

139 FERC ¶ 61,121
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Borough of Weatherly, Pennsylvania

Project No. 14358-001

ORDER DENYING REHEARING

(Issued May 17, 2012)

1. On March 14, 2012, the Borough of Weatherly, Pennsylvania, (Borough) filed a request for rehearing of a February 17, 2012 Commission staff order dismissing as late-filed its competing preliminary permit application to study the feasibility of developing the hydroelectric power potential at the U.S. Army Corps of Engineers' (Corps) Francis E. Walter Dam, located on the Lehigh River, in Luzerne County, Pennsylvania.¹ For the reasons discussed below, we deny the request for rehearing.

Background

2. On November 20, 2008, the Commission issued a 36-month preliminary permit to the Borough to study the feasibility of the proposed Francis E. Walter Dam Water Power Project No. 13177-000. The permit became effective on November 1, 2008, and expired October 31, 2011 (36 months from the effective date).²

3. On November 1, 2011, Francis Walter Hydro, LLC (FW Hydro), filed a preliminary permit application to study the feasibility of the proposed Francis E. Walter Hydroelectric Project No. 14314-000, to be located at, and use the power potential of, the Corps' Francis Walter Dam.³ FW Hydro's project would include a 16-foot-diameter,

¹ *Borough of Weatherly, Pennsylvania*, 138 FERC ¶ 62,140 (2012).

² According to ordering paragraph A of the permit order, the permit was effective on "the first day of the month in which this permit is issued." *Borough of Weatherly, Pennsylvania*, 125 FERC ¶ 62,169, at 64,556 (2008).

³ FW Hydro filed its application on October 31, 2011, at 5:39 p.m. Pursuant to Rule 2001(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R.

(continued...)

600-foot-long bifurcated steel penstock; a powerhouse containing two 4.5-megawatt turbines; and a 0.5-mile-long, 12.4-kilovolt transmission line.

4. On November 14, 2011, the Commission accepted the application and issued public notice, setting January 13, 2012, as the deadline for filing comments, motions to intervene, competing applications, and notices of intent to file competing applications.

5. On January 23, 2012, ten days after the intervention deadline, the Borough filed a letter requesting an extension of time to file a competing permit application. Seven days later, the Borough filed its competing preliminary permit application.

6. Commission staff's February 17 Order dismissed the Borough's competing preliminary permit application, explaining that the application was late-filed because it was not filed before the prescribed deadline in the public notice of the permit application for Project No. 14314-000 or pursuant to a timely notice of intent to file a competing permit application.

7. On March 14, 2012, the Borough filed a request for rehearing of staff's order.⁴

Discussion

8. On rehearing, the Borough argues that the Commission should have accepted its competing permit application because at the time of its filing, no other entity held a preliminary permit for the site.

§ 385.2001(a)(2) (2011), because FW Hydro's application was received after normal Commission business hours, it is deemed filed at 8:30 a.m. on the next regular business day, in this case November 1, 2011.

⁴ The Borough's request for rehearing is deficient because it fails to include a Statement of Issues, as required by Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2011). Rule 713(c)(2) requires that a request for rehearing include a separate section entitled "Statement of Issues" that lists each issue presented to the Commission on rehearing in a separately enumerated paragraph, which includes representative Commission and court precedent upon which the requester is relying. Under Rule 713, any issue not so listed is deemed waived. Accordingly, the Borough's rehearing request is subject to dismissal. *See, e.g., South Carolina Electric & Gas Co.*, 116 FERC ¶ 61,218 (2006); *Duke Power Co., LLC*, 116 FERC ¶ 61,171 (2006). We will nevertheless address the merits of the Borough's rehearing request.

9. We disagree with the Borough's assertion.⁵ Under section 4.36 of the regulations, the Commission requires competing applications or notices of intent to file a competing application to be filed on or before the prescribed intervention deadline for the initial application.⁶ Here, the intervention deadline set by the Commission was January 13, 2012, but the Borough did not file its competing permit application until January 30, 2012, which was not only late, but was three months after the Borough's permit expired. Commission staff properly dismissed the Borough's application as late-filed.⁷

10. For the above reasons, we deny rehearing.⁸

⁵ It appears that the Borough's argument is based on its mistaken belief that section 4.33(a)(1) of the regulations applies to its situation. 18 C.F.R. § 4.33(a)(1) (2011). That section states that the Commission will not accept an application for a preliminary permit that would develop water resources already being developed by an unexpired preliminary permit. Although there was no unexpired permit for the site at the time the Borough filed its permit application, as we have explained, the appropriate regulation governing the timeliness of the Borough's competing application is found at section 4.36, 18 C.F.R. § 4.36 (2011).

⁶ 18 C.F.R. § 4.36(a)(1) and (c)(1) (2011). Competing applications filed pursuant to a timely notice of intent must be filed: (1) for competing permit applications, within 30 days of the intervention deadline; and (2) for development applications, within 120 days of the intervention deadline. 18 C.F.R. §§ 4.36(a)(2) and (3) (2011).

⁷ Even if we were to consider its request for an extension of the intervention deadline as a notice of intent to file a competing application, the notice of intent was late and gave no reason for why the Borough was unable to timely file its competing application. In any event, to ensure fairness to all competitors for project sites, the Commission has a long-standing policy of not extending competition deadlines. *See, e.g., Manter Corp.*, 52 FERC ¶ 61,071, at 61,283 (1990).

⁸ The Borough also asks the Commission to consider the work it has performed under its previous permit for the site. However, such information is not relevant to the timeliness of the Borough's application for a second preliminary permit, and in any event, as explained in n.8, *supra*, does not appear to demonstrate that the Borough pursued the project with due diligence under its previous permit.

The Commission orders:

The request for rehearing filed by the Borough of Weatherly, Pennsylvania, on March 14, 2012, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.