

111 FERC ¶ 61,424
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Gustavus Electric Company

Project No. 11659-004

ORDER ON RECONSIDERATION AND
REJECTING REQUEST FOR REHEARING

(Issued June 17, 2005)

1. In this order, the Commission rejects a request filed by several intervenors¹ for rehearing of the order on rehearing issued in this proceeding (second rehearing request) on March 24, 2005.² We are, however, granting reconsideration to correct certain mischaracterizations by the intervenors regarding the order on rehearing and to respond to new legal arguments. This order serves the public interest by properly characterizing the Commission's prior orders addressing the intervenors' legal arguments.
2. An order issuing an original license to Gustavus Electric Company for the Falls Creek Project No. 11659 was issued on October 29, 2004.³ The intervenors timely sought rehearing, which we denied. On April 25, 2005, the intervenors filed their second rehearing request.⁴

¹ The intervenors are Sierra Club, the Wilderness Society, American Rivers, Hoonah Indian Association, Glacier Bay's Bear Track Inn, Thomas L. Mills, Sr., Patrick G. Mills, Sophie McKinley, and Diane McKinley.

² 110 FERC ¶ 61,334.

³ 109 FERC ¶ 61,105.

⁴ Paragraph 4 of the second rehearing request includes a request that the U.S. Department of the Interior (Interior) rescind its concurrence with certain findings made by the Commission in connection with issuance of the license. On May 17, 2005, Interior filed a response, notifying the parties that it is not rescinding its concurrence.

3. We are rejecting the intervenors' second request for rehearing. Rehearing of an order on rehearing lies when the order or rehearing modifies the result reached in the original order in a manner that gives rise to a wholly new objection.⁵ Here, the gist of the intervenors' argument is that the Commission did not respond with sufficient specificity to some of the arguments in their first rehearing request. They also assert that we changed our interpretation of aspects of the Glacier Bay National Park Boundary Adjustment Act of 1998 (Boundary Act),⁶ in the order on rehearing but, as discussed below, this is incorrect.

4. Although we are rejecting the intervenors' second rehearing request, we think it is appropriate to grant reconsideration for the purpose of responding to certain mischaracterizations and new legal arguments made therein.

5. First, section 2(c)(1)(C) of the Boundary Act states that the Commission may issue a license for the project only if it finds that the project is "economically feasible," which the Boundary Act does not define. We explained in the license order that we determined economic feasibility by comparing the estimated cost of generation from the project over a 30-year period to the cost of equivalent generation from a diesel-fueled facility under different scenarios, based on a range of assumptions for such variables as load growth, inflation rates, and diesel fuel costs. The project would be found to be economically feasible if it would cost less to construct and operate over the term of the analysis than an equivalent diesel facility. We stated that this analysis "is based on standard utility ratemaking practices."⁷

6. The intervenors argued on rehearing that we should have used for this purpose various ratemaking techniques employed by the Regulatory Commission of Alaska (RCA) or other agencies to establish electric utility rates, such as evaluating rates of return relative to risk. We explained that we did not do so because our purpose is not to determine rates, but to determine economic feasibility in the context of deciding whether to issue a license for a 50-year term, over which time period the ratemaking techniques favored by the intervenors have no certainty. In light of that uncertainty, and consistent with the Boundary Act, we included in the license a provision prohibiting construction of the project until we have approved a financing plan.⁸

⁵ See *Southern Natural Gas Co. v. FERC*, 877 F.2d 1066, 1073 (D.C. Cir. 1999), citing *Tennessee Gas Pipeline Co. v. FERC*, 871 F.2d 1099, 1109-10 (D.C. Cir. 1988). See also *Symbiotics, L.L.C.*, 99 FERC ¶ 61,064 (2002) and ¶ 61,015 (2002).

⁶ Public Law 105-317 (Oct. 30, 1998). See second rehearing request at 9.

⁷ 109 FERC ¶ 61,105 at P 43-45.

⁸ 110 FERC ¶ 61,334 at P 23-24.

7. In their second rehearing request, the intervenors continue to interpret our statement that our analysis was based on “standard utility ratemaking practices” as a finding that the Boundary Act requires the Commission to use the ratemaking methods of the RCA and other ratemaking agencies, but assert that our explanation in the rehearing order of why we did not use those particular ratemaking techniques constitutes a change in our interpretation of the Boundary Act.⁹

8. The intervenors are incorrect on both counts. The license order merely cites the requirement for a finding of economic feasibility and states that that term is not defined in the Boundary Act.¹⁰ As to the rehearing order, we reiterate; nothing in the Boundary Act requires us to use any particular analytical methods, let alone the methods preferred by the intervenors, and that such tools have very little utility in the licensing context.¹¹ Having made that determination, we did not respond to their arguments concerning what the results would be if the techniques and values for different variables they prefer had been employed.

9. The Environmental Impact Statement (EIS) considered and found not to warrant detailed consideration various forms of renewable energy technologies other than hydropower, such as windmills, tidal turbines, and fuel cells.¹² The license order further explained why these potential alternatives do not merit consideration as reasonable alternatives.¹³

10. On rehearing, the intervenors argued that we improperly placed the burden of proof on them and relied on evidence submitted by Gustavus, and should have consulted with other government agencies and non-governmental developers of renewable energy technologies, and taken various other steps to investigate the reasonableness of such alternatives.¹⁴ We responded that it is entirely appropriate for the Commission to rely on evidence submitted by an applicant and, regardless of who carries the ultimate burden of proof with respect to an application, any party making a recommendation has the

⁹ Second rehearing request at 8-9.

¹⁰ 109 FERC ¶ 61,105 at P 44.

¹¹ 110 FERC ¶ 61,334 at P 24.

¹² EIS at 1-6 to 1-11.

¹³ 109 FERC ¶ 61,105 at P 42.

¹⁴ Second rehearing request at 12-14.

responsibility to support its recommendation with substantial evidence. We further explained why the evidence submitted by the intervenors on rehearing regarding tidal generation is so insubstantial that it does not warrant any further consideration. We also explained why consultation with other federal agencies identified by the intervenors would serve no useful purpose.¹⁵

11. In their second rehearing request, the intervenors contend that our consideration of reasonable alternatives to the project violates the Administrative Procedures Act (APA).¹⁶ Citing APA section 556(d),¹⁷ which provides that the proponent of an order has the burden of proof, they suggest that Gustavus' evidence may only be relied upon if the Commission makes an affirmative holding it is reliable and probative, and that this was not done. They also suggest that we should not find Gustavus' evidence to be reliable and probative because Gustavus has no expertise in renewable energy technologies, in contrast to expert testimony submitted by the intervenors.¹⁸

12. Gustavus has never held itself out as expert in renewable energy technologies, and the evidence submitted by Gustavus on which we relied is factual in nature, not expert opinion. This evidence was evaluated by our professional staff and we adopted their conclusions. The intervenors make no effort to challenge the facts on which we relied. We therefore see no reason to question the validity of Gustavus' evidence at this point.

13. The intervenors, however, state that our conclusions in this regard violate APA section 557(c),¹⁹ which requires an agency decision to include a statement of its findings and conclusions, and the reasons therefor. Specifically, they assert that we failed in this regard by not identifying the individuals who prepared the relevant section of the EIS, the evidence on which they relied, or their reasoning.²⁰ The identity of the individual analysts who prepared this portion of the EIS is not important. The discussion in the EIS

¹⁵ 110 FERC ¶ 61,334 at P 29-39.

¹⁶ 5 U.S.C. §§ 500-596.

¹⁷ 5 U.S.C. § 556(d).

¹⁸ Second rehearing request at 12-13.

¹⁹ 5 U.S.C. § 557(c) applies when a hearing is required to be conducted in accordance with 5 U.S.C. § 556, which establishes procedures for rulemakings and for adjudications required by statute to be determined on the record after opportunity for an agency hearing.

²⁰ Second rehearing request at 13.

is based on their review of the evidentiary record developed by Gustavus and the intervenors, and their own research.²¹ That discussion, and the discussion in the order denying rehearing, adequately explain the basis for our conclusion that the evidence submitted by the intervenors in this regard is too speculative to warrant detailed consideration of other potential alternatives.

14. Finally, the intervenors state that we failed to respond to their assertion that more is required to support a finding that the project is in the public interest than the conclusions that the project will be economically beneficial and environmental impacts will be mitigated.²² We did in fact respond to their assertions in this regard,²³ and the intervenors ignore the principal basis on which we found that the project is in the public interest; it will give an isolated community access to a reliable source of energy at a stable price.²⁴

15. In conclusion, the intervenors have demonstrated no reason why we should revisit our prior orders in this proceeding.

The Commission orders:

(A) The intervenors' request for rehearing of the order denying rehearing in this proceeding is rejected.

²¹ See Reconnaissance Study of Energy Requirements and Alternatives, Initial Consultation Document Appendix G, at G-17 to G-19, filed December 14, 1998 by Gustavus; Preliminary Draft Environmental Assessment, Appendix D at IV-1 to IV-13 and V-1 to V-2, filed October 23, 2001; Revised Power Supply Study at IV-1 to IV-13 and V-1 to V-2, filed January 9, 2002; www.seaconference.org/inter.html; intervenor comments filed August 28, 2002; Economic Analysis of the Proposed Gustavus Electric Falls Creek Hydro Project and Potential Alternatives, Eric Cutter, filed December 16, 2003 at 20-37; Comments on the Economic Analysis in the Draft Environmental Impact Statement for the Falls Creek Hydroelectric Project, Natural Heritage Institute, filed January 6, 2004 at 6-7.

²² Second rehearing request at 18-19.

²³ See 110 FERC ¶ 61,334 at P 54-55.

²⁴ 109 FERC ¶ 61,105 at P1 and 110 FERC ¶ 61,334 at P 1.

(B) Reconsideration is granted as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.