

132 FERC ¶ 61,035  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur

York Haven Power Company, LLC

Project No. 1888-028

ORDER DENYING REHEARING

(Issued July 15, 2010)

1. On April 12, 2010, the Director, Office of Energy Projects (Director), issued a study plan determination letter to York Haven Power Company, LLC (York Haven), licensee for the 19.6-megawatt (MW) York Haven Hydroelectric Project No. 1888, located on the lower Susquehanna River. On May 3, 2010, the Susquehanna River Basin Commission (SRBC) filed a notice of study dispute of the letter, which was dismissed on May 6, 2010, by the Director because SRBC is not an agency with mandatory conditioning authority under sections 4(e) and 18 of the Federal Power Act or section 401 of the Clean Water Act. On June 7, 2010, SRBC filed a request for rehearing of the Director's letter dismissing its notice of study plan dispute. In this order, we deny the rehearing request.

**Background**

2. The York Haven Project is the uppermost of five hydroelectric projects on the lower Susquehanna River. Proceeding downstream from the York Haven Project (at river mile (RM) 55) are the 417.5-MW Safe Harbor Hydroelectric Project No. 1025 (at RM 33), the 107.2-MW Holtwood Project No. 1881 (at RM 25), and the 573-MW Conowingo Project No. 405 (at RM 10). The 800-MW Muddy Run Pumped Storage Project No. 2355 is located between the Holtwood and Conowingo Projects and uses the Conowingo Pond as its lower reservoir. Three of these projects, York Haven, Conowingo, and Muddy Run, are currently in the relicensing process.<sup>1</sup>

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<sup>1</sup> The current license for York Haven was issued in 1980 (21 FERC ¶ 61,430 (1982)) and will expire in 2014. The license for the Conowingo Project was issued in 1980 (19 FERC ¶ 61,348 (1982)) and will expire in 2014. The license for the Muddy Run Project was issued in 1964 (32 FPC 826) and will expire in 2014. The licenses for the Safe Harbor and Holtwood projects will expire in 2030.

3. On June 1, 2009, York Haven filed with the Commission a notice of its intent to apply for a new license for the York Haven Project, pursuant to the integrated licensing process (ILP),<sup>2</sup> as well as a pre-application document (PAD).<sup>3</sup> In its PAD for the York Haven Project, York Haven proposed to evaluate the dam's fishway structure; monitor headpond levels to determine current level of reservoir fluctuation; study dissolved oxygen and water temperature; identify species of concern in the project area; identify future boating access and portage needs; and develop a cultural resources survey.<sup>4</sup>
4. On July 24, 2009, Commission staff issued a notice and scoping document for the purpose of obtaining public comment on its initial determination of the issues to be studied in the proposed environmental document in the relicensing proceeding, and seeking comments and study requests from interested stakeholders for the project.<sup>5</sup>
5. One of the participants who filed comments and requested studies was the SRBC. The SRBC was established by the Susquehanna River Basin Compact,<sup>6</sup> with duties and responsibilities for comprehensive planning, programming, and management of the water and related resources of the Susquehanna River Basin. In 1975 the Commission and SRBC entered into a Memorandum of Understanding (MOU). Under the November 5, 1975 MOU, the Commission and SRBC committed to cooperate in the processing of license applications to the extent feasible and the Commission agreed to give due regard to any recommendations made by the SRBC.
6. Among other things, the SRBC requested that for the York Haven Project, York Haven prepare (1) a hydrologic model of the 55-mile reach of the lower Susquehanna River from the York Haven project impoundment to the mouth of the river at the

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<sup>2</sup> The ILP was established by the Commission in 2003 with the goal of creating efficiencies by integrating a potential license applicant's pre-filing consultation with the activities of the Commission and other agencies pursuant to the Federal Power Act, the National Environmental Policy Act (NEPA), and other applicable legislation. *See Hydroelectric Licensing Under the Federal Power Act*, Order No. 2002, 68 Fed. Reg. 51,070 (Aug. 25, 2003), FERC Stats. & Regs., Regulations Preambles 2001-2005 ¶ 31,150 (2003) (ILP Preamble).

<sup>3</sup> *See* 18 C.F.R. § 5.6 (2010) (requiring filing of PAD).

<sup>4</sup> *See* York Haven PAD filed on May 1, 2009, at section 6.4.

<sup>5</sup> A revised scoping document was issued on November 13, 2009.

<sup>6</sup> Pub. L. No. 91-575, 84 Stat. 1509 (1970). The Compact is a Federal interstate agreement among Maryland, Pennsylvania, and the United States.

Chesapeake Bay; and (2) a count of upstream resident fish movement through the existing fishway outside of the spring shad migration period.<sup>7</sup>

7. York Haven proposed to conduct seven studies, including an assessment of aquatic resources below the Main and East Channel sections of the dam. York Haven did not include in its plans the development of a hydrologic model of the 55-mile reach of the lower Susquehanna River or the counting of upstream resident fish movement through the fishway outside of the spring shad migration season as requested by the SRBC.<sup>8</sup> On December 9 and 10, 2009, and February 2, 2010, York Haven and numerous stakeholders, including SRBC, participated with Commission staff in meetings to discuss the proposed study plans and try to resolve disagreements.<sup>9</sup> The meetings did not result in the inclusion of SRBC's requested changes to the proposed studies.<sup>10</sup>

8. On April 12, 2010, the Director issued his study plan determination letter, which did not require York Haven to include the elements proposed by the SRBC. On May 3, 2010, SRBC filed a formal dispute notice of the letter. On May 6, 2010, the Director dismissed SRBC's study dispute notice. On June 7, 2010, SRBC filed a request for rehearing of the Director's dismissal letter.

## **Discussion**

### **A. Participation in Formal Dispute Resolution Process**

9. Section 5.14 of the Commission's regulations<sup>11</sup> allows federal agencies with mandatory conditioning authority pursuant to sections 4(e) and 18 of the Federal Power Act (FPA)<sup>12</sup> to file a notice of study dispute with respect to studies pertaining directly to the exercise of their authority under FPA section 4(e) or 18.

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<sup>7</sup> See letters filed by the SRBC regarding York Haven Project No. 1888 on September 29, 2009, at pp. 6-7 and 10-11; February 11, 2010 at pp. 6-9; and March 29, 2010, at pp. 7-8 and 10-11.

<sup>8</sup> See York Haven's Proposed Study Plan for the York Haven Project, filed November 13, 2009, at section 2 and Appendix C; and York Haven's Updated Study Plan filed February 5, 2010, at Appendix C.

<sup>9</sup> See York Haven's Revised Study Plan filed March 12, 2010, at p. 3.

<sup>10</sup> See York Haven's Revised Study Plan filed March 12, 2010, at pp. 13-14 and 16.

<sup>11</sup> 18 C.F.R. § 5.14 (2010).

<sup>12</sup> 16 U.S.C. §§ 797(e) and 811 (2006). State agencies or tribes with mandatory

10. On rehearing, SRBC argues that it should be permitted to bring a formal dispute despite its lack of authority pursuant to section 4(e) or 18. It asserts that it has concurrent jurisdiction with the Commission and regulates hydroelectric projects pursuant to certain provisions of the Susquehanna River Basin Compact<sup>13</sup> and its own regulations.<sup>14</sup> It argues that the Director should have allowed it to participate in the formal dispute process to facilitate SRBC achieving its own statutory mandates, which include coordinating the planning, conservation, management, utilization, development and control of the basin's water resources among the public and private sectors. SRBC states that the study plan revisions that it proposed are necessary to maintain consistency with its Comprehensive Plan for the Water Resources of the Susquehanna River Basin and to assure compliance with federal requirements.<sup>15</sup>

11. As we recently explained in *Exelon Generation Company, LLC* (Exelon),<sup>16</sup> in establishing the ILP, the Commission carefully limited the ability to initiate study dispute resolution to agencies with mandatory conditioning authority under FPA sections 4(e) and 18 or under section 401 of the Clean Water Act. While SRBC is a federal agency, it admits that it does not fit into the categories set forth in the regulations. Therefore, the Director properly dismissed its filing. Moreover, while the Commission expects that its staff will work with the SRBC as contemplated by the MOU, the Commission has no obligation to provide a record to support other agencies' decision making or to require studies that it does not deem necessary to evaluate the merits of proposed projects.<sup>17</sup>

12. SRBC also argues that the Director's study plan determinations failed to consider the Commission's commitment under the 1975 MOU.<sup>18</sup> As noted above, under the 1975 MOU, the Commission and SRBC committed to cooperate in the processing of license applications to the extent feasible and the Commission agreed to give due regard to any

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authority pursuant to section 401 of the Clean Water Act are also permitted by 18 C.F.R. § 5.14 to avail themselves of the formal dispute process.

<sup>13</sup> Pub. L. No. 91-575, 84 Stat. 1509 at Article 3, Section 3.10, and Article 10, Section 10.1.

<sup>14</sup> 18 C.F.R. Parts 801, 806, 807, and 808 (2010).

<sup>15</sup> Rehearing Request at 6-7.

<sup>16</sup> 131 FERC ¶ 61,166, at P 11 (2010).

<sup>17</sup> ILP Preamble at P 92. *See also Curtis/Palmer Hydroelectric Company LP and International Paper Company*, 92 FERC ¶ 61,037 (2000). *See also United States Department of the Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992).

<sup>18</sup> Rehearing Request at 7-8.

recommendations made by the SRBC. However, as we said in Exelon,<sup>19</sup> that does not mean that the Commission must require a study on SRBC's behalf where the Commission does not believe it is necessary.

13. SRBC argues that the Director has the authority to waive or modify any of the provisions of the Commission's ILP rules for good cause and that it has demonstrated good cause in this case.<sup>20</sup> In addition to its rehearing request, SRBC filed a waiver request, arguing that while it may not have the conditioning authority that requires imposition of operational parameters in the Commission license (as do the conditioning agencies), the practical reasons for allowing the conditioning agencies full participation in the formal dispute resolution process also apply to SRBC.<sup>21</sup> This request is untimely: SRBC should have sought a waiver from the Director before he acted, rather than raising the matter on rehearing. In any case, as we stated in Exelon,<sup>22</sup> the formal dispute resolution process was established for the limited use of agencies with mandatory conditioning authority under FPA section 4(e) or 18 (or section 401 of the Clean Water Act) to have an opportunity to demonstrate how studies they request are needed for them to develop their mandatory conditions under those statutory provisions precisely because those conditions are required to be placed in the license. Here, because SRBC is not a mandatory conditioning agency and has no mandatory conditions to support, we do not see a reason to waive the requirements.

The Commission orders:

The rehearing request filed on June 7, 2010, by the Susquehanna River Basin Commission, is denied.

By the Commission. Commissioner LaFleur voting present.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>19</sup> 131 FERC ¶ 61,166 at P 12.

<sup>20</sup> Rehearing Request at 8-10.

<sup>21</sup> Rehearing Request at 10-12.

<sup>22</sup> 131 FERC ¶ 61,166 at P 14.