

136 FERC ¶ 61,178
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.

Grand Coulee Project Hydroelectric Authority

Project No. 13681-002

ORDER DENYING MOTION FOR STAY

(Issued September 15, 2011)

1. Grand Coulee Project Hydroelectric Authority (the Authority) has filed a motion for stay of the Commission's December 14, 2010 order¹ dismissing the Authority's application for a preliminary permit to study the feasibility of the proposed North Dam Pumped Storage Project No. 13681, to be located in part at Banks Lake, which is a component of the U.S. Bureau of Reclamation's (Reclamation) Columbia Basin Project, in Washington.² Because the Authority has not shown that justice requires a stay, we deny the motion.

Background

2. In 2009, Commission staff issued a preliminary permit to BPUS Generation Development LLC (BPUS) to study the feasibility of the 1,040-megawatt (MW) Banks

¹ *Grand Coulee Project Hydroelectric Authority*, 133 FERC ¶ 62,245 (2010).

² The Columbia Basin Project produces power at Grand Coulee Dam and at the Grand Coulee Pump-Generating Plant (Pump-Generating Plant). The project also provides irrigation flows for 671,000 acres in portions of Grant, Lincoln, Adams, and Franklin Counties, Washington. The flow of the Columbia River is impounded by Grand Coulee dam to form the Franklin D. Roosevelt Lake (Roosevelt Lake) reservoir. The Pump-Generating Plant pumps water from Roosevelt Lake into a feeder canal, which carries the water to an upper reservoir, Banks Lake, where it is available for irrigation or for power production back through the Pump-Generating Plant.

Lake Project No. 13296.³ The proposed project would include construction of a new upper reservoir and would use as its lower reservoir Banks Lake. The permit expires February 29, 2012.

3. On March 8, 2010, the Authority, a Washington municipality, filed an application for a preliminary permit to study the feasibility of the proposed 900-MW North Dam Project. The proposed project would use Banks Lake as its upper reservoir and Roosevelt Lake (also a component of Reclamation's Columbia Basin Project) as its lower reservoir.

4. On December 14, 2010, Commission staff dismissed the Authority's preliminary permit application concluding that its proposed project would use the same water resource, Banks Lake, as the preliminary permit issued to BPUS for Project No. 13296.⁴

5. The Authority sought rehearing, arguing that staff erred in its conclusion that its project would utilize the same water resources as BPUS' project, and that, in any event, issuance of a permit for its Project No. 13681 is in the public interest.

6. By order dated April 21, 2011,⁵ the Commission denied rehearing, concluding that water used by the Authority for its project would come from the intermingled waters of Banks Lake, the same water resource that BPUS proposed to use. The Commission also disagreed with the Authority's contention that its project did not present an inherent conflict with the BPUS project, noting its policy that "we do not issue more than one permit for the development of the same water resource. A permittee must have the flexibility to propose for licensing the most comprehensive development of the water resource identified in its permit application."⁶ Finally, the Commission explained that, even if it issued a permit to the Authority on the basis of its assertion that it may be able to develop a project compatible with the Banks Lake Project, the Authority would have no way of knowing the exact configuration of BPUS' project until that application for a

³ *BPUS Generation Development LLC*, 126 FERC ¶ 62,168 (2009).

⁴ Staff cited section 4.33(a)(1) of the Commission's regulations, 18 C.F.R. § 4.33(a)(1) (2010), which states that the Commission will not accept preliminary permit applications for project works that "[w]ould 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 there is an unexpired preliminary permit."

⁵ *Grand Coulee Project Hydroelectric Authority*, 135 FERC ¶ 61,046 (2011).

⁶ *Ashuelot Hydro Partners, Ltd.*, 30 FERC ¶ 61,048 (1985).

license was filed (and acted on by the Commission), and thus would hold a permit, but be unable to design its project until, at the earliest, late in its permit term.

7. On June 21, 2011, the Authority filed a petition for judicial review of the two orders.⁷

8. On July 1, 2011, the Authority filed the instant motion for stay.

Discussion

9. The Commission reviews request for stay under the standard established by the Administrative Procedure Act:⁸ a stay will be granted if “justice so requires.”⁹ Under this standard, the Commission generally considers whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and whether a stay is in the public interest.¹⁰ In order to make a showing of irreparable injury, the movant must show that the injury is certain and great, actual and not theoretical. Moreover, economic loss alone does not constitute irreparable injury.¹¹

10. The Authority asks the Commission to stay the December 14, 2010 order so that the Authority can “maintain its first-to-file priority for the preliminary permit application for the North Dam Project pending resolution of its appeal.”¹² While the Authority recognizes that the Commission would dismiss any other application for a project similar to the Authority’s while BPUS’ permit is effective, it argues that that it would, in the absence of a stay, suffer irreparable injury and be prejudiced because it could not be sure,

⁷ *Grand Coulee Project Hydroelectric Authority v. FERC*, No. 11-1239 (D.C. Cir.). The Authority subsequently filed a motion to hold the appeal in abeyance, pending future developments with respect to BPUS’ Project No. 13296, which was granted August 10, 2011.

⁸ 16 U.S.C. § 817(1)(2006).

⁹ *See, e.g., Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 8 (2008).

¹⁰ *See, e.g., Public Utility District No. 1 of Pend Oreille County*, 113 FERC ¶ 61,166, at P 6 (2005).

¹¹ *See, e.g., Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at P 26 (2001) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

¹² Motion for Stay at 2.

if BPUS' permit expires before BPUS files a development application, that another municipality might not then file a permit application before the Authority did.¹³

11. As noted above, irreparable injury must be certain and not theoretical. The Authority's argument, however, is purely speculative – the Authority theorizes that if BPUS does not file a development application (thereby opening the site for development by other entities) and if another municipality then files an application for a project similar to the Authority's before the Authority files another application, the Commission might issue a permit to that other entity. This series of hypotheticals does not amount to a showing of irreparable injury. Accordingly, we deny the motion for stay.¹⁴

The Commission orders:

The motion for stay filed by Grand Coulee Project Hydroelectric Authority on July 1, 2011 is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹³ *Id.* at 3.

¹⁴ The Authority also asserts that a stay will not substantially harm any other entity and that a stay is in the public interest because it would preserve a potential development opportunity for a municipality. Motion for Stay at 4. We agree that a stay would not harm any other entity, but do not agree that staying an order that followed our policy of dismissing permit applications in the circumstances presented here would be in the public interest. In any event, the Authority's failure to demonstrate irreparable harm renders inquiry into the other factors moot.