

137 FERC ¶ 61,052
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Northern Illinois Hydropower, LLC

Project Nos. 12626-003
12717-003

ORDER GRANTING REHEARING

(Issued October 20, 2011)

1. Exelon Corporation has filed a request for rehearing of the July 20, 2011, notices denying its motions to intervene in the licensing proceedings involving Northern Illinois Hydropower, LLC's (Northern) license applications for its proposed Dresden Island Hydroelectric (Dresden Island) Project No. 12626 and its proposed Brandon Road Hydroelectric (Brandon Road) Project No. 12717. For the reasons discussed below, the Commission grants Exelon's request for rehearing.

Background

2. On April 1, 2009, Northern filed an application for an original license for the 11.7-megawatt (MW) Dresden Island Project, proposing to utilize the hydraulic head of the existing U.S. Army Corps of Engineers' (Army Corps) Dresden Island Lock and Dam, located on the Illinois River, in the Town of Morris, Grundy County, Illinois. The proposed project would involve constructing a powerhouse, headrace, tailrace, and primary transmission line. On May 27, 2009, Northern filed an application for an original license for the 10.2-MW Brandon Road Project, proposing to utilize the hydraulic head of the existing Army Corps' Brandon Road Lock and Dam, located on the Des Plaines River, near the City of Joliet, Will County, Illinois. The proposed project would involve constructing a powerhouse, headrace, tailrace, and primary transmission line.

3. The proposed Brandon Road Project would be located on the Des Plaines River 13.3 miles upstream from the confluence of the Des Plaines and Kankakee rivers, which together form the Illinois River. The proposed Dresden Island Project would be located on the Illinois River 1.5 miles downstream of the confluence of Des Plaines and Kankakee rivers. Also located on the Illinois River is the Dresden Nuclear Generating Station (Dresden Nuclear Station), which is situated immediately upstream of the

proposed Dresden Island Project and roughly 14 miles downstream of the Brandon Road Project.

4. On April 2, 2010, the Commission issued public notice of the Dresden Island Project, establishing June 1, 2010, as the deadline for filing motions to intervene. On April 29, 2010, the Commission issued public notice of the Brandon Road Project, establishing June 28, 2010, as the intervention deadline.

5. On July 8, 2011, Exelon filed late motions to intervene in both the Brandon Road and Dresden Island proceedings. Exelon argued that it should be allowed to intervene out-of-time because the Commission's regulations¹ require license applicants to consult with members of the public that "may be affected by [a] proposed project" before filing a license application, yet Exelon only learned of the two projects when it was contacted by a Commission employee.² Exelon also asserted that allowing it to intervene would ensure that the Commission would be fully informed of the effects of the proposed projects on the operation and potential emergency conditions of the Dresden Nuclear Station.³

6. On July 20, 2011, in two separate notices, the Commission Secretary denied Exelon's late motions to intervene. The notices explained that Northern published public notice of its applications in the Herald News, a Joliet, Illinois area newspaper, on September 23, 2008, as required by section 4.38(b)(4) of the Commission's regulations.⁴ Further, the Commission issued public notice of the license application for the Dresden Island Project No. 12616 on April 2, 2010, and published notice in the *Federal Register* on April 9, 2010. The Commission also issued public notice of the license application for the Brandon Road Project No. 12717 on April 29, 2010, and published notice in the *Federal Register* on May 6, 2010. Accordingly, the notices concluded that Exelon failed to show good cause for failing to file timely motions to intervene in the proceedings.

7. On August 19, 2011, Exelon filed a timely request for rehearing of the notices.⁵

¹ 18 C.F.R. § 4.38(a)(1) & (2) (2011).

² Motion to Intervene at 3.

³ *Id.* at 3-4.

⁴ 18 C.F.R. § 4.38(b)(4) (2011).

⁵ On September 6, 2011, Northern filed a motion to answer Exelon's request for rehearing. Answers may not be made to rehearing requests unless otherwise ordered by the decisional authority. 18 C.F.R. § 385.213(a)(2) (2011). Nothing in Northern's

Discussion

8. The Commission's regulations dealing with motions for late intervention state that, in acting on such motions the Commission may consider: whether the movant had good cause for not filing timely; any disruption of the proceeding that might result from permitting the intervention; whether the movant's interest is adequately represented by other parties; and whether any prejudice to, or additional burden on, existing parties might result from permitting the intervention.⁶ Late intervention at the early stages of a proceeding generally does not disrupt the proceeding or prejudice the interest of any party. The Commission is therefore more liberal in granting late intervention at the early stages of a proceeding, but becomes progressively more restrictive as a proceeding nears its end.⁷

9. Exelon contends that there is good cause to grant its late intervention because there is an overriding public interest in ensuring the proposed projects will not compromise the safe and effective operation of the Dresden Nuclear Station.⁸ The company further asserts that because it accepts the record as it is, has already timely commented on Commission staff's environmental assessment, and seeks only a consultative role in post-license construction and operation for the limited purpose of ensuring the safety of the Dresden Nuclear Station, its intervention will not prejudice or burden Northern or the Commission.⁹ In addition to reiterating its previous claim that Northern did not properly consult with members of the public, Exelon argues that, while it owns property within the boundaries of the proposed projects, Northern did not send Exelon a copy of the applications, as required by the Commission's regulations.¹⁰

10. We agree that there is a strong public interest in permitting the participation in a licensing proceeding of the owner of a nuclear power plant that may be affected by a

answer is necessary for us to understand and resolve the issues at hand. Moreover, Northern had an opportunity to respond to Exelon's motions to intervene, but elected not to do so. We therefore reject Northern's answer.

⁶ 18 C.F.R. § 385.214(d) (2011).

⁷ *Transok, L.L.C.*, 89 FERC ¶ 61,055, at 61,186 (1999).

⁸ Request for Rehearing at 3.

⁹ *Id.* at 4-5. We note that there is no requirement that an entity given a consultative role must be an intervenor.

¹⁰ *Id.* at 5-7.

proposed project. Moreover, because Exelon is not raising untimely issues in opposition to the project, but rather is simply seeking a post-license consultation role, we agree with Exelon that its late intervention will not result in prejudice or undue burden.

11. Exelon's assertion that Northern did not engage in proper public consultation is less convincing. Northern published public notice of the proposed projects in the Herald News, a Joliet, Illinois area newspaper, on July 17, 2008. Furthermore, Northern held public meetings regarding the licensing of the projects on October 13, 2008, hosted a site tour of the projects on October 14, 2008, and published notice of these public meetings and the site tour in the Herald News on September 23, 2008. Members of the public were entitled to participate in these meetings and were afforded the opportunity to express their views regarding resource issues addressed in the applications. By taking these actions, Northern fully satisfied the public consultation requirements of section 4.38 of the Commission's regulations. In addition, as discussed in the Secretary's notice, the Commission issued Federal Register notices of the projects. Thus, the public, including Exelon, was put on notice of the projects.

12. Exelon also claims that, because it owns land within the proposed project boundaries of the proposed projects, it was required to receive notice via certified mail of the applications according to section 4.32(a)(3) of the Commission's regulations.¹¹ We agree with Exelon that it owns property within the proposed project boundary of the Dresden Island Project,¹² and that, accordingly, Northern was required to notify Exelon via certified mail of its license application for this project. Northern thus failed to comply with the requirements of section 4.32(a)(3) of the Commission's regulations.

13. By itself, Northern's failure to provide actual notice to Exelon might not be sufficient to justify late intervention, given that it had constructive notice of the proposed projects.¹³ However, we conclude that the combination of the public interest in the safe

¹¹ A license applicant must state that it "has made, either at the time of or before filing the application, a good faith effort to give notification by certified mail of the filing of the application to: every property owner of record of any interest in the property within the bounds of the project" 18 C.F.R. § 4.32(a)(3) (2011).

¹² Specifically, the proposed Dresden Island Project includes 275 feet of transmission line that would cross Exelon's property prior to entering the Commonwealth Edison substation.

¹³ "Federal Register notice is constructive notice to all who may be affected." *Hy-Tech Co*, 29 FERC ¶ 61,130, at n.3 (1984) (citing *Federal Crop Ins. Corp. v. Merrill*, 322 U.S. 380 (1947)).

operation of nuclear facilities, Northern's failure to provide notice via certified mail, and the limited role Exelon seeks to play in these proceedings amount to good cause. Accordingly, we grant both rehearing and Exelon's late motions to intervene.

The Commission orders:

(A) The request for rehearing filed in Project Nos. 12626 and 12717, by Exelon Corporation, on August 19, 2011, is granted, and Exelon accordingly is granted party status in both proceedings.

(B) Northern Illinois Hydropower, LLC's September 6, 2011, motion for leave to file an answer to Exelon's request for rehearing is denied, and its answer is rejected.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Kimberly D. Bose,
Secretary.