

127 FERC ¶ 61,151
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, Marc Spitzer,
and Philip D. Moeller.

Renaissance Ketchikan Group, LLC

Project No. 13282-001

ORDER DENYING REHEARING

(Issued May 21, 2009)

1. On March 4, 2009, Commission staff issued a preliminary permit to Renaissance Ketchikan Group, LLC (Renaissance), to study the proposed RKG Hydroelectric Project No. 13282-000 located on Ward Cove, Ward Creek, and Connell Lake in Ketchikan Borough, Alaska.¹ On April 3, 2009, Ketchikan Public Utilities (Ketchikan) filed a timely request for rehearing of the permit order. For the reasons discussed below, we deny rehearing.

Background

2. Renaissance filed a preliminary permit application on August 20, 2008. On October 17, 2008, Commission staff issued notice of the application and solicited motions to intervene, comments, and competing applications or notices of intent to file competing applications. No competing applications were submitted. On February 10, 2009, Renaissance filed an amendment to its permit application to correct its project boundary to include the entire reservoir and to inform the Commission that it no longer owned the land upon which project facilities are located.²

¹ *Renaissance Ketchikan Group, LLC*, 126 FERC ¶ 62,160 (2009).

² Other commenters, including the U.S. Forest Service and Trout Unlimited, informed the Commission that Renaissance's land had been foreclosed upon and ownership had reverted back to Ketchikan.

Discussion

3. On rehearing, Ketchikan does not assert that the Commission erred in issuing the preliminary permit. Rather, Ketchikan argues that the Commission should recognize that the project is not viable and amend the permit to include terms and conditions used by the Commission under its interim strict scrutiny policy for hydrokinetic permits,³ in order to provide Ketchikan and other entities the opportunity to develop the project site should Renaissance fail to do so. Specifically, Ketchikan requests that Renaissance be required to submit a detailed schedule of permit activities within 45 days of the permit order, to show adequate financial resources to execute the schedule, and that the Commission include language that would allow termination of the preliminary permit if Renaissance fails to meet its schedule.

Viability of Project

4. Ketchikan argues that the Commission's decision to issue Renaissance a permit with standard terms and conditions is not based on substantial evidence because the permit order ignored comments in the record indicating that Renaissance no longer owned the land on which some proposed project facilities are located. A preliminary permit does not affect property rights because a permit does not authorize access to the site or any land-disturbing activities.⁴ Consequently, ownership of the land within a permit project boundary is not relevant in determining whether to issue a permit. The Commission was aware of the ownership status of the proposed project facilities because Renaissance submitted an amendment to its application explaining that there had been a change of ownership. In addition, several commenters informed the Commission that Renaissance no longer owned the property and Ketchikan had received the property through a foreclosure sale. Therefore, with full knowledge of the ownership change, the Commission issued Renaissance a preliminary permit for the proposed project.

5. Ketchikan argues that the Commission was required to consider comments indicating that Renaissance does not have adequate financial resources to prepare a

³ See *Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects, Notice of Inquiry and Interim Policy Statement*, FERC Stats. & Regs. ¶ 35,555 (2007) (Policy Statement).

⁴ A permit holder can only enter lands it does not own with the permission of the landowner, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. See, e.g., *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301, at P 6 (2003); see also *Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

license application and that the proposed project is not viable.⁵ However, it is longstanding Commission policy not to base the grant of a preliminary permit, conventional or hydrokinetic, on proof of the applicant's ability to finance or perform studies required under the permit.⁶ Similarly, since the purpose of a permit is to allow a permit holder to investigate the feasibility of a project, the Commission does not consider allegations of the potential lack of feasibility of a project as relevant in determining whether to issue a permit.⁷ These issues are relevant at the licensing stage, not during the consideration of a permit application.⁸ For these reasons, we deny rehearing.

Need for Additional Terms and Conditions

6. The Commission's interim strict scrutiny policy for hydrokinetic permits was developed to provide a framework for new hydrokinetic technologies to apply for preliminary permits, and ultimately pilot licenses, while preventing the reservation of potential sites by entities who do not intend to develop a project.⁹ Ketchikan argues that the Commission should modify Renaissance's permit to include the interim strict scrutiny terms and conditions employed for hydrokinetic permits because Ketchikan fears Renaissance will apply for successive permits and site bank, thereby holding the exclusive right to the site and the federal lands. Ketchikan argues that the strict scrutiny approach would avoid the excessive time and cost of consultation for local governments and stakeholders under the standard terms and conditions of conventional permits.

7. We have not hitherto expanded the strict scrutiny policy, which was designed to deal with the unique circumstances of the new hydrokinetic industry, to more traditional projects, and we see no reason to do so here. Heightened scrutiny for Renaissance's permit is unnecessary. The terms and conditions for conventional permits currently

⁵ Ketchikan offers as evidence that the proposed project is not viable its statement that it previously held an initial permit and a successive permit for the same site and determined that the site is not viable for a hydropower project. The fact that Ketchikan failed to develop a project at the site is hardly dispositive of whether Renaissance will do so.

⁶ See *Symbiotics, L.L.C.*, 99 FERC ¶ 61,101, at 61,419 (2002); *Upper Falls Hydro Assoc.*, 65 FERC ¶ 61,203, at 61,966 (1993).

⁷ See, e.g., *Robert A. Davis*, 53 FERC ¶ 61,040, at 61,151 (1990).

⁸ See *Symbiotics, L.L.C.*, 99 FERC at 61,419; *Upper Falls Hydro Assoc.*, 65 FERC at 61,966; *Robert A. Davis*, 53 FERC at 61,151.

⁹ Policy Statement, FERC Stats. & Regs. ¶ 35,555.

require a permit holder to file six month progress reports and authorize the Commission to cancel a permit if such progress reports are not adequate. Furthermore, the Commission will grant successive permits only if it finds that an applicant has diligently pursued its obligations under its prior permit.¹⁰ Whether a permit holder will apply for a successive permit is not a relevant consideration in issuing an initial permit. In fact, Ketchikan itself held an initial permit and a successive permit for the same site. If Ketchikan or any other potential applicant was interested in competing for development of the site, it had an opportunity to file a competing preliminary permit application when the Commission issued public notice of Renaissance's application. No entity did so.

8. Moreover, Ketchikan misunderstands the nature of a preliminary permit. A permit does not give anyone the exclusive right to a site because a permit confers no authority to access or use another's land. Rather, a permit merely gives the holder priority to file a development application while the holder conducts the studies necessary to prepare a development application. In fact, issuance of a permit does not preclude Ketchikan, or other entities with Ketchikan's permission, from studying the site.¹¹

9. We find that the comments identified by Ketchikan raise issues that are not relevant in determining whether to issue a preliminary permit. In addition, we are not persuaded that Renaissance's permit should be modified to reflect our interim strict scrutiny policy for hydrokinetic permits, particularly in light of the fact that there was no competition for the permit site. Accordingly, we deny rehearing.

The Commission orders:

The request for rehearing filed by Ketchikan Public Utilities on April 3, 2009, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁰ See, e.g., *Little Horn Energy Wyoming, Inc.*, 58 FERC ¶ 61,132, at 61,423 (1992).

¹¹ *Continental Hydro Corp.*, 18 FERC ¶ 61,216, at 61,439 (1982).