matter, and will be rejected.

Indian River's Filing Date

7. Sections 4.35(a) and (b)(2) of our regulations¹⁰ provide that if an exemption applicant files a "material amendment" to its application, acceptance of the application is rescinded and the filing date is changed from the date on which the application was initially filed to the date on which the amendment was filed. The purpose of this rule is to prevent applicants in competitive situations from circumventing the deadlines established in our regulations by filing poorly-developed applications.¹¹ As relevant here, section 4.35(f)(1)¹² defines a material amendment to a license or exemption application as:

. . . any fundamental or significant change, including, but not limited to:

(i) A change in the installed capacity or the number or location of any generating units of the proposed project if the change would significantly modify the flow regime associated with the project.

⁹ See 18 C.F.R. § 385.213(a)(2) (2005).

¹⁰ 18 C.F.R. § 4.35(a) and (b)(2) (2005).

¹¹ *Michigan Power Co.*, 57 FERC ¶ 61,277 (2005).

¹² 18 C.F.R. § 4.35(f)(1) (2005).

8. Indian River did not file any document purporting to amend its exemption application. Alternative L&H submits, however, that certain filings made by Indian River were, in effect, amendments. First, Alternative L&H cites Indian River's submission in response to the deficiency letter, which it states proposed to increase the project's installed capacity.¹³ It also cites Indian River's comments in response to the Commission's environmental analysis (EA) scoping document, which recommended that staff consider in the EA as an alternative to the filed proposal for a 700 kW project the installation of two new turbines with an installed capacity of 1,620 kW.¹⁴

9. Alternative L&H argues that these documents constitute a material amendment to the exemption application within the meaning of 4.35(f)(1). Were we to so find, Indian River's application would, as discussed above, be assigned a new filing date, which would have been beyond the July 29, 2003 deadline for filing development applications in competition with Alternative L&H's permit application. Thus, Indian River's application would have been rejected, and Alternative L&H's permit application would have been reinstated.

10. We reject Alternative L&H's argument. Indian River's deficiency response does not propose any change in the project's installed capacity, except to the extent that the existing turbines would be more efficient following restoration. While Indian River did state in its scoping comments that it had investigated the feasibility of a larger project and suggested that staff study it as an alternative, it never stated that it intended to pursue the alternative, or asked the Commission for authority to construct it. The larger project, moreover, was never treated as an alternative by Staff, or even considered. Instead, the EA considered as action alternatives only Indian River's original proposal to refurbish the existing turbines and that same proposal with staff-recommended environmental mitigation measures. Indian River did not amend its exemption application, and thus sections 4.35(a) and 4.35(b)(2) are not applicable here.

The Environmental Analysis

11. Its arguments regarding the impropriety of Indian River's comments with respect to a 1,620-kW alternative proposal notwithstanding, Alternative L&H asserts that the EA

¹³ Rehearing request at 4, citing Indian River's response to staff's deficiency letter, filed August 3, 2004.

¹⁴ Indian River comments on scoping document, filed March 24, 2005, at 2-4 and attachment. Alternative L&H also cites an August 29, 2005 letter from Indian River showing a lack of agency opposition to consideration of the 1,620-kW alternative.

should have considered such a project as an alternative because section 1502.22 of the Council on Environmental Quality's regulations require an EA to evaluate all "foreseeable impacts"¹⁵ of a project proposal and a 1,620-kW project is foreseeable because it is mentioned in Indian River's filings.

12. The requirement to examine "foreseeable impacts" is not established by section 1502.22, as Alternative Hydro asserts. That section deals with the manner in which an agency should respond in situations where it "is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement" and finds that there is incomplete or unavailable information. Rather, the significance of reasonably foreseeable impacts is established by section 1502.16 of CEQ's regulations,¹⁶ which mandates that the discussion of environmental consequences include both direct and indirect effects, in tandem with section 1508.8,¹⁷ where the Council defines "effects" as including both direct effects and "[i]ndirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable."

13. Here, the larger project is not reasonably foreseeable. As discussed above, Indian River did not seek authorization from the Commission to construct and operate the 1,620-kW project, and does not have such authorization. Nothing in the record shows that construction of the 1,620-kW project is in any way an indirect or reasonably foreseeable consequence of issuing the exemption for the smaller project. Thus, there was no reason to study any indirect effects of the larger project.

14. Alternative L&H also asserts that the EA should have considered its permit proposal as a reasonable alternative.¹⁸ We disagree. First, Alternative L&H's assertion in this regard is untimely. It should have made this recommendation in its comments

¹⁵ Rehearing request at 13, citing 40 C.F.R. § 1502.22 (2005).

¹⁶ 40 C.F.R. § 1502.16 (2005).

¹⁷ 40 C.F.R. § 1508.8 (2005).

¹⁸ Rehearing request at 13-15. The only specific assertion Alternative L&H makes in this regard is that its proposal is better because it is bigger, *i.e.*, more power. The larger of two project proposals is not, however, necessarily the project that better comports with the overall public interest. *See, e.g., City of Hibbing, MN*, 24 FERC ¶ 61,020 (1983).

responding to the Commission's scoping document, but did not.¹⁹ Second, as noted above,²⁰ the Commission's long-standing policy is to favor development applications over preliminary permit applications. Finally, we have already held that Alternative L&H's permit proposal was too general to allow a comparison with Indian River's development application.²¹ Although that decision was made in the context of our rules pertaining to competing applications, the lack of information identified there is equally applicable to comparison for purposes of an environmental analysis. Such a sketchily-developed proposal is not a reasonable alternative.

Other Matters

15. Alternative L&H contends that the Commission "should have issued determinations on the jurisdictional status of the site."²² It evidently refers to a December 2002 letter from the Commission notifying Indian River of a jurisdictional review. The Commission ultimately decided not to pursue the matter because Indian River filed an exemption application. With the issuance of an exemption, any issues regarding the need for Commission authorization to develop a project at the site have become moot.

16. Alternative L&H also appears to be attempting to preserve for appeal an argument that the Commission should investigate the fitness of Indian River to hold any exemption on the basis that it engaged in unauthorized project rehabilitation activities at the project site prior to December 2002, which resulted in harm to the environment.²³ First, the compliance matter raised anew by Alternative L&H has long since been closed. The

¹⁹ See Comments of Alternative L&H in response to scoping document, filed March 24, 2005.

²⁰ Paragraph 4, *supra*.

²¹ Alternative L&H's permit application indicated that many studies would need to be completed before it could assess its proposed project's feasibility. These included, among others: (1) acquire site-specific flow data; (2) conduct exploratory soil-rock boring for construction of a second powerhouse; (3) estimate construction costs for alternative development plans; (4) establish baseline environmental data; (5) conduct in-stream studies to assess impacts of various development options on aquatic habitat and life; and (6) select a project plan to maximize power generation consistent with protecting environmental values. See 112 FERC ¶ 61,110 at P 8-13.

²² Rehearing at 2-3, 17.

²³ Rehearing request at 17.

Commission declined to initiate any compliance action against Indian River. Second, the Commission's discretion to determine whether to investigate or hold a hearing on an allegation of non-compliance with the FPA, the regulations thereunder, or a Commission order is subject to judicial review in only the most exceptional circumstances.²⁴

17. Finally, Alternative L&H again challenges the Commission's waiver of certain pre-filing requirements and extensions of time granted to Indian River.²⁵ We have already addressed this matter.²⁶ For the reasons discussed above, Alternative L&H's rehearing request will be denied.

18. Lastly, we note that Ordering Paragraph (B) of the February 23, 2006 Order issuing an exemption to Indian River inadvertently omits the lands component of the project description. Ordering Paragraph (C) below corrects this omission.

The Commission orders:

(A) The response filed by Indian River Power Supply, LLC in this proceeding on April 14, 2006, is hereby rejected.

(B) The request for rehearing filed by Alternative Light & Hydro Associates in this proceeding on March 28, 2006, is hereby denied.

(C) Ordering Paragraph (B) of the order issued February 23, 2006, issuing an exemption from licensing for the Indian River Project No. 12462 is amended as follows:

²⁴ *Friends of the Cowlitz v. FERC*, 253 F.3d 1161 (9th Cir. 2001).

²⁵ Rehearing request at 17-18.

²⁶ *Indian River Power Supply, LLC*, 109 FERC ¶ 61,066 (2004).

- (1) Existing subparagraph numbers (1) through (9) are renumbered as subparagraphs (2) through (10).
- (2) After the phrase “The project consists of:” the following language is inserted:

“(1) All lands, to the extent of the exemptee’s interests in these lands, described in the project description and the project boundary discussion of this order.”

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.