

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Wind River Hydro, LLC	Project No. 12480-001
Eastern Shoshone Tribe of the Wind River Reservation	Project No. 12457-001

ORDER DENYING REHEARING

(Issued April 5, 2006)

1. The Eastern Shoshone Tribe of the Wind River Reservation (Tribe) has filed a request for rehearing of an order granting an application by Wind River Hydro, LLC, for a preliminary permit to study the proposed 1.0-megawatt (MW) Wind River Diversion Hydroelectric Project, and denying the Tribe's competing preliminary permit application.¹ We deny rehearing, based on the conclusion that our regulations and our precedent thereunder require us, under the circumstances presented here, to give preference to the first permit application filed, which was that of Wind River.

Background

2. On May 20, 2003, Wind River Hydro, a private developer, filed a preliminary permit application to study the feasibility of constructing and operating its proposed Wind River Diversion Hydroelectric Project, to be located on the Wind River within Fremont County, Wyoming, on the Wind River Reservation. The project would utilize the Bureau of Reclamation's (Reclamation) existing Wind River Diversion Dam. The proposed run-of-river project would include a 96-inch-diameter, 50-foot-long steel penstock; a powerhouse containing a 1.0-megawatt (MW) turbine; and an approximately one-mile-long 24.9-kilovolt transmission line. Wind River Hydro's application included a list of needed studies and cost estimates for completing them, as well as maps of the project area, boundary, and project features. On August 15, 2003, the Commission accepted the application and issued public notice thereof, setting October 15, 2003, as the deadline for submitting comments, protests, motions to intervene, and competing permit applications. On October 14, 2003, the Tribe filed a notice of intent to file a competing

¹ *Wind River Hydro, LLC*, 109 FERC ¶ 62,202 (2004).

preliminary permit application,² and one day later filed a motion to intervene and protest of Wind River's application.

3. On November 12, 2003, the Tribe timely filed a competing preliminary permit application for the Eastern Shoshone Wind River Hydroelectric Project. The Tribe also proposed a run-of-river project, using Reclamation's Wind River Diversion Dam, including a penstock at the dam to feed water to a powerhouse located at the dam's base; a 1.0-MW turbine to be installed in the powerhouse; and switching facilities to transmit power to an interconnection at a substation to be located at transmission lines owned by a rural electrical cooperative. The application listed needed studies and cost estimates for completing them, and provided maps of the project. On March 4, 2004, the Tribe submitted for the Commission's consideration a "comprehensive water resources plan" for the Wind River, as well as a copy of a Tribal Resolution adopting the plan.

4. In its competing application, the Tribe argued that it has preference over Wind River Hydro under section 7(a) of the Federal Power Act (FPA)³ based on the Commission's trust responsibility as set forth in the July 23, 2003 "Policy Statement on Consultation with Indian Tribes in Commission Proceedings" (Policy Statement).⁴

5. On December 14, 2004, Commission staff issued a preliminary permit to Wind River Hydro. The order stated that there were no significant substantiated differences between Wind River Hydro's plans and those of the Tribe that would support a conclusion that either of the proposals is superior to the other, and that therefore, under section 4.37(b)(2) of the Commission's regulations,⁵ Wind River Hydro, because it had the first-filed accepted application, should be issued the permit. The order also concluded that nothing in the FPA or the Policy Statement supports a preference for the Tribe in issuing a preliminary permit.

6. On January 14, 2005, the Tribe timely filed a request for rehearing of staff's order.

² The Commission's regulations at 18 C.F.R. § 4.36 (2005) allow anyone desiring to file a competing application to submit a notice of intent to file such application on or before the specified comment date for the particular application. Submission of a timely notice of intent allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application.

³ 16 U.S.C. § 800(a) (1994).

⁴ See 18 C.F.R. § 2.1(c) (2005).

⁵ 18 C.F.R. § 4.37(b)(2) (2005).

Discussion

7. Section 7(a) of the FPA requires the Commission, when granting preliminary permits, to give preference to municipalities or states whose plans, when compared to those of any other permit applicants, are, or can within a reasonable time be made, “equally well adapted . . . to conserve and utilize in the public interest the water resources of the region.” Section 7(a) also provides that, where neither applicant is a state or municipality, the Commission may give preference to the applicant “the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region,” if it is satisfied that the applicant can carry out those plans.

8. Section 4.37(b)(1) of our regulations further provides that, if neither of two competing preliminary permit applicants is a municipality or a state, the Commission will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the resources of the region, taking into consideration the ability of each applicant to carry out its plans.⁶ Where the plans and abilities of the applicants, neither of which is a municipality or a state, appear equal, the Commission will favor the applicant with the earliest application acceptance date.⁷

A. Comparing the Competing Permit Applications

9. The Tribe argues that the Commission owes it a trust responsibility, as expressed in the Policy Statement, which requires the Commission to analyze the needs of the Tribe during the process of considering the preliminary permit applications and to “take into account that the Tribe’s interests are part of the public interest, that the Tribe is a sovereign government entity that must meet the resource demands within its jurisdiction, and that it has limited resources to do so.”⁸

⁶ See 18 C.F.R. § 4.37(b)(1) (2005).

⁷ See 18 C.F.R. § 4.37(b)(2) (2005). If one competing applicant is a municipality or state and the other is not, and if the plans of the municipality or state are at least equal to those of a non-municipal, non-state applicant, the Commission will favor the municipality or state. See 18 C.F.R. § 4.37(b)(3)(2005).

⁸ Request for rehearing at 6. See generally *id.* at 4-6. The Tribe cites the Policy Statement to the effect that “in keeping with its trust responsibility, [the Commission] will assure that tribal concerns and interests are considered whenever the Commission’s actions or decisions have the potential to adversely affect Indian tribes or Indian trust resources.” 18 C.F.R. §§ 2.1c(b), (e) (2005).

10. The Commission has previously explained that the FPA does not condition issuance of a preliminary permit upon a finding that it is in the public interest, because to make such a finding would require the information and conclusions that are to be developed during the permit phase.⁹ Similarly, arguments in opposition to a proposed project that may be relevant at the licensing stage are premature at the preliminary permit stage, where, by definition, the details of a project have not yet been developed, so that its impacts cannot yet be assessed. Thus, while the Tribe's assertions could be considered during licensing, they are as yet premature.¹⁰

11. The Tribe argues that the December 15, 2004 Order erred in concluding that there are no significant substantive differences between the competing preliminary permit applications. Specifically, the Tribe contends that the Commission failed to consider certain factors in comparing the applications, including the Tribe's ownership of, and access rights to, relevant lands and waters; its need to develop power and boost the Tribe's economic development; and its ability to market project power.¹¹

12. The Commission has consistently stated that, absent the results of detailed studies to be conducted under a permit, it cannot, except in unusual cases, determine that one applicant's plans are better adapted than another's.¹² It is typically not the case that the Commission can conclude that a permit applicant has substantiated its proposal through supporting studies and analyses on the technical, environmental, economic, etc. aspects of the proposed action, since permit applications are usually speculative in nature and applicants cannot support their proposals – or demonstrate the superiority of one competing proposal over another -- without the results of the detailed studies that they

⁹ See, e.g., *Michael Arkoosh*, 30 FERC ¶ 61,002 (1985); *Jackson Falls Hydroelectric Power Company*, 26 FERC ¶ 61,145 (1984).

¹⁰ While, as noted, it is not possible to deal with public interest issues at this stage, it is not necessarily the case that a private-developed hydroelectric project would be antithetical to the Tribe's interests. It would be prudent for a developer to take the Tribe's interests into account in developing a license application and we would, in any case, include in any license whatever conditions were necessary to meet the public interest, or deny an application for a project that could not do so.

¹¹ Request for rehearing at 7-11.

¹² *Sullivan Island Associates*, 58 FERC ¶ 61,129 (1992); *City of Ellensburg, Washington*, 36 FERC ¶ 61,301 (1986).

seek to conduct under the permit.¹³ Such is the case here. Indeed, the Commission has specifically found that many, if not all, of the factors cited by the Tribe are not relevant or dispositive at the preliminary permit stage.¹⁴

13. Here, both applicants proposed to study the hydroelectric potential of the same water resources, and proposed generally the same scheme of development. In order to overcome Wind River Hydro's first-in-time preference, the Tribe would have to demonstrate that its plan was better adapted, taking into consideration the Tribe's and Wind River Hydro's abilities.¹⁵ The Tribe did not do so.¹⁶

¹³ *Dennis V. McGrew*, 32 FERC ¶ 61,229 (1985); *Continental Hydro Corp*, 20 FERC ¶ 61,347 (1982).

¹⁴ *See, e.g., Mid-Atlantic Energy Engineers, Ltd.*, 78 FERC ¶ 61,225 (1997) (economic considerations not considered in permit proceeding because doing so would make permit process subject to veto right by parties with economic or other interests in vicinity of project site); *City of Ellensburg, WA*, 36 FERC ¶ 61,301 (1986) (fact that competing entity held water rights and ownership of lands needed for project not relevant in issuing permit); *Eastern States Energy Resources, Inc.*, 22 FERC ¶ 61,185 (1983) (allegations of superior experience, greater ability to finance, and lower ultimate cost of power not relevant at permit stage); *Brasfield Development, Ltd.*, 20 FERC ¶ 61,358 (1982) (applicant's assertions of closer proximity to, and knowledge of, project site and needs of region not dispositive); *Western Montana Electric Generating and Transmission Cooperative*, 19 FERC ¶ 61,028 (1982) (allegations regarding potential marketing of project power speculative and premature and cannot support best-adapted determination).

¹⁵ *Sullivan Island Associates*, 58 FERC ¶ 61,129 at 61,414.

¹⁶ The Tribe asserts, request for rehearing at 3-4, that a subsidiary of Wind River's parent holds another preliminary permit for a project within the Reservation, which it has recently reported it is putting on hold pending passage of a federal energy bill that will make that project economically feasible. According to the Tribe "it can only be assumed" that Wind River's intentions are similar with respect to the Wind River Project, in contrast to the Tribe, which "currently intends to and is capable of developing the Project." We cannot extrapolate from the assertion that a subsidiary of Wind River's parent is not moving forward with one project that it will take the same approach to the Wind River Project, nor is the Tribe's assertion that it intends to and is capable to developing the project a demonstration of a superior ability to carry out its plans. *See Baltic Associates*, 35 FERC ¶ 61,368 (1986) (rejecting argument by competitor that permit applicant has record of obtaining permits without intending to develop projects and noting that a substantial number of permits do not result in applications).

14. With respect to the Policy Statement, while that document calls for communication and consultation with Indian tribes, and consideration of their concerns and interests, it does not require the reversal of our long-term policy that substantive issues such as the Tribe has raised are to be dealt with during licensing, and not at the preliminary permit stage. Moreover, nothing in the Policy Statement suggests that we have in any way altered our long-standing conclusion, affirmed by the courts, that in dealing with tribal matters we are not required to afford tribes greater rights than they would otherwise have under the FPA and its implementing regulations.¹⁷ For these reasons, we reject the Tribe's claim regarding trust responsibility.¹⁸

B. Application of the Municipal Preference in this Case

15. The Tribe states that the FPA permits the Commission the discretion to treat it as governmental entity during the preliminary permit process, asserting that the Western Area Power Administration and the Bonneville Power Administration treat tribes as preferred entities for the purpose of allocating power.¹⁹ While it is willing to assume, "for the sake of argument" that tribes are not preference entities under the FPA, it nonetheless argues that the Commission "must recognize that Tribes are sovereign governmental entities that function exactly as municipalities and other governmental agencies, and adopt a construction of the FPA that enables them to function as such."²⁰

¹⁷ See, e.g., *Skokomish Indian Tribe*, 72 FERC ¶ 61,268 at 62,182 (1995), *aff'd*, *Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th Cir. 1997); *City of Tacoma, WA*, 71 FERC ¶ 61,381 at 62,492-93 (1995).

¹⁸ The Tribe separately argues that the Commission failed to consider the Tribe's March 4, 2004 "comprehensive water resources plan" in determining whose plan was best adapted. This plan appears to be a general land use plan that neither addresses the Tribe's actual project proposal, nor provides any detailed studies that demonstrate the Tribe's proposal's superiority. For the reasons stated in this order, the appropriate time to consider matters such as the Tribe's plan would be at the licensing stage.

¹⁹ Request for rehearing at 12, 17-18. The fact that these agencies grant tribes a preference in power purchasing under the authorities granted them has no bearing in deciding whether the Tribe should receive a preference under the hydroelectric licensing scheme of Part I of the FPA.

²⁰ *Id.* at 12.

Thus, the Tribe maintains, the Commission should offer tribes a municipal preference akin to that afforded other governmental entities.²¹

16. Section 3(7) of the FPA²² defines a municipality as a “city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.” The Commission has held that Indian tribes do not fall under any of these categories, and cannot therefore claim municipal preference.²³

17. The Tribe does not appear to dispute our construction of the FPA, but rather urges us to create a new preference for Tribes with respect to preliminary permits, similar to that Congress created for municipalities. It argues that it functions as a municipality, and that section 7(a), which states in part that the Commission “may give preference to the applicant the plans of which it finds and determines are adapted in the public interest...” gives the Commission discretionary authority to treat it as such.²⁴

²¹ *Id.* at 15. The Tribe also states that FPA section 4(e) “clearly contemplates an increased role and preference for Tribes in the development of hydroelectric power on Indian Reservations.” *Id.* at 13. We cannot agree. Section 4(e), 16 U.S.C. § 797(e)(1994), authorizes the Secretary of the department who supervises a reservation of the United States (including national forests and Indian reservations) on which a licensed project is to be located to require such terms and conditions as the Secretary deems necessary for the adequate protection and utilization of the reservation. This authority rests solely with the federal government, and, while it certainly allows federal officials to impose conditions that may meet the needs of Tribes, it does not create any role or preference for them.

²² 16 U.S.C. § 797(7) (1994).

²³ *See, e.g., Pondera County Canal and Reservoir Company*, 58 FERC ¶ 62,167 (1992); *Mitex, Inc.*, 35 FERC ¶ 61,131 (1986).

²⁴ Request for rehearing at 11. The Tribe also cites what it deems discretionary language in FPA section 4(g), 16 U.S.C. § 797(g)(1994), which states in part that the Commission is authorized “to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.” However, section 4(g) is inapposite: when read in its totality, it only authorizes the Commission to conduct investigations, on its own motion, of certain matters pertinent to jurisdiction, and to issue orders to that effect. Section 4(g) does not expand the Commission’s jurisdiction, but rather provides the Commission with the authority to ensure compliance with its licensing jurisdiction. *See Pyramid Lake Paiute Indian Tribe*, 59 FERC ¶ 61,067 (1992). Similarly, the Tribe cites FPA

(continued...)

18. In crafting sections 7 and 3(7) of the FPA, Congress decided to create a municipal preference, and to limit it to subdivisions of the states. Congress could have defined Tribes as municipalities or created a separate preference for them, if it so chose. It did not do so. Moreover, we note that the Tribe had the same opportunity as Wind River Hydro to be the first-in-time filer of a preliminary permit application but failed to do so, or to demonstrate any reason why it could not have.

19. Our decision here in no way minimizes the significance of the issues raised by the Tribe, and does not in any way prejudice what action we might take with respect to any license application(s) filed for the Wind River site. Should an application or applications be filed, we would at that time consider all of the public interest issues raised by the applications, including any matters raised by the Tribe.²⁵ And while it is the case that, all other things being equal, an application filed by a permit holder will be given preference over applications by other entities, the issues that we deem to be premature at the preliminary permit stage will, if relevant, be ripe for consideration in reviewing one application, or in choosing between competing applications.

The Commission orders:

The request for rehearing filed by the Eastern Shoshone Tribe of the Wind River Reservation on January 14, 2005 is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

section 15(a)(2)(D), 16 U.S.C. § 808(a)(2)(D)(2000), for the proposition that the Commission is required to consider and explain whether a Tribe needs the electricity to be generated by a project. Request for rehearing at 6. First, section 15 applies by its terms exclusively to relicensing, not to the issuance of preliminary permits. Second, the cited portion of section 15 deals with the need of an applicant and its customers for the power to be generated by a project being relicensed and states only with reference to Tribes that if a relicense applicant is a Tribe, the Commission may include in a relicensing order “a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.”

²⁵ See *Robert A. Davis and Michael P. O'Brien*, 53 FERC ¶ 61,040 (1990).