

133 FERC ¶ 61,053  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Thermalito Afterbay Hydro, LLC

Project No. 13794-001

ORDER DENYING REHEARING

(Issued October 21, 2010)

1. On July 2, 2010, Commission staff issued an order dismissing a preliminary permit application proposing to study the feasibility of developing hydropower at the Thermalito afterbay dam and outlet, features of an existing licensed project, the Oroville Project, located on the Feather River in Butte County, California.<sup>1</sup> On August 2, 2010, Thermalito Afterbay Hydro, LLC (Thermalito Hydro) filed a timely request for rehearing of the order.<sup>2</sup> As discussed below, we deny rehearing.

**Background**

2. The Thermalito afterbay reservoir, dam, and outlet are features of the 762-megawatt Oroville Project No. 2100 operated by the California Department of Water Resources (California DWR) as an integrated power, flood control, water supply, and irrigation system. These features are part of the Thermalito Pumping-Generating Plant, one of three generation facilities at the Oroville Project. The afterbay reservoir functions as the lower reservoir for the Thermalito Pumping-Generating Plant, and provides storage for water that will be pumped back to Lake Oroville, helps regulate the power system, produces controlled flow in the Feather River downstream from the Thermalito facilities, and provides recreation. No generation facilities currently exist at the afterbay dam or outlet. As relevant to Thermalito Hydro's proposal, water flows from the afterbay

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<sup>1</sup> *Thermalito Afterbay Hydro, LLC*, 132 FERC ¶ 62,008 (2010).

<sup>2</sup> The order dismissed a second permit, Project No. 13724, which was initially also the subject of the August 2, (2010) request for rehearing. However, the second permit application, as well as the party's request for rehearing regarding it, were subsequently withdrawn.

reservoir, created by the afterbay dam, and through the outlet, which releases flows into the Feather River. The proposed project is entirely within the existing Oroville Project.

3. On January 26, 2005, the California DWR filed an application for a new license for its existing project. On March 24, 2006, California DWR submitted a settlement agreement among interested entities in the Oroville Project relicensing proceeding. On May 18, 2007, the final environmental impact statement for the Oroville Project facilities was issued. Currently, the Commission is awaiting action by the California State Water Resources Control Board and the U.S. Department of Commerce, National Marine Fisheries Service, to complete the relicensing process.

4. On May 21, 2010, Thermalito Hydro filed an application for a preliminary permit to study the feasibility of the Thermalito Afterbay Small Hydroelectric Project No. 13794-000. The proposed project would operate as a run-of-river project and would generate 57 gigawatt-hours annually, with a total capacity of 10 megawatts. The project would include five or six low-head turbine generators each installed on Thermalito afterbay dam and Thermalito outlet, a crane mounted on both the dam and the outlet for maintenance purposes, a control station and switchyard, and a five-mile-long transmission line.

5. On July 2, 2010, Commission staff issued an order dismissing Thermalito Hydro's permit application, without prejudice, because it proposed to develop incremental capacity within the existing Oroville Project, which is currently in a relicensing proceeding. The dismissal order explained that the Commission will determine whether the Oroville Project relicense proposal is best adapted to a comprehensive plan for improving or developing the waterway, as required by section 10(a)(1) of the Federal Power Act.<sup>3</sup> Commission staff found that because the Commission has the authority to modify the Oroville Project in the course of acting on the relicensing proposal, and the licensee's proposed plan for development is provisional at this time, it is not possible to determine with certainty whether the project proposed in the permit application would utilize the same water resource as the Oroville Project. Therefore, Commission staff dismissed Thermalito Hydro's permit application without prejudice pending the outcome of the Oroville Project relicensing proceeding.

6. On August 2, 2010, Thermalito Hydro filed a timely request for rehearing.

### **Discussion**

7. In the order dismissing Thermalito Hydro's permit application, Commission staff found that "it is not possible to determine with certainty whether the project[] proposed

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<sup>3</sup> 16 U.S.C. § 803(a)(1)(2006).

by the permit application[] would utilize the same water resource as the Oroville Project,”<sup>4</sup> and therefore dismissed the application pursuant to *Marseilles Land and Water Co.*<sup>5</sup> In *Marseilles*, we held that preliminary permits will not be issued for proposed projects that would develop, conserve, and use the same water resources and are located in close proximity to projects that are in the licensing or development phase.<sup>6</sup>

8. Thermalito Hydro asserts that although its proposed project is in close proximity to the Oroville Project, it would not interfere with the Oroville Project, nor develop, conserve, or use the same water resources as the Oroville Project. To support this position, Thermalito Hydro points to language in California DWR’s license application stating that it does not propose any modification to the Oroville facilities that would either add new generation equipment or increase the generation capability of the existing three power plants.<sup>7</sup> Thermalito states that neither the environmental impact statement nor the settlement agreement contemplate use of the water resources that it proposes to develop.<sup>8</sup> Thermalito Hydro asserts that the settlement agreement in the Oroville Project relicensing calls for a feasibility study to be prepared within three years following license issuance to consider facility modifications to improve temperature conditions in the Feather River downstream from the afterbay outlet.<sup>9</sup> Thermalito Hydro clarifies that, of the modification options to be evaluated, “only the Palermo Canal improvements, the diversion canal around Thermalito Afterbay, and the Thermalito Afterbay Outlet and Channel would have the potential to affect its proposed project.”<sup>10</sup> Thermalito Hydro concludes that “since minimum flow requirements for the high flow channel [in the Feather River] would need to be maintained with the Afterbay Channel and Outlet

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<sup>4</sup> *Thermalito Afterbay Hydro, LLC*, 132 FERC ¶ 62,008 at P 5.

<sup>5</sup> *Marseilles Land and Water Co.*, 129 FERC ¶ 61,140 (2009) (*Marseilles*).

<sup>6</sup> *Id.* P 30-32.

<sup>7</sup> Thermalito Hydro August 2, 2010 Request for Rehearing at 4.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> The potential modification options to be evaluated include “a new outlet structure at Oroville Dam, non facilities modifications to meet water temperature objectives, *Palermo Canal improvements*, . . . Hyatt intake extension, river valve improvements, *diversion canal around Thermalito Afterbay*, channel structure within Thermalito Afterbay, *alternate Thermalito Afterbay Channel and Outlet*, and a temperature curtain within Thermalito Afterbay.” *Id.* (emphasis added).

<sup>10</sup> *Id.*

alternative, the [proposed project] *may* remain feasible even with this alternative,” and that “water passing through the Thermalito Pumping-Generating Plant would be available for both proposed projects *except as noted above.*”<sup>11</sup>

9. Given Thermalito Hydro’s own concession in its request for rehearing that it is not clear whether future licensing modifications will impact its project proposal, we believe that staff’s decision to dismiss the permit application was entirely reasonable and consistent with *Marseilles*.<sup>12</sup> In fact, Thermalito Hydro’s thorough analysis of the potential for generating capacity at the afterbay dam and outlet confirms that it is not clear whether its proposed project would utilize the same water resource that will be used by the Oroville Project upon completion of its relicensing. For example, if the diversion canal around the afterbay were the chosen modification, then it is not clear whether there is sufficient water flow to serve both the diversion canal and Thermalito Hydro’s generating facilities. Further complicating the inquiry into whether the proposed project uses the same water resource is the fact that, in addition to releasing flows into the Feather River, California DWR withdraws water from the afterbay reservoir when it pumps water for use at the Thermalito Pumping-Generating Plant. Even though we are affirming dismissal of the permit application, we remind Thermalito Hydro that the dismissal is without prejudice and if a license is issued, and proposed modifications evaluated and implemented, proposals for incremental capacity at an existing project may be submitted. Also, even without a preliminary permit, Thermalito Hydro is free to study the site for future development of incremental capacity.

10. Thermalito Hydro further contends that the Commission should issue a preliminary permit configured to avoid interference with the California DWR’s license application or the conditions of a new license, as the Commission did in *Cosumnes River Water and Power Authority*.<sup>13</sup> In *Cosumnes*, a license application was filed to develop a 100-kilowatt project after a permit application had been submitted for a proposal to develop a 44,000-kilowatt project in the same area. Based on representations by the permit applicant that it could configure its proposal so as not to interfere with the license application, we authorized issuance of a permit subject to a condition that it would not

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<sup>11</sup> *Id.* (emphasis added).

<sup>12</sup> In *Marseilles*, the competing permit and license applications were both for original proposed projects. In this case, California DWR’s application is for a new license for its existing project. However, the *Marseilles* policy applies equally whether the license application is for an original or a new license (i.e., relicense).

<sup>13</sup> *Cosumnes River Water and Power Authority*, 39 FERC ¶ 61,272 (1987) (*Cosumnes*).

interfere with the licensing proposal.<sup>14</sup> However, the position of the parties in the current case is the converse of the situation presented in *Cosumnes*. In *Cosumnes*, a permit applicant proposed a significantly larger project that spanned a large geographic area encompassing several water features, while the subsequent license applicant proposed a comparatively tiny project on one section of a shared water feature. Here, California DWR has filed a license application to develop a 762-megawatt project in the course of its relicensing proceeding. The permit applicant, Thermalito Hydro, proposes to study a much smaller 10-megawatt project. Because of the potential modifications to the Oroville Project that may still occur, Thermalito Hydro has not established that it can operate without interfering with the Oroville Project. Furthermore, the permit applicant in *Cosumnes*, unlike Thermalito Hydro, had filed its permit application before the license application, and had proposed a project with significantly greater generating capacity than proposed in the later-filed development application. Neither of these factors is present here.

11. Additionally, we note that where, as here, it is not clear whether a proposed project to develop incremental capacity is truly incremental (i.e., not developing the same water resource) or replacement capacity, for regulatory purposes, we have considered multiple proposals as competing.<sup>15</sup> Under this framework, Thermalito Hydro's permit application should not be accepted on the basis of section 4.33(a)(3) of the Commission's regulations, which provides that the Commission will not accept a permit application for project works that would develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which an initial development application has been filed.<sup>16</sup> A relicense application is considered

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<sup>14</sup> *Id.*

<sup>15</sup> See, e.g., *Skokomish Indian Tribe*, 71 FERC ¶ 61,023, at 61,100 (permit application rejected because filed after new license application for existing project, and availability of water resource pending relicensing was unclear), *reh'g denied*, 72 FERC ¶ 61,268 (1995), *aff'd*, 121 F.3d 1303 (9<sup>th</sup> Cir. 1997); *Alpine Hydroelectric Co.*, 58 FERC ¶ 61,127, at 61,411 (1992) (affirmed rejection of permit application where permit application filed subsequent to an accepted new license application for an existing project did not compete with existing project but did conflict with modifications proposed in the relicense application).

<sup>16</sup> 18 C.F.R. § 4.33(a)(3) (2010). The preamble to this section explains that our reasons for developing limitations on permit applications include to favor actual development over studies, reduce unnecessary uncertainty, assure fair treatment of prospective competing applicants, and promote efficient use of Commission resources. See *Application for License, Permit, and Exemption from Licensing for Water Power Projects*, Order No. 413, FERC Stats. & Regs. ¶ 30,632, at 31,265-67 (1985).

an initial development application.<sup>17</sup> California DWR's application for a new license for the Oroville Project was accepted on February 3, 2005. Thermalito Hydro submitted its permit application after California DWR's new license application had been accepted by the Commission. Thus, it was proper to dismiss Thermalito Hydro's permit application because we presume that it could develop and utilize the same water resources as the Oroville Project.

12. Moreover, the suggestion that the Commission should condition the permit order to avoid interference with the as yet unissued license order and conditions raises another ground for dismissing the permit application. In *Skokomish Indian Tribe*, we indicated that section 4.32(j) of the Commission's regulations<sup>18</sup> could provide a basis for rejecting preliminary permit applications where the development of a project would depend on the outcome of a relicensing proceeding.<sup>19</sup> Since any permit issued for the proposed project would require conditioning based on the as yet unknown requirements and conditions of the Oroville Project license, we further affirm staff's decision not to accept Thermalito Hydro's permit application.

13. For the reasons discussed above, the Commission denies rehearing.

The Commission orders:

The request for rehearing filed by Thermalito Afterbay Hydro, LLC, on August 2, 2010, is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>17</sup> *Alpine Hydroelectric Co.*, 58 FERC ¶ 61,127, at 61,411.

<sup>18</sup> 18 C.F.R. § 4.32(j) (2010). This section provides: "Any application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected."

<sup>19</sup> *See Skokomish Indian Tribe*, 71 FERC ¶ 61,023, at 61,099.