

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Benton Falls Associates

)

Project No. 5073-

**ANSWER OF BENTON FALLS ASSOCIATES TO
REQUEST FOR REHEARING**

Pursuant to Rule 213 of the Federal Energy Regulatory Commission's ("Commission's") Rules of Practice and Procedure, 18 C.F.R. § 385.213, Benton Falls Associates ("Benton Falls") hereby files this Answer to the request for rehearing filed on or about March 22, 2010 by Douglas H. Watts and Friends of the Kennebec Salmon ("Mr. Watts"). Mr. Watts raises issues that are simply not relevant to the issue at hand – Benton Falls' modifications to its operating plan and changes to trashracks to provide for downstream eel migration.¹ Mr. Watts' request for rehearing must be denied.

I.

BACKGROUND

The Benton Falls Project is located in the town of Benton, on the Sebasticook River, a tributary of the Kennebec River, in Somerset and Waldo Counties, Maine. The Benton Falls project consist of two turbines, Unit #1 and Unit #2. Benton Falls is party to the Kennebec Hydro Developers Group (KHDG) Settlement Agreement ("KHDG Settlement Agreement"), an agreement developed between seven hydroelectric project owners, state and federal fish and wild life resource agencies, and several non-governmental organizations involving hydroelectric operations at identified hydroelectric facilities, including Benton Falls, in Maine. As relevant here, one of the requirements of the settlement and related orders is that Benton Falls must

¹ *Benton Falls Associates*, 130 FERC ¶ 62,161 (2010) ("February 24 Order").

prepare and conform to an Upstream and Downstream Eel Passage Facility Plan.² On November 7, 2006 the Commission issued an Order Approving Upstream and Downstream Eel Passage Operation Plan and Effectiveness Study.³ Benton Falls was required to install an eel screen on generating Unit #1 by September 1 of each year and leave the screen in place until the earlier of November 30 or a date mutually agreed to by Benton Falls and the Maine Department Marine Resources (“DMR”). Benton Falls agreed not to use its generating Unit # 2 during night time hours unless “protection measures are installed or it is determined, in consultation with DMR, that eel protection is not warranted.”⁴ Benton Falls noted that it reserved the right to propose changes to the plan and its operations based on actual operating experience of the screens and operations.

Benton Falls first began to operate its upstream fish elevator and installed Unit #1 eel screen in 2006. Since that initial operating year, Benton Falls has submitted annual Operations and Effectiveness Study for its fish lift and Unit #1 eel screen. All annual reports are submitted for agency review and comment prior to submission to the FERC. Benton Falls has worked cooperatively with relevant consulting agencies, including MDMR and the US Fish and Wildlife Service (“FWS”). As evidenced by the agency correspondence and concurrences submitted as part of the annual reports submitted to the Commission, the Benton Falls fish facilities have been successful and exceeded initial expectations.

In 2009, Benton Falls consulted with the consulting agencies, including DMR, FWS and the Maine Department of Environmental Protection in order to replace the trashracks at generating Unit # 2 so that it could resume nighttime operations at the plant during the eel

² 84 FERC ¶ 61,227 (1998).

³ *Benton Falls Associates*, 117 FERC ¶ 62,131 (2006).

⁴ Benton Falls has already installed trashracks with 1 inch spacing at Unit # 1.

migration season without adversely affecting the migrating eels. The agencies concurred with Benton Falls' proposals as evidenced by the correspondence submitted. The Commission agreed and issued the February 24 Order.

Mr. Watts' request does not deal with the issue at hand in this proceeding, namely the replacement of the Unit #2 trashracks and a modification of the Unit #2 operating regime. Mr. Watts request for rehearing seeks to substantially modify the Plan and, in effect, Benton Falls' license. Moreover, Mr. Watts seeks to unilaterally modify the long-standing KHDG Settlement Agreement. Mr. Watts does not explicitly object to the addition of 1 inch spacing and operation of Unit # 2 at night, but seeks an order from the Commission that would require Benton Falls to install screens year round for downstream salmon passage. Mr. Watts' demands are clearly not germane to the issue upon which the order is based – proposed changes to the eel mitigation plan. Its request for rehearing must be denied.

II. MOTION FOR LEAVE TO ANSWER

While answers to requests for rehearing are not generally permitted by the Commission's rules, the Commission has accepted an answer when it aides in decision making or corrects factual mis-statements.⁵ This Answer does both. First, it points out the flaws in Mr. Watts' arguments that additional screening is appropriate. Second, it corrects factual misstatements he makes in his arguments. Benton Falls respectfully requests that its Answer to the Request for Rehearing be granted and Benton Falls so moves.

⁵ See, *California Independent System Operator, Inc.*, 129 FERC ¶ 61,241 (2009).

III. ARGUMENT

A. Mr. Watts' Claims For Additional Screening for Protection of Salmon are Outside the Scope of the Proceeding

Mr. Watts' claims for additional screening are outside the scope of the proceeding. As noted above, Benton Falls' proposed replacement of its Unit #2 trash rack was expressly contemplated in the Plan submitted to and approved by the Commission in 2006. The protections and prior operations (or non-operations) of Unit # 2 during eel migration was in place to protect eel migration. Contrary to Mr. Watts' unsupported allegations, it was neither intended nor required to address downstream salmon issues.

The modifications of the Unit #2 trash racks were presented to and the agencies concurred with Benton Falls' proposal, which was filed with and approved by the Commission. Thus, the sole matter at issue involves the operation of Unit # 2 with the replaced trash rack structure and whether that modification is sufficient to meet the goals of assisting eel migration.

Mr. Watts seeks to modify Benton Falls' license through filing a request for rehearing, something that is simply not permitted. Benton Falls' license remains in full force and effect and its Plan is in full compliance with the Benton Falls license and the KHDG Settlement Agreement. Mr. Watts has not made any showings otherwise.

B. What Mr. Watts Seeks is Inconsistent with the 1998 KHDG Settlement Agreement

Despite the fact that issues relating to downstream salmon passage have nothing to do with the changes to Benton Falls' Plan as it applies to eel migration, Benton Falls must point out that not only does Mr. Watts seeks on rehearing to inappropriately attempt to amend Benton Falls' license, he also seeks to unilaterally amend the Settlement Agreement. Again, it is highly

inappropriate and would not be in the public interest to allow a party to, on rehearing, seek to modify the terms and conditions of a settlement agreement that has been the foundation of seven hydroelectric operations on the Kennebec River since 1998.

The KHDG Settlement Agreement obligated various parties to take a myriad of steps in order to balance hydroelectric and fisheries needs. With respect to Benton Falls and salmon-related issues, the Settlement Agreement required Benton Falls to install permanent upstream fish passages facilities capable of “passing sufficient quantities of alewife, shad and Atlantic salmon. . .”⁶ Benton Falls’ upstream fishway facilities were installed and in place for the 2006 migration season. Each annual report submitted to the Commission describes the success achieved by the fishway in moving shad, alewives and salmon. Benton Falls has a downstream fish passage in place and operational as well, consisting of a surface bypass system used to provide attention flow during fish lift operations and to provide downstream passage during the fall migration season.⁷ There has been no showing that these measures, which are substantial, are deficient. In fact, quite the contrary is true. As shown by each annual report, the fish lift and passage facilities have been very successful. In fact, Benton Falls believes its fish lift operation in 2009 was one of the most successful fish restoration stories to date. Mr. Watts’ attempt to use a request for rehearing to pursue his agenda against hydroelectric licensees must not be countenanced.

⁶ Settlement Agreement at 18.

⁷ Benton Falls vigorously disagrees with the claims of Mr. Watts with respect to Endangered Species-related matters but, again, these issues are irrelevant to the matter at hand and, therefore, Benton Falls will discuss them no further.

**IV.
CONCLUSION**

The Commission appropriately, based on the concurrence of the consulted agencies and in compliance with the Settlement Agreement, the Benton Falls License and the Plan, approved Benton Falls' Unit #2 trash rack replacement and revisions to the downstream eel migration procedures. Mr. Watts has not shown that what Benton Falls proposes is inconsistent with the Plan, License or Settlement – because he cannot. Mr. Watts must not be permitted to pursue his agenda without regard to the processes and scope of proceedings and without regard to the rights of licensees to operate their projects pursuant to a validly issued and effective license. Mr. Watts' request for rehearing must be promptly denied.

WHEREFORE, Benton Falls Associates respectfully requests that Mr. Watts' request for rehearing be promptly denied.

Respectfully submitted,

/s/Elizabeth W. Whittle
Elizabeth W. Whittle
Counsel to Benton Falls Associates

Of Counsel:

Nixon Peabody LLP
401 Ninth Street, N.W.
Suite 900
Washington, DC 20004
202-585-8338
202-585-8080 (fax)
ewhittle@nixonpeabody.com (e-mail)

Dated: March 26, 2010

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing, **ANSWER OF BENTON FALLS ASSOCIATES TO REQUEST FOR REHEARING** via electronic mail on all parties listed on the service list compiled by the Secretary in this proceeding.

Dated in Washington, DC this 26th day of March, 2010.

/s/Elizabeth W. Whittle
Elizabeth W. Whittle