

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

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

Northeast Hydrodevelopment, LLC	Project Nos. 13388-001
	13389-001
	13397-001
	13413-001

ORDER DENYING REHEARING

(Issued May 20, 2010)

1. Northeast Hydrodevelopment, LLC (Northeast Hydro) has filed a request for rehearing of a March 3, 2010 staff order canceling four of Northeast Hydro's preliminary permits for Project Nos. 13388, 13389, 13397, and 13413.¹ Because the permittee failed to diligently prosecute the activities for which the permits were issued, we deny rehearing.

I. Background

2. On July 30, 2009, Commission staff issued permits to Northeast Hydro to study the feasibility of the Milton Three Ponds Hydroelectric Project No. 13388, to be located on the Salmon Falls River in Stafford County, New Hampshire, and the Weare Reservoir Dam Hydroelectric Project No. 13413, to be located on the Piscataquog River in Hillsborough County, New Hampshire.² On July 31, 2009, Commission staff issued permits to Northeast Hydro to study the feasibility of the McLane Dam Hydroelectric Project No. 13389, to be located on the Souhegan River in Hillsborough County, New

¹ *Northeast Hydrodevelopment, LLC*, 130 FERC ¶ 62,180 (2010).

² *Northeast Hydrodevelopment, LLC*, 128 FERC ¶ 62,078 (2009) and 128 FERC ¶ 62,076 (2009), respectively.

Hampshire, and the Mascoma Lake Power Dam Hydroelectric Project No. 13397, to be located on the Mascoma River in Grafton County, New Hampshire.³

3. Article 4 of each of the permits requires that the permittee file a progress report with the Commission every six months that describes the nature and timing of what the permittee has done under the Commission's pre-filing requirements, and the status of the permittee's efforts to access and use land for studies.⁴ The same day the permits were issued, the Division of Hydropower Licensing sent Northeast Hydro an introductory letter highlighting the filing requirements of Article 4 and offering guidance on the preparation of any license application.⁵ The letter stated that the "first progress report is due six months from the first day of the month the preliminary permit was issued, and that "[y]our preliminary permit may be cancelled if you fail to pursue diligently the required consultation and feasibility studies." Article 2 of each of the permits gives notice of the possible cancelation of a permit if the permittee fails "to prosecute diligently the activities for which a permit is issued, or for any other good cause shown."

4. The first progress reports for the four permits at issue in this proceeding were due by December 31, 2009. Northeast Hydro did not file the progress reports. On January 15, 2010, Commission staff sent Northeast Hydro a letter giving notice that the progress reports were overdue and that the four preliminary permits would be canceled if the overdue progress reports were not filed within 30 days. Northeast Hydro made no filings in response to the letter, and on March 3, 2010, Commission staff canceled the four permits. On March 16, 2010, almost two weeks after the permits were canceled,

³ *Northeast Hydrodevelopment, LLC*, 28 FERC ¶ 62,082 (2009) and 128 FERC ¶ 62,083 (2009), respectively.

⁴ Article 4 states that "[a]t the close of each six-month period from the effective date of this permit, the permittee shall file four copies of a progress report with the Secretary [of the Commission] The report shall describe, for that report period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R., Sections 4.38 and 5.1-5.31 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission to access and use the land."

⁵ *Northeast Hydrodevelopment, LLC*, Project Nos. 13388 and 13413 (July 30, 2009) and Project Nos. 13389 and 13397 (July 31, 2009) (unpublished letters). The letters also informed Northeast Hydro about the Commission's Policy Statement on Consultation with Indian Tribes.

Northeast Hydro filed one progress report for nine permits, including the four canceled permits at issue here.⁶

II. Discussion

5. Section 5 of the Federal Power Act (FPA) authorizes the Commission to issue preliminary permits for the sole purpose of maintaining priority of application for a license.⁷ FPA section 5 further states that “[e]ach such permit shall set forth the conditions under which priority shall be maintained,” and that “[s]uch permits . . . may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.”⁸

6. As noted above, Northeast Hydro did not file the six-month progress reports required by the permits. Further, it did not respond to Commission staff’s letter warning that the permits were subject to cancelation. Rather, Northeast Hydro belatedly filed progress reports after the permits had been canceled, and now seeks rehearing of the cancelation order.

7. Northeast Hydro asserts that it never received the January 15 letter notice of probable cancelation. This is unavailing. Norm Herbert, manager of Northeast Hydro, is on the Commission’s mailing list and service list for each of the four permits at issue here. Mr. Herbert registered electronically (eRegister) with the Commission, which allows individuals to electronically file documents with the Commission, and to login to the Commission’s database and change individual contact information as necessary. Individuals who are on a docket’s mailing list or service list and who e-register receive electronic mail (email) notification of Commission issuances, and do not receive a paper

⁶ With respect to the other five permits, which are not at issue here, the progress report appeared to be a timely response to a February 23, 2010 notice letter informing Northeast Hydro that progress reports for those five preliminary permits were late and the permits would be canceled if the progress reports were not filed within 30 days. Northeast Hydro’s progress report describes general activities relating to the nine permits (e.g., developing a business plan, compiling information for financial analysis of each project, soliciting funding, and evaluating the comments received on the permits).

⁷ 16 U.S.C. § 798 (2006).

⁸ *Id.*

copy in the mail.⁹ The Commission's technical staff confirmed that Mr. Herbert has registered as the manager of Northeast Hydro, he was sent an email notification of the January 15 letter notice, and Commission technical staff did not receive notification that the email was undeliverable. Therefore, we must presume that Northeast Hydro received notification of the January 15 letter notice by email. Entities appearing before the Commission are charged with knowledge of the Commission's regulations,¹⁰ and are presumed to have received official Commission issuances.¹¹

8. In any case, Northeast Hydro had sufficient notice of the permit requirements and the consequences of not fulfilling those requirements. The permit itself gave Northeast Hydro notice of the six-month progress report requirement, and Commission staff further explained the implications of not complying with the terms of the permit in the introductory letter. After Northeast Hydro missed the filing deadline for four of its permit progress reports, Commission staff then sent a letter notifying Northeast Hydro of the probable cancelation of its permits if the progress reports were not filed within 30 days. All communications from Commission staff (the permit, the introductory letter, the January 15 letter notice, the February 23 letter notice, and the March 3 letter order canceling four permits) were addressed to the same party, sent to the same address, and promptly placed in the Commission's e-library record for each of the proceedings. We presume that Northeast Hydro received the referenced Commission issuances. In any case Northeast Hydro failed to meet the requirements clearly set forth in its permits, and has provided no explanation for these deficiencies. Therefore, rehearing is denied.¹²

⁹ Rule 2010(g) of the Commission rules of practice and procedure states that service by the Commission's Secretary shall be made by electronic means. 18 C.F.R. § 385.2010(g) (2009).

¹⁰ *See, e.g., San Diego Gas & Electric Co.*, 112 FERC ¶ 61,330, at P 8 (2005).

¹¹ *See, e.g., City of Summersville, W. Va.*, 86 FERC ¶ 61,148 (1999) (Commission presumes that rejection notice was received because recipient was on service list).

¹² Northeast Hydro also asserts on rehearing that it has never before been delinquent in its Commission filings and substantial harm will be done if rehearing is not granted because it has invested significant time and resources in the four potential projects, there was no competition for the permit sites, and the proposed projects will provide jobs in New Hampshire, energy independence for the United States, and a reduction in greenhouse gas emissions. The consequences of not complying with Commission orders (including the permit at issue here) are particular to each individual order. Thus, whether Northeast Hydro has ever been delinquent before is not relevant in this proceeding. In any event, we reject Northeast Hydro's claim of past diligence

(continued...)

The Commission orders:

Northeast Hydrodevelopment, LLC's request for rehearing in Project Nos. 13388-001, 13389-001, 13397-001, and 13413-001 is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

inasmuch as these are the first permits ever issued to Northeast Hydro. Furthermore, the decision to cancel these permits is based only on Northeast Hydro's inability to comply with our basic permit requirements. Northeast Hydro could have avoided the consequences of the permit cancelations by complying with the terms of its permits.