

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Consumers Energy Company

Project Nos. 2436-180 and -194; 2447-171, -175, -177, and -185; 2448-176, -183, -185, and -193; 2449-153, -157, -159, and -166; 2450-151, -155, -157, and -164; 2451-149, -151, -153, and -160; 2452-156, -159, -161, and -169; 2453-178, -183, -185, and -194; 2468-153, -156, -159, and -168; 2580-207, -213, -215, and -223; and 2599-170, -175, -177, and -186

ORDER DISMISSING REQUESTS FOR REHEARING AND FOR STAY AS MOOT
AND DENYING REQUEST FOR RECONSIDERATION

(Issued March 23, 2005)

1. This order dismisses as moot Consumers Energy Company's (Consumers) requests for rehearing of the Commission order issued June 11, 2003,¹ and an unpublished staff order issued September 11, 2003, which denied Consumers' motions for extensions of time, respectively, to propose and to pay fiscal year (FY) 2003 contributions to the Michigan Habitat Improvement Account (Habitat Account) under Article 409 of Consumers' licenses for the above-numbered projects (except the Foote Project No. 2436). It dismisses as moot Consumers' September 17, 2003 request for a stay of staff's September 11, 2003 Order. And, it denies Consumers' request for

¹ 103 FERC ¶ 61,325 (2003).

reconsideration, filed June 4, 2004, challenging the findings in the staff order issued May 4, 2004,² rejecting Consumers' proposal to provide no expenditures for fiscal year 2004 for studying fish protection devices under Article 408 for the above-numbered projects.³ This order is in the public interest because it clarifies the processes for habitat account payments.

Background

2. In 1994, pursuant to a settlement agreement among Consumers, Michigan Department of Natural Resources (Michigan DNR), and others,⁴ Consumers was issued eleven new licenses for the continued operation of its hydroelectric projects, all of which are located in Michigan on the AuSable, Manistee, and Muskegon Rivers.⁵ Article 409 of the licenses requires Consumers to make specified annual contributions to the Habitat Account.⁶ Article 408 of the licenses requires Consumers to fund capital costs in the maximum amount, for the duration of the licenses, of \$5 million to study, plan, design, and construct fish protection devices or measures at its projects. Article 409 states that, if fish protection measures or devices are implemented at the project pursuant to Article 408, the annual Habitat Account contribution specified in the license for that project may be reduced based on the effectiveness of those devices.

² 107 FERC ¶ 62,099 (2004).

³ Consumers' filing was styled as a request for rehearing, but it was filed after close of business on June 3, 2004, the statutory deadline for filing requests for rehearing, and therefore docketed on June 4, one day late. Pursuant to Consumers' request contained in its letter filed June 14, 2004, we have exercised our discretion (*see* Order No. 530, III FERC Statutes and Regulations, Regulations Preambles, ¶ 30,906 at 31,864 (1990)) to consider Consumers' late rehearing request as a request for reconsideration.

⁴ Other signatories to the settlement agreement were the U.S. Forest Service, U.S. Fish and Wildlife Service, National Park Service, and Michigan State Historic Preservation Officer.

⁵ *See* 68 FERC ¶ 61,077 (Settlement Order).

⁶ The Habitat Account funds are used for a variety of mitigation and enhancement purposes related to the operation of Consumers' projects.

3. Under Article 414 of the licenses, on October 1 of each year, Consumers submits for Commission approval its proposed contributions for the fiscal year that is just beginning. Payment of the approved amounts is due the following October 1. The Article 409 contributions to the Habitat Account were calculated based on fish entrainment and mortality studies conducted by Consumers in 1991 in connection with its relicense applications for the eleven projects. To implement Article 408 of the eleven licenses, Consumers filed a plan for the phased installation and testing of fish screens at the projects. Under the Article 408 plan, which was approved in 1996,⁷ fish screens were to be designed and tested first at the Foote Project, because it has the highest annual fish losses. In 1998, Consumers installed fish screens at Foote. The Commission thereafter approved a study plan for determining the effectiveness of those screens in reducing turbine mortality at that project.

4. In 1999, pursuant to Article 408, Consumers conducted a study at the Foote Project No. 2436 to determine the effectiveness of fish screens in reducing turbine mortality. In 2001, the Commission accepted the 1999 study's finding that, with or without fish screens, entrainment mortality at the Foote Project is much lower than the 1991 studies had indicated.⁸ Accordingly, it reduced the Foote Project's Article 409 contribution to the Habitat Account from \$210,180 to \$3,100 (in year 2000 dollars). For Consumers' ten other projects, the Commission has found that Consumers must pay the amounts specified in Article 409 of the licenses until such time as it requests, and we approve, amendment applications for those projects.⁹

5. On April 30, 2002, Consumers filed applications to amend its 10 other licenses to reduce its Article 409 contributions based on a “desktop” entrainment model that used mortality analyses for the Foote Project and other Midwest projects to estimate entrainment mortality at the 10 other Consumers projects. It also sought a determination that it had no further fish projection obligations under Article 408.

⁷ *Consumers Power Company*, 77 FERC ¶ 62,115 (1996).

⁸ *Consumers Energy Company*, 95 FERC ¶ 62,048, *order on reh'g*, 95 FERC ¶ 61,394 (2001).

⁹ *Consumers Energy Company*, 105 FERC ¶ 61,126, P 4 (2003).

6. On October 1, 2002, as supplemented November 14, 2002, Consumers filed for Commission approval its proposed expenditures for FY 2003, including Article 409 payments to the Habitat Account. With respect to the Habitat Account, Consumers proposed a \$3,500 contribution, the amount due for the Foote Project. Claiming uncertainty as to the level of contributions for the 10 other projects (in light of its April 30, 2002 amendment applications), Consumers requested an extension of time to submit the Article 409 portion of its proposed FY 2003 expenditures for the ten projects until 30 days after the Commission issues orders on Consumers' pending amendment requests. A March 11, 2003 staff order approved the proposed funding payments and granted the requested extension.

7. Michigan DNR sought rehearing of the March 11, 2003 staff order. In its June 11, 2003 Order, the Commission granted Michigan DNR's rehearing request, finding that Consumers must pay the amount specified in the licenses until such time as its licenses require otherwise.¹⁰

8. On August 12, 2003 Consumers filed its proposal for payment of the FY 2003 habitat account contribution. It proposed two calculations for the contributions, the amount specified in the licenses and the amount specified in its amendment applications. It requested that it not be required to pay the contributions until the Commission ruled on its amendment applications. In its September 11, 2003 Order, staff adopted the proposed contributions specified in the licenses and denied the request to delay the payment of the contributions.

9. On September 27, 2003, Consumers sought a stay of the FY 2003 payment, pending the Commission's decision on its amendment applications. It argued that it would be unfair to require it to pay an amount that could soon be reduced.¹¹

¹⁰ 103 FERC ¶ 61,325, *supra*, P 7. The Commission noted that Consumers had yet to pay its FY 2001 and 2002 contributions. *Id.* at P 8.

¹¹ Consumers has made its FY 2003 habitat account contribution. *See* Michigan DNR's letter filed October 21, 2003.

10. On October 27, 2003, the Commission issued an order denying Consumers' amendment applications,¹² and on November 23, 2004, the Commission denied Consumers' request for rehearing of the October 27, 2003 Order.¹³

Discussion

A. The Requests for Rehearing

11. Consumers' requests for rehearing challenge the Commission's June 11, 2003 Order and staff's September 11, 2003 Order, which denied Consumers' requests for extensions of time, respectively, to propose and to pay fiscal year FY 2003 contributions to the Habitat Account.¹⁴ However, the above-cited Commission orders denying Consumers' amendment applications moot those rehearing requests, since Consumers requested that the Commission grant the extensions of time involved pending issuance of the Commission order deciding the subject amendment applications.¹⁵

¹² *Consumers Energy Company*, 105 FERC ¶ 61,126 (2003). The Commission found that differences in such variables as turbine capacities, modes of operation, and resident fish populations invalidated Consumers' use of fish mortality data from other projects to calculate fish mortality at Consumers' projects.

¹³ *Consumers Energy Company*, 109 FERC ¶ 61,211 (2004). The Commission addressed the Article 408 fish protection request for the first time in the November 23, 2004 Order. Consumers has sought rehearing of that order solely on the issue of fish protection requirements under Article 408. That matter is being decided in an order issued contemporaneously with this order.

¹⁴ The June 11, 2003 Order expressly pertained only to the FY 2003 contributions. Consumers correctly points out (at pp. 2-3 of its July 11, 2003 request for rehearing of that order) that footnote 8 of the June 11 Order mistakenly specified an amount for the FY 2001 contribution, which is being determined in a separate proceeding.

¹⁵ Likewise, Consumers' request, filed September 17, 2003, for a stay of staff's September 11, 2003 Order denying Consumers' requests for extensions of time to propose and to pay FY 2003 contributions to the Habitat Account is moot.

12. Nevertheless, some clarification of the process for contributions to the Habitat Account is required. In its October 14, 2003 request for rehearing of the September 11, 2003 Staff Order, Consumers argues that prior Commission orders require that, before the Commission will authorize payment of the contributions to the Habitat Account under Article 409, Consumers must submit an acceptable spending plan under Article 414 of the licenses, and the plan must include a list of projects submitted by Michigan DNR that are to be funded by the contributions. Consumers argues that, until Michigan DNR submits a list of projects to be funded for the contributions and the Commission has approved the projects under the plan, Consumers is not required to propose or pay the Habitat Account contributions.

13. While the Commission reviews Michigan DNR's projects to be funded by the Habitat Account to ensure that spending from the account will conform to the requirements of Article 409, neither Article 409 nor Article 414 expressly requires that Consumers file a list of projects submitted by Michigan DNR as a prerequisite for proposing and paying an annual contribution to the Habitat Account. Additionally, due to the uncertainty about available Habitat Account funds that was raised by Consumers' amendment applications and its ceasing its Habitat Account payments, Michigan DNR suspended its Habitat Account grant process for choosing projects to be funded.¹⁶ In essence, Consumers' ceasing to propose and pay the contributions specified in Article 409 of the licenses resulted in Michigan DNR's failure to produce the list of projects that Consumers contends is required for it to propose and pay the contributions. However, in the June 11, 2003 Order challenged here, the Commission has clarified its position that the Habitat Account contributions specified in the licenses are effective until

¹⁶ *See* Michigan DNR's October 21, 2003 letter filed in response to Consumers' rehearing request challenging the September 11, 2003 staff order, at p. 1, which states in part: "Without a clear understanding of the level of payments to the [Habitat Account], when those payments are scheduled to arrive, and with appropriate lead time, it is impractical for [Michigan DNR] to process any requests for grants. As a result of Consumers' [amendment applications] the [Habitat Account] grant process was suspended... ." While Commission procedural rules generally bar consideration of answers to rehearing requests (*see* 18 C.F.R. § 713(d) (2004)), we have considered Michigan DNR's comments because they help to clarify the important issues pertaining to the habitat contribution process.

they are changed,¹⁷ and consequently the type of impasse created by the uncertainty of contribution amounts should be avoided in the future.¹⁸

B. Request for Reconsideration

14. Consumers argues that staff's May 4, 2004 Order misconstrued the basis for Consumers' proposal for no expenditures for fish protection measures and erroneously assumed that work remains to be done under the Fish Protection Plan at this time. It argues that, regardless of whether Article 408 and the plan are modified, nothing can be done at this time under the plan, since fish screens were found to be unnecessary and ineffective at Foote in the 1999 study, the only possible steps left under the plan would be to re-evaluate seasonal barrier nets at Foote and Five Channels and there is already sufficient data gathered to conclude that a seasonal barrier net at Foote and Five Channels would be ineffective both biologically and financially.

15. Consumers misapprehends staff's May 4, 2004 Order. Staff found that the Commission had not stayed Article 408 and that the next steps in the Article 408 process were to be decided in the amendment rehearing order, then pending before the Commission.¹⁹ Therefore, staff properly rejected Consumers' proposals for no expenditures for fish protection measures and for a determination that Article 408 did not require further fish protection measures. The staff proceeding was not the proper forum for deciding the fish protection issues Consumers raised. Accordingly, Consumers' request for reconsideration of staff's order is denied.²⁰

¹⁷ See *Consumers Energy Company*, 103 FERC ¶ 61,325, *supra*, at P 7.

¹⁸ Consumers has submitted its Article 409 contributions (subject to its reservation to pay whatever lower amount proves to be appropriate pursuant to its amendment applications), with the exception of the contributions for FY 2001 and 2002. Consumers must submit its FY 2001 and 2002 contributions to be in compliance with its licenses. See the staff letters to Consumers dated July 11 and September 11, 2003.

¹⁹ 107 FERC ¶ 62,099, *supra*, 64,221, where staff found that: "the issue regarding the Installation Plan and Schedule for Fish Protection Devices is the subject of a pending rehearing request and being administered under a separate proceeding."

²⁰ As noted, we are addressing in a contemporaneous order Consumers' substantive arguments opposing further fish protection measures under Article 408.

The Commission Orders:

(A) The requests for rehearing filed on July 11, 2003, and October 14, 2003, by Consumers Energy Company are dismissed as moot, as described in this order.

(B) Footnote 8 of the order issued in these proceedings on June 11, 2003, at 103 FERC ¶ 61,325, is deleted.

(C) The request for stay, filed on September 17, 2003, by Consumers Energy Company is dismissed as moot.

(D) Consumers Energy Company's June 4, 2004 request for reconsideration of the staff order issued May 4, 2004 (107 FERC ¶ 62,099 (2004)) is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.