

167 FERC ¶ 61,244
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Algionis, Inc.

Project Nos. 14896-001
14897-001
14898-001
14899-001
14900-001
14901-001
14902-001
14903-001
14904-001
14905-001
14906-001
14907-001
14908-001
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14955-001

ORDER DENYING REHEARING

(Issued June 20, 2019)

1. On February 22, 2019, Commission staff issued a letter dismissing Algonis, Inc.'s (Algonis) applications for preliminary permits at 60 nuclear power plants throughout the United States. On March 22, 2019, Algonis filed a timely request for rehearing of the dismissals. For the reasons discussed below, we deny rehearing.

I. Background and Procedural Matters

2. On November 27, 2018, Algonis filed preliminary permit applications for 60 projects to be located at nuclear power plants throughout the United States.¹ As set

¹ The 60 preliminary permit proceedings, which are all the subject of this rehearing order, are listed in the appendix to this order.

forth in the applications, the proposed projects would generally be composed of numerous algae cultivation and retention ponds using the waste heat from the output water of adjacent nuclear power facilities to grow algae. The applications further explain that “[u]nlike most facilities co-located with existing jurisdictional facilities, the algae cultivation facilities would be less directed toward the production of power and more directed at developing, conserving, and utilizing the water resources of the region in the public interest.”²

3. On February 22, 2019, Commission staff dismissed the applications, finding that the Commission did not have jurisdiction over the proposals under the Federal Power Act (FPA). Staff determined that the proposed algae retention ponds did not constitute project works for the development of hydroelectric power as contemplated by the FPA.

4. On March 22, 2019, Algignis filed a timely request for rehearing, alleging that the Commission improperly and prematurely dismissed its applications. In addition, Algignis clarifies that, in addition to algae cultivation, its proposed projects would also use nuclear waste heat to generate a variety of non-bioplastic products and services.³

5. Algignis filed its entire request for rehearing as privileged, claiming the request contained privileged attorney-work product and confidential trade secrets. On May 16, 2019, Commission staff issued a letter informing Algignis that the information marked privileged in the rehearing request did not warrant special treatment, and pursuant to 18 C.F.R. § 388.112(d), the Commission would release the entire document as non-privileged unless Algignis objected. On May 21, 2019, Algignis responded, indicating that the entire request should be treated as privileged because the filing contains trade secrets and attorney-work product, which are exempt from mandatory disclosure under the Freedom of Information Act (FOIA).⁴ After considering Algignis’s objections, Commission staff determined that the FOIA exemptions cited by Algignis were not applicable to the information in Algignis’s request for rehearing and, on May 30, 2019, staff denied Algignis’s request that the filing be treated as privileged. On June 5, 2019, Algignis’s request for rehearing was made public.

6. On April 17 and May 21, 2019, Algignis filed memoranda in support of its request for rehearing. The Commission does not permit supplements to requests for rehearing,

² *E.g.*, Algignis’s Preliminary Permit Application for the proposed David-Besse Nuclear Power Station Algae Cultivation Project No. 14896 at Exhibit I.

³ Algignis’s March 22, 2019 Request for Rehearing at 3.

⁴ 5 U.S.C. § 552 (2012).

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given the FPA's 30-day statutory rehearing deadline,⁵ and so we reject the filings as supplements. Nonetheless, for the purpose of providing clarity, we respond to some of the arguments raised in the supplemental filings below.⁶

II. Discussion

7. Algnis confuses the Commission's jurisdiction over non-federal hydropower projects, as provided in Part I of the FPA, with the Commission's authority to regulate electric utility companies engaged in interstate commerce, as provided in Part II of the FPA. Algnis repeatedly cites to sections in Part II of the FPA as providing a basis for the Commission's authority to issue preliminary permits and licenses for Algnis's proposals.

8. The Commission's authority to issue preliminary permits and licenses for non-federal hydropower projects derives from Part I of the FPA.⁷ As Commission staff stated in its February 22 letter, under Part I of the FPA, the Commission is authorized to license:

project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction . . . or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam⁸

9. As further explained in the February 22 letter, the Commission's jurisdiction under Part I of the FPA is limited to the comprehensive development of hydroelectric power and associated project works. In *Chemehuevi Tribe of Indians v. FERC*, the Supreme Court held that:

⁵ See *Boyce Hydro Power, LLC*, 166 FERC ¶ 61,029, at P 6 (2019).

⁶ The supplemental filings were also filed as privileged. From those filings, we refer only to some of Algnis's characterizations of the Commission's jurisdiction, in general terms, for the purpose of clarifying misconceptions.

⁷ 16 U.S.C. §§ 792-823 (2012).

⁸ 16 U.S.C. § 797(e) (2012).

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[a]lthough the language of s[ection] 4(e) itself could nonetheless be interpreted as extending the Commission’s licensing jurisdiction to include thermal-electric power plants located on navigable streams, the legislative history of the Act conclusively demonstrates that Congress intended to subject to regulation only the construction and operation of *hydroelectric* generating facilities.⁹

10. Algnis argues that *Chemehuevi* has been legislatively overruled by the Public Utility Regulatory Policies Act of 1978¹⁰ and, moreover, that the Commission has been inconsistently applying *Chemehuevi* because the Commission regularly issues licenses to “coal-fired and nuclear-electricity generation plant[s] (all of which are thermal-electric plants, and not in any way hydroelectric power plants).”¹¹ Again, Algnis appears to be confusing the Commission’s hydroelectric licensing authority with other parts of the FPA.¹² The Commission does not issue licenses to coal-fired or nuclear generation plants. Nuclear generation plants are regulated by the Nuclear Regulatory Commission and coal-fired generation plants are regulated by the states; neither of these generation facilities are subject to the Commission’s jurisdiction under Part I of the FPA. *Chemehuevi* remains good law and still dictates the bounds of our licensing authority under Part I.¹³

11. Algnis also alleges that the Commission does not have the legal authority to dismiss its applications for lack of jurisdiction and that the Commission has not previously taken such action on other preliminary permit applications. Algnis is

⁹ 450 U.S. 395, 405 (1975) (emphasis added).

¹⁰ Pub. L. No. 95-617, 92 Stat. 3117.

¹¹ Algnis’s March 22, 2019 Request for Rehearing at 4-5; *see also id.* at 5-6 (“Nuclear and coal-fired power plants in the United States are licensed and regulated by FERC The fact that FERC now disavows jurisdiction over thermal-electric or other power recovered from waste heat seems a little disingenuous.”).

¹² We note that PURPA’s additions to Part II of the FPA, which in part encourages the Commission to prescribe rules necessary to encourage cogeneration, did not alter the Commission’s licensing jurisdiction under Part I, as alleged by Algnis.

¹³ The Commission continues to consistently apply the holding in *Chemehuevi* in its jurisdictional determinations. *See Covington Mountain Hydro, LLC*, 165 FERC ¶ 61,257, at P 29 (2018) (citing *Chemehuevi*, 420 U.S. at 422-24) (“As the Supreme Court has held, the licensing provisions of Part I of the FPA are limited to the use of the Nation’s waterways for the development of hydroelectric power.”).

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mistaken. In fact, the Commission lacks authority to issue a permit for a proposal that the Commission would have no jurisdiction to ultimately license.¹⁴ And further, the Commission has routinely dismissed preliminary permit applications for proposals over which it lacks jurisdiction.¹⁵

12. In addition, Algignis's claims that the Commission "abdicated its environmental responsibilities" mandated by the Electric Consumers Protection Act of 1986 (ECPA)¹⁶ are without merit. As Algignis points out, ECPA amended the FPA to require the Commission, when issuing a license, to give equal consideration to environmental and developmental values.¹⁷ Algignis argues that the dismissal of its preliminary permit applications, despite the numerous environmental benefits its proposals could provide, was improper. In a similar vein, Algignis alleges that its proposals are in the public interest and that the Commission is required to regulate in the public interest. We clarify that the Commission does not have jurisdiction over any and all proposals that have environmental benefits or are in the public interest. As explained above, the Commission's licensing jurisdiction under Part I of the FPA is limited to hydroelectric power. If a proposal is subject to the Commission's licensing jurisdiction, then, in deciding whether and under what conditions to issue a license, the Commission will consider environmental impacts and the public interest.

13. Algignis also argues that, in dismissing its applications without first consulting with Algignis, staff denied Algignis due process. Commission staff's February 22 letter informed Algignis of its right to request rehearing of staff's determination, which Algignis did. Rehearing allows parties a meaningful opportunity to respond to and challenge the Commission or staff's initial determination, thus providing due process.¹⁸ Accordingly, we find Algignis was not denied due process.

¹⁴ The Commission's permitting jurisdiction stems from its licensing jurisdiction. The Commission can only issue a preliminary permit for project works for which it could issue a license. *See Swanton Village, Vermont*, 70 FERC ¶ 61,325, at 61,992 (1995).

¹⁵ *See, e.g., Next Generation Pumped Storage LLC*, 166 FERC ¶ 62,054 (2018); *Rivertec Partners, LLC*, 156 FERC ¶ 62,003, *reh'g denied*, 157 FERC ¶ 61,113 (2016); *Palo Verde Power*, 155 FERC ¶ 62,036 (2016); and *North Santiam Hydro Power LLC*, 153 FERC ¶ 62,241 (2015).

¹⁶ Pub. L. No. 99-495, 100 Stat. 1243.

¹⁷ *See* 16 U.S.C. § 797e (2012).

¹⁸ *See Constitution Pipeline Co., LLC*, 165 FERC ¶ 61,081, at P 23 (2018) (citing *Minisink Residents for Env'tl. Preservation & Safety v. FERC*, 762 F.3d 97, 115 (D.C. (continued ...))

14. Lastly, Algnis claims that the Commission's dismissal of its applications is an attempt by the Commission to block the proposals from moving forward. The Commission's dismissal of Algnis's applications does not bar Algnis from pursuing development of its proposals with the appropriate regulatory entities. Rather, we simply find that these proposals do not fall within the Commission's licensing authority under Part I of the FPA.

15. For the reasons stated above, we affirm staff's dismissal of Algnis's preliminary permit applications.

The Commission orders:

Algnis, Inc.'s request for rehearing, filed on March 22, 2019, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix
Preliminary Permit Applications

<u>Project Number</u>	<u>Project Name</u>
P-14896-001	David-Besse Nuclear Power Station
P-14897-001	Perry Nuclear Power Station
P-14898-001	Beaver Valley 1 & 2 Nuclear Power Station
P-14899-001	Fermi Nuclear Power Station
P-14900-001	Arkansas 1 & 2 Nuclear Power Station
P-14901-001	Braidwood 1 & 2 Nuclear Power Station
P-14902-001	Browns Ferry 1, 2, & 3 Nuclear Power Station
P-14903-001	Brunswick 1 & 2 Nuclear Power Station
P-14904-001	Byron 1 & 2 Nuclear Power Station
P-14905-001	Callaway Nuclear Power Station
P-14906-001	Calvert Cliffs 1 & 2 Nuclear Power Station
P-14907-001	Catawba 1 & 2 Nuclear Power Station
P-14908-001	Clinton Nuclear Power Station
P-14909-001	Columbia Nuclear Power Station
P-14910-001	Comanche Peak 1 & 2 Nuclear Power Station
P-14911-001	Cooper Nuclear Power Station
P-14912-001	D.C. Cook 1 & 2 Nuclear Power Station
P-14913-001	Diablo Canyon 1 & 2 Nuclear Power Station
P-14914-001	Dresden 2 & 3 Nuclear Power Station
P-14915-001	Duane Arnold Nuclear Power Station
P-14916-001	Farley 1 & 2 Nuclear Power Station
P-14917-001	Fitzpatrick Nuclear Power Station
P-14918-001	Ginna Nuclear Power Station
P-14919-001	Grand Gulf 1 Nuclear Power Station
P-14920-001	Hatch 1 & 2 Nuclear Power Station
P-14921-001	Hope Creek Nuclear Power Station
P-14922-001	Indian Point 2 & 3 Nuclear Power Station
P-14923-001	LaSalle 1 & 2 Nuclear Power Station
P-14924-001	Limerick 1 & 2 Nuclear Power Station
P-14925-001	McGuire 1 & 2 Nuclear Power Station
P-14926-001	Millstone 2 & 3 Nuclear Power Station
P-14927-001	Monticello Nuclear Power Station
P-14928-001	Nine Mile Point 1 & 2 Nuclear Power Station
P-14929-001	North Anna 1 & 2 Nuclear Power Station
P-14930-001	Oconee 1, 2, & 3 Nuclear Power Station
P-14931-001	Oyster Creek Nuclear Power Station
P-14932-001	Palisades Nuclear Power Station
P-14933-001	Palo Verde 1, 2, & 3 Nuclear Power Station
P-14934-001	Peach Bottom 2 & 3 Nuclear Power Station

P-14935-001	Pilgrim 1 Nuclear Power Station
P-14936-001	Point Beach 1 & 2 Nuclear Power Station
P-14937-001	Prairie Island 1 & 2 Nuclear Power Station
P-14938-001	Quad Cities 1 & 2 Nuclear Power Station
P-14939-001	Saint Lucie 1 & 2 Nuclear Power Station
P-14940-001	Turkey Point 3 & 4 Nuclear Power Station
P-14941-001	Vogtle 1, 2, 3, & 4 Nuclear Power Station
P-14942-001	River Bend 1 Nuclear Power Station
P-14943-001	Robinson 2 Nuclear Power Station
P-14944-001	Salem 1 & 2 Nuclear Power Station
P-14945-001	Seabrook 1 Nuclear Power Station
P-14946-001	Sequoyah 1 & 2 Nuclear Power Station
P-14947-001	Shearon Harris 1 Nuclear Power Station
P-14948-001	South Texas 1 & 2 Nuclear Power Station
P-14949-001	Summer 1, 2, & 3 Nuclear Power Station
P-14950-001	Surry 1 & 2 Nuclear Power Station
P-14951-001	Susquehanna 1 & 2 Nuclear Power Station
P-14952-001	Three Mile Island 1 Nuclear Power Station
P-14953-001	Waterford 3 Nuclear Power Station
P-14954-001	Watts Bar 1 & 2 Nuclear Power Station
P-14955-001	Wolf Creek 1 Nuclear Power Station