

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Eastern Hydroelectric Corporation

Project No. 7019-063

ORDER DENYING REHEARING

(Issued December 21, 2006)

1. On September 29, 2006, the Commission's Secretary issued a notice rejecting a request for rehearing filed by Eastern Hydroelectric Corporation (Eastern) of an order modifying and approving construction of a fishway for its East Juliette Project No. 7019, located on the Ocmulgee River in Jones County, Georgia. The request for rehearing was rejected because it was filed more than 30 days after the order was issued. On October 26, 2006, Eastern filed a request for rehearing of the Secretary's notice. For the reasons stated below, we deny rehearing.

Discussion

2. In January 2006 (as supplemented in April 2006), Eastern filed a plan for the construction and operation of a fishway, as required by Article 401 of its license.¹ On August 15, 2006, Commission staff issued an order modifying and approving the plan.² The deadline for seeking rehearing was September 14, 2006.

3. On September 20, 2006, Eastern filed a request for rehearing of the August 15 order,³ asking that the Commission postpone Eastern's obligation to construct the fishway until after we require the state and federal fish and wildlife agencies to conduct a

¹ 99 FERC ¶ 62,207 (2002).

² 116 FERC ¶ 62,132 (2006).

³ The request for rehearing was dated September 14, 2006, and mailed September 15, 2006.

baseline fish study. The Secretary issued the notice rejecting Eastern's request for rehearing as late filed.⁴

4. On rehearing of the Secretary's notice, Eastern asks that the Commission extend the September 14 rehearing deadline and accept as timely its request for rehearing of the August 15 order. In support, Eastern states that in the past it received orders, notices, and other documents by regular mail, but that it did not receive a mailed copy of the August 15 order. Eastern asserts that it was not aware that the Commission had amended its regulations to provide for notification of Commission issuances electronically, rather than by mail.⁵

5. Section 313(a) of the Federal Power Act⁶ provides that a party aggrieved by a Commission order must file a request for rehearing within 30 days after the issuance of the order. This deadline is statutory and it cannot be extended or waived.⁷ In any event, Eastern's failure to be aware of the Commission's procedures is no excuse for missing the rehearing deadline. Indeed, it is clear from Eastern's pleading that it in fact obtained a copy of the order and prepared a request for rehearing by the deadline. However, rather

⁴ The notice also stated that the pleading would have been dismissed as deficient because it failed to include a Statement of Issues, as required by Rule 713(c)(2) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.713(c)(2) (2006).

⁵ The final rule on electronic notification was issued on February 10, 2005, and became effective on March 21, 2005. Notice of this rule was posted on the Commission's website and published in the Federal Register. *Electronic Notification of Commission Issuances*, Order No. 653, 70 Fed. Reg. 8,720 (February 23, 2005), *FERC Statutes and Regulations* ¶ 31,176.

⁶ 16 U.S.C. § 825l(a) (2000).

⁷ *Sierra Association for Environment v. FERC*, 791 F.2d 1403 (9th Cir. 1986).

than timely submitting its pleading electronically,⁸ Eastern apparently placed it in the regular mail on the day after it was due.⁹ A document in paper form is considered filed when it is date stamped by the Secretary, not when it is mailed.¹⁰

6. Accordingly, we affirm the rejection of the request for rehearing filed by Eastern on September 20, 2006.

7. In any event, Eastern's arguments on rehearing of the August 15 order modifying and approving the fishway are without merit. The fishway requirements of Article 401 have been in the license since 2002 when Eastern received authorization to increase the project's capacity.¹¹ Eastern was to file its plan and schedule for constructing the fishway within 90 days of the 2002 order (by September 18, 2002).

8. Eastern did not seek rehearing of the 2002 order. Instead, it has dragged its feet for almost four and one half years while complaining that a fishway for its project is too costly and unnecessary. Eastern's request to postpone construction of the fishway while agencies conduct a baseline fish study is nothing more than another attempt to put off fulfilling its license obligations.¹² The plan and schedule as approved in the August 15 order are reasonable, and Eastern should proceed expeditiously.

⁸ Under Rule 2001(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2001(a)(2) (2006), a document filed via the Internet is considered filed on the day it is received during regular business hours.

⁹ Eastern states that its request for rehearing "was placed in the mail for filing within the original time." See Eastern's October 26, 2006 rehearing request.

¹⁰ Rule 2001(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2001(a)(2) (2006); and *Beaver City Corp.*, 64 FERC ¶ 61,088 (1993).

¹¹ 99 FERC ¶ 62,207 (2002). The order also included water quality certification from the Georgia Department of Natural Resources, which requires construction of a fishway.

¹² A baseline study would determine the design capacity (total number of fish that can be passed upstream) of the fishway. However, the design capacity has already been determined, and the fishway has been designed to meet that capacity. Moreover, we cannot, as Eastern would have us do, order the agencies to undertake such a study.

The Commission orders:

The request for rehearing filed by Eastern Hydroelectric Corporation in this proceeding on October 26, 2006, is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.