

131 FERC ¶ 61,031  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
and John R. Norris.

Lock+ TM Hydro Friends Fund IV, LLC

Project No. 13624-001

ORDER DENYING REHEARING

(Issued April 15, 2010)

1. Lock+ TM Hydro Friends Fund IV, LLC (Hydro Friends) has filed a request for rehearing of a January 7, 2010 order by Commission staff rejecting Hydro Friends' license application for the proposed Predator Hydroelectric Project No. 13624-000, which would be located at the U.S. Army Corps of Engineers' (Corps) Lock and Dam No. 7 on the Mississippi River in Minnesota.<sup>1</sup> Because we agree with the conclusions of the January 7 Order, and for additional reasons discussed below, we affirm rejection of the application and therefore deny rehearing.

**I. Background**

2. On November 24, 2008, FFP Project 34, LLC (FFP) filed a preliminary permit application for Project No. 13337-000 to be located at the Corps' Lock and Dam No. 7. On March 30, 2009, Gundersen Lutheran Hydro, LLC (Gundersen Lutheran) filed a competing preliminary permit application for the same site under Project No. 13416-000. In its application, Gundersen Lutheran described itself as a limited liability company that "is a subsidiary of Gundersen Lutheran Health Systems, Inc.," a healthcare provider interested in lowering costs through developing renewable power projects, and explained

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<sup>1</sup> See *Lock+ TM Hydro Friends Fund IV, LLC*, Project No. 13624-000, (January 7, 2010) (unpublished letter order) (January 7 Order).

that Hydro Green Energy, LLC (Hydro Green) would be its technology provider and operator.<sup>2</sup>

3. Public notice of the competing applications was issued on May 14, 2009, establishing July 13, 2009, as the deadline for comments, motions to intervene, competing applications, or notices of intent to file competing applications. Pursuant to the Commission's regulations, the filing of a notice of intent gives the applicant an additional 120 days to complete a license application.<sup>3</sup>

4. On July 13, 2009, Gundersen Lutheran filed a notice of intent to file a development application in competition with the competing permits applications for the Lock and Dam No. 7 site, accompanied by a preliminary application document. The notice of intent identified Gundersen Lutheran Hydro, LLC as the applicant.<sup>4</sup> As had been the case with the permit application, Gundersen Lutheran identified its agent as the executive director of the "Gundersen Lutheran Health System, [d]esignated [r]epresentative of Gundersen Lutheran Hydro, LLC."<sup>5</sup>

5. On November 10, 2009, the last day of the 120-day notice of intent period, a competing license application for the proposed Predator Hydroelectric Project No. 13624-000 to be located at the Corps' Lock and Dam No. 7 was filed by Hydro Friends. The applicant listed as its business address the same address as Hydro Green and listed as agent a person at Hydro Green. In a letter accompanying the application, Hydro Green stated that Gundersen Lutheran had been "a special project entity jointly owned by Gundersen Lutheran Health Systems and Hydro Green Energy, LLC," and that "the ownership structure of Gundersen Lutheran Hydro, LLC has recently changed," and that Hydro Green had assumed full ownership of Gundersen Lutheran. Hydro Green stated that the new name of the special project entity would be Lock+ TM Hydro Friends Fund IV, LLC.<sup>6</sup>

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<sup>2</sup> See Gundersen Lutheran Hydro, LLC, March 30, 2009 Preliminary Permit Application at unnumbered pages 2, 8, and 9.

<sup>3</sup> See 18 C.F.R. § 4.36(b)(3) (2009).

<sup>4</sup> Gundersen Lutheran, July 13, 2009 Cover Letter to Notice of Intent and Preliminary Application Document at Attachment 1.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> Lock+ TM Hydro Friends Fund IV, LLC, November 10, 2009 Cover Letter to License Application at 1.

6. On January 7, 2010, Commission staff issued a letter order rejecting Hydro Friends' license application. The order explained that July 13, 2009, had been the deadline for filing applications or notices of intent to file competing applications, and that while Gundersen Lutheran had in fact filed a notice of intent, Hydro Friends, which filed the application, was a different entity. Thus, Hydro Friends' application was not timely filed.

7. On January 29, 2010, Hydro Friends filed a request for rehearing, arguing that the November 10 application had in fact been filed by the same entity that filed the July 13 notice of intent.

## II. Discussion

8. The Commission will only accept a license application that has been submitted in competition with a preliminary permit application: (1) during the initial permit application's 60-day comment period; or (2) pursuant to a notice of intent that is filed during the initial permit application's comment period.<sup>7</sup> A notice of intent affords the prospective license applicant an additional 120 days to complete its license application.<sup>8</sup> Only the entity identified as the prospective applicant in the notice of intent may file a license application during the additional 120 days.<sup>9</sup> The purpose of this requirement is to ensure that all interested parties know the identity of all actual and prospective competing applicants during the initial permit application's 60-day comment period.<sup>10</sup>

9. Hydro Friends states that it and Gundersen Lutheran Health System were not able to complete negotiations to create a jointly-owned company to develop a hydropower project at Mississippi Lock and Dam No. 7 in time to meet their internal deadline for filing a preliminary permit application. Consequently, Gundersen Lutheran Health System on its own created Gundersen Lutheran and filed the March 30 permit application.<sup>11</sup> Hydro Friends asserts that, after the notice of intent was filed, Gundersen

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<sup>7</sup> 18 C.F.R. § 4.36(a) (2009).

<sup>8</sup> See 18 C.F.R. § 4.36(a)(3) (2009).

<sup>9</sup> See 18 C.F.R. § 4.36(c)(2) (2009). This section requires that a notice of intent include the exact name, business address, and telephone number of the prospective applicant, and an unequivocal statement of intent to submit a license application.

<sup>10</sup> *Application for License, Permit, and Exemption from Licensing for Water Power Projects*, Order No. 413, FERC Stats. & Regs. ¶ 30,632, at 31,266 (1985).

<sup>11</sup> See Hydro Friends, January 29, 2010 Request for Rehearing at 4.

Lutheran Health System decided that it no longer wished to pursue the project and, on November 5, 2009, conveyed its interest in Gunderson Lutheran to Hydro Green, contingent upon Hydro Green, within 30 days, changing the name of Gundersen Lutheran to a company name not including any reference to the various Gundersen entities.<sup>12</sup>

10. Hydro Green asserts that it became the sole owner of Gundersen Lutheran as a result of the November 5 assignment agreement, and that on December 4, 2009, it filed a Certificate of Amendment to the company's articles of organization with the Wisconsin Department of Financial Institutions to reflect the name change of the company to Hydro Friends.<sup>13</sup>

11. Based on the foregoing facts, Hydro Friends argues that it and Gundersen Lutheran are not different entities, but that "Hydro Friends Fund IV" is simply the new name for Gundersen Lutheran, and that the rejection of the November 10 application therefore was error.

12. The 60-day comment period after notice of an initial preliminary permit application is intended to be the only period that a competing applicant can come forth and notify all interested parties of its intent to file a license application, either by submitting a competing permit application or a notice of intent to file a competing permit or license application. It is vital to the integrity of the permit competition process that applicants not act as placeholders for other applicants who have not come forward during the 60-day permit competition period.<sup>14</sup>

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<sup>12</sup> *Id.* at 5-6. Hydro Friends appends to its request for rehearing as Attachment 1 a March 18, 2009 document executed by Gundersen Lutheran Health System and Hydro Green in which the parties agree that Gundersen Lutheran Health System will create a limited liability company (LLC) for the purpose of filing a preliminary permit application. The document provides that if necessary agreements are not completed by July 1, 2009, Gunderson Lutheran Health System will convey the LLC to Hydro Green, which will make the name change discussed above. Hydro Friends does not attach the November 5 agreement.

<sup>13</sup> The certificate of amendment is Attachment 2 to the request for rehearing. Under Wisconsin law, the assignment of a limited liability interest does not dissolve the limited liability company. Wis. Stat. § 183.0704(1) (2009).

<sup>14</sup> This is especially important now as competition for potential hydropower project sites has increased.

13. Here, Hydro Friends has not demonstrated that it is the same entity as Gundersen Lutheran. While it filed with us its initial agreement with the Gundersen entities and its Wisconsin filing affecting the name change, it elected not to provide us with the assignment agreement, which it contends demonstrates that Gundersen Lutheran and Hydro Friends are the same entity. That being the case, Hydro Friends has not shown that staff was incorrect in concluding that the entity which filed the notice of intent was not the same as that which filed the license application. In addition, we note that the license application stated that Gundersen Lutheran was a special project entity jointly owned by Gundersen Lutheran Health Systems and Hydro Green, when that was never in fact the case. Moreover, as demonstrated by Attachment 2 to the request for rehearing, the license application was filed under the name of Hydro Friends on November 10, 2009, when the amendment establishing the Hydro Friends name was not even filed with Wisconsin until December 4, 2009. Thus, the application was filed under a name that did not yet legally apply to the filing. Based on the foregoing, we affirm the January 7, 2010 order.

14. In addition, we find that the license application must be rejected as patently deficient. The Commission's regulations require, as a prerequisite to filing an application, that potential applicants engage in three-stage consultation with state and federal agencies, Indian tribes and members of the public.<sup>15</sup> In the first stage of consultation, the applicant must confer with relevant resource agencies on project design, project impacts, reasonable alternatives and potential studies.<sup>16</sup> In the second stage, the applicant must diligently conduct all reasonable studies and obtain all reasonable information requested by the resource agencies, and provide the agencies with copies of the draft application, the results of the studies, and allow sixty days for the agencies to comment on the draft license application.<sup>17</sup> In the third stage, the application, with documentation of consultation, is filed with the Commission and given to the resource agencies.<sup>18</sup>

15. It is this three-stage consultation, a cornerstone of our licensing process, that gives state and federal resource agencies, Indian tribes, and other stakeholders, the opportunity to become informed about a proposed project and to develop proposed license terms, conditions, and recommendations. As we have explained,

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<sup>15</sup> See 18 C.F.R. § 4.38 (2009).

<sup>16</sup> 18 C.F.R. § 4.38(b) (2009).

<sup>17</sup> 18 C.F.R. § 4.38(c) (2009).

<sup>18</sup> 18 C.F.R. § 4.38(d) (2009).

[t]he requirement of our consultation process is not . . . merely intended as a procedural courtesy to agencies which can be side-stepped at the option of an applicant. The requirement ensures that agencies have a full opportunity to effectively comment on proposals and that applications filed with the Commission reflect any alterations in design and/or operation that may arise as a result of the agency consultation and review process. This in turn ensures that we can process applications with a minimum of delay and procedural problems.<sup>19</sup>

16. Hydro Friends did not complete the first or second stage of consultation. Hydro Friends states that it solicited consultation from several stakeholders who would not fully participate in consultation because of the uncertainty of the permit applications pending for the site.<sup>20</sup> We will not excuse the failure to consult that appears to have arisen in large measure because Hydro Friends sought to engage entities required to be consulted on an early, expedited basis, based on its efforts to overcome an earlier-filed permit application. We have consistently rejected license applications for failing to meaningfully complete three-stage consultation,<sup>21</sup> and we do so again here.

17. It is important to note that the purpose of the period allowed for filing development applications in competition with permit applications is strictly limited to allowing entities to complete applications that they have already been working on, not to create new ones out of whole cloth.<sup>22</sup> In *Electric Plant Board of the City of Paducah*,

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<sup>19</sup> *Ashuelot Hydro Partners, Ltd.*, 36 FERC ¶ 61,250, at 61,605 (1986). *See also* *Murphy Hydro Co., Inc.*, 71 FERC ¶ 61,071, at 61,246 (1995) (stating that a consultation meeting requirement “provides expanded opportunities for participation by resource agencies and the public and the failure to hold such a meeting hampers the free and open exchange of information before an application is filed”).

<sup>20</sup> Hydro Friends, November 10, 2009 Cover Letter to License Application at 2.

<sup>21</sup> *See, e.g., Electric Plant Board of the City of Paducah, Kentucky*, 122 FERC ¶ 61,149 (2008) (license application patently deficient because it failed to complete consultation); *Robert W. Shaw*, 59 FERC ¶ 61,346 (1992) (license application patently deficient because it failed to meaningfully complete three-stage consultation).

<sup>22</sup> In its preliminary application document, submitted with the notice of intent, Gundersen Lutheran requested to use the traditional licensing process to prepare its license application. *See* Gundersen Lutheran, July 13, 2009 Cover Letter to Notice of Intent and Preliminary Application Document at 4. A potential license applicant must request to use either the traditional licensing process or the alternative licensing process

(continued...)

*Kentucky (Paducah)*, we denied the City of Paducah's request to waive consultation requirements and to extend the 120 days afforded by a notice of intent to allow the City of Paducah to complete consultation because the City appeared to be attempting to gain a competitive advantage over other preliminary permit applications by filing a notice of intent.<sup>23</sup> We explained that the Commission's competition regulations are designed to discourage hasty, poorly-prepared development applications and to allow only applicants who have completed, or can quickly complete, necessary studies and pre-filing consultation to file development applications in competition with preliminary permit applications.<sup>24</sup> Hydro Friends simply stated that it was unable to complete a robust license application and was unable to gather needed information and feedback from stakeholders because of the compressed licensing timetable.

18. Here, nothing in the record allows us to conclude that Hydro Friends was attempting to complete an already well-advanced license application within the 120 days afforded by a notice of intent. Indeed, Gundersen Lutheran's request to use the traditional licensing process in its notice of intent shows that it had not begun the license application process before that time. Consequently, in filing its license application, Hydro Friends acknowledged that it was unable to gather needed information and feedback from stakeholders before submitting its license application because of the compressed licensing timetable – a difficulty it created for itself. As in *Paducah*, Hydro Friends is only under the strain of a compressed licensing timetable because it is attempting to gain an advantage over FFP's first-filed preliminary permit application. Because Hydro Friends failed to engage in the consultation required by our regulations before filing its license application, its application is rejected as patently deficient.

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(the integrated licensing process is the default) before preparing a license application. 18 C.F.R § 5.3 (2009). Thus, Gundersen Lutheran had not begun the licensing process prior to submitting the notice of intent.

<sup>23</sup> *Paducah*, 121 FERC ¶ 61,051, at P 40 (2007).

<sup>24</sup> *Id.* P 22-25. See also *Application for License, Permit, and Exemption from Licensing for Water Power Projects*, Order No. 413, FERC Stats. & Regs. ¶ 30,632, at 31,266 (1985).

The Commission orders:

The request for rehearing filed by Lock+ Hydro Friends Fund IV, LLC, on January 29, 2010, is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.