

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	EPAct Docket No. 09-0055
)	
Public Service Company of Colorado)	
d/b/a Xcel Energy)	
Tacoma Hydroelectric Project)	
FERC No. 12589)	

Ruling Granting in Part and Denying in Part Motions to Dismiss and Clarifying Discovery Schedule

The United States Forest Service on February 4, 2009 filed a series of motions to dismiss all eight of the disputed issues raised by the Public Service Corporation of Colorado d/b/a Excel (PSCo), on the grounds that they each failed to identify material facts that are in dispute. PSCo filed an opposition on February 17, 2009, contending that each of the disputed issues did involve disputed material facts that could be relied on by ultimate decision makers in this matter. I find that each of the disputed issues, other than disputed issued # 6, involves facts that may be material to the ultimate decision makers, and accordingly deny the motions to dismiss disputed issues 1 through 5, 7 and 8. I grant the motion to dismiss disputed issued # 6.

Along with other administrative law judges who have ruled on similar issues, I am inclined to liberally interpret the regulations in favor of holding hearings if there is any reasonable dispute that material facts exist which could affect ultimate decisions in these cases. When Congress passed the relevant provisions of the Federal Power Act, 16 U.S.C. § 797 (e), it was because they wanted “to provide the parties an opportunity to develop facts that might prove material to the decision making of the Federal Energy Regulatory Commission, and enhance the

review of the Federal Courts.” Idaho Power Company, Hells Canyon Complex, 65 Agric. Dec. 273 (2006). Failure to allow development of disputed facts that might be material would be counter to the intentions of Congress in setting up this entire integrated license review process, which was clearly intended to “afford interested parties an opportunity to raise concerns and restore fairness to hydroelectric license proceedings.” Klamath Hydroelectric Project, Ruling of Judge McKenna, July 13, 2006; see, also, Judge Canorro’s detailed analysis in Yadkin-Pee Dee Hydroelectric Project, August 23, 2007.

With respect to all but the 6th disputed issue, I find that there appear to be disputed facts which may be material to the ultimate decision maker. For example, Issue 1, disputing the Forest Service position that there is a direct relationship between operations of the project and reduced ecosystem sustainability in Cascade Creek, cannot be simply categorized as not identifying a factual issue in dispute, as there may (or may not) be numerous facts concerning the impact of the project on Cascade Creek that would be beneficial to the ultimate decision maker. Likewise, the Forest Service’s contention that because “ecosystem sustainability” is subjective and not capable of precise measurement renders it outside the scope of this hearing misreads the holdings of the above-cited rulings that would allow the development of facts which would allow the ultimate decision maker to have a basis to consider whether the ecosystem sustainability is in fact reduced, and what the effect of such reduction would be on the conditions imposed on PSCo. Similar logic can be applied to the other disputed issues raised by PSCo, other than Issue 6.

Issue 6 would require me to make findings as to whether conditions imposed by the Forest Service are inconsistent with Forest Service goals. This appears to me to be a policy determination or legal conclusion for which no new material facts could be developed, although it appears to me at this juncture that such facts that are developed under several of the other

issues might have a bearing on how the ultimate decision maker rules on this issue. However, with regard to disputed issue 6, the Act does not anticipate the administrative law judge in a hearing of this nature to make a finding as to whether conditions imposed by the Forest Service are consistent with the goals of the Forest Service. Accordingly, I grant the motion to dismiss issue number 6, and deny the motions to dismiss issues 1 through 5, 7 and 8.

I note that the parties have cooperated in a manner to render moot PSCo's objections to many of the Forest Service's discovery requests. Given that the parties have agreed to discovery, there is no need for me to issue an order in this area. At this point, pursuant to the Rules of Procedure, and our prehearing conference call of February 17, 2009. I do direct that all discovery must be completed by March 16, 2009, while the written direct testimony must be filed by March 23, 2009.

MARC R. HILLSON
Chief Administrative Law Judge

February 27, 2009

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