

140 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Cascade Creek, LLC

Project No. 12495-006

ORDER DENYING REHEARING

(Issued September 20, 2012)

1. On January 30, 2012, Commission staff issued an order denying Cascade Creek, LLC's (Cascade) application for a third preliminary permit for the Cascade Creek Hydroelectric Project No. 12495.¹ On the same day, Commission staff issued a letter to Cascade terminating the pre-filing alternative licensing process (ALP) for the proposed project.

2. On February 29, 2012, Cascade filed a request for rehearing of the January 30, 2012 Order denying its permit application and letter terminating the ALP. This order denies Cascade's request for rehearing.

I. Background

3. On October 8, 2004, Commission staff issued Cascade its first three-year preliminary permit for the proposed Cascade Creek Hydroelectric Project, an 80-megawatt project to be located in the Tongass National Forest on Swan Lake, in Southeast Alaska near the town of Petersburg.² The Cascade Creek project would divert water from Swan Lake through a low-head weir and conduit for approximately three miles to a powerhouse, after which the water would be delivered to Thomas Bay. The estimated annual generation would be 205 gigawatt-hours.

4. On August 3, 2007, approximately two months before its permit expired, Cascade filed a Notice of Intent (NOI) to prepare a license application, a Pre-Application

¹ *Cascade Creek, LLC*, 138 FERC ¶ 62,063 (2012).

² *Cascade Creek, LLC*, 109 FERC ¶ 62,027 (2004).

Document (PAD) identifying existing information relevant to the proposed project,³ and a request to use the alternative licensing procedures (ALP) to prepare a license application.⁴ Cascade's PAD included the process plan and schedule for pre-license application activities required by the Commission's regulations.⁵ Cascade's process plan and schedule stated that scoping, study planning, and studies would be conducted from fall 2007 through spring 2008, and a draft license application would be sent to stakeholders in March 2010.⁶

5. Cascade's PAD also included a communications protocol with a schedule for providing major documents to interested entities for review.⁷ This schedule stated that Cascade expected to distribute study plans in fall 2007, Scoping Document 1 in fall 2007, study reports in 2008-2009, a draft license application in spring 2009, a preliminary draft environmental assessment in spring 2009, and a final license application in fall-winter 2009. In addition to the schedule, the communications protocol stated that a reference file for all documents would be maintained in Petersburg, Alaska, and Cascade would develop and maintain a website on which most pre-filing material would be available.

³ Cascade's PAD, filed on August 3, 2007, described three proposed projects for which Cascade held three separate preliminary permits: Cascade Creek Hydroelectric Project No. 12495, Ruth Lake Hydroelectric Project No. 12619, and Scenery Lake Hydroelectric Project No. 12621. Cascade lost a successive permit for the Ruth Lake Hydroelectric Project to a competing municipal applicant, and Cascade did not seek a successive permit for the Scenery Lake Hydroelectric Project.

⁴ In contrast to the default integrated licensing process (ILP), the ALP allows potential license applicants some flexibility in designing pre-filing consultation such that timeframes for completing pre-filing consultation and studies are established collaboratively in the communications protocol and recited in the process plan and schedule section of the PAD.

⁵ See 18 C.F.R. § 5.6(d)(1) (2012).

⁶ Cascade Creek, LLC August 3, 2007 Filing at 28.

⁷ When requesting use of the ALP, a potential license applicant must submit a communications protocol, supported by interested entities, governing how the applicant and other participants in the pre-filing consultation process, including Commission staff, may communicate with each other regarding the merits of the applicant's proposal and proposals and recommendations of interested entities. 18 C.F.R. § 4.34(i)(3)(ii) (2012).

6. On September 13, 2007, the Commission issued public notice of Cascade's NOI, PAD, and Commission's staff's approval of Cascade's request to use the ALP to prepare a license application.⁸

7. Cascade's first permit expired September 30, 2007, and on October 2, 2007, Cascade filed an application for a successive preliminary permit. On February 14, 2008, Commission staff issued Cascade a second three-year preliminary permit for the proposed project, finding that Cascade had demonstrated sufficient progress toward preparing a license application during the course of its previous permit.⁹ The permit explained that, during the permit term, staff expected Cascade to conduct agency consultation and prepare a license application in accordance with sections 4.38 and 4.41 of the Commission's regulations.¹⁰

8. Standard Article 4 for preliminary permits requires that a permittee submit progress reports every six months describing the specific nature of the progress made in preparing an adequate license application during that six-month period. The Commission's ALP regulations also require a potential license applicant to submit, every six months, a report summarizing the progress made in the pre-filing consultation process and referencing the applicant's public reference file, where additional information on that process can be obtained.¹¹ On August 1, 2008, and February 3, 2009, Cascade submitted its first and second six-month progress reports.¹²

⁸ Ten entities, including state and federal agencies, local communities, tribes, and a consulting firm, consented to Cascade's communications protocol for the ALP, indicating that they did not oppose Cascade's use of the ALP.

⁹ *Cascade Creek, LLC*, 122 FERC ¶ 62,147 (2008).

¹⁰ *Id.* at 64,307. Section 4.38 of the Commission's regulations describes the Commission's first and second stage consultation requirements, which include consulting with relevant stakeholders, diligently conducting all reasonable studies, and obtaining all reasonable information required by resource agencies and Indian tribes affected by the proposed project. 18 C.F.R. § 4.38 (2012). Section 4.41 of the Commission's regulations details the specific application filing requirements for a major unconstructed hydropower project. 18 C.F.R. § 4.41 (2012).

¹¹ 18 C.F.R. § 4.34(i)(6)(ii) (2012).

¹² Rather than having completed necessary studies in consultation with agencies and nearly completed its draft license application by February 2009, as had been presented in Cascade's schedule, Cascade stated that it reviewed stakeholder comments,

(continued...)

9. On May 26, 2009, Commission staff issued Scoping Document 1, which gave public notice of two scoping meetings to be held in Petersburg, Alaska, on June 18, 2009, briefly described the project, and described the procedures for filing scoping comments and participating in the meetings.

10. On July 31, 2009, and February 2, 2010, respectively, Cascade Creek submitted its third and fourth progress reports.¹³

11. On February 2, 2010, and March 8, 2010, almost three years later than identified in its schedule, Cascade filed several draft study plans for review by Commission staff.¹⁴ On March 31, 2010, Commission staff responded by explaining that staff attempted to review the plans but they “lack[ed] the detail needed to provide constructive input on the study efforts.” The letter reminded Cascade that its second preliminary permit would expire on January 31, 2011, noted Cascade’s “general lack of progress toward developing a license application,” and warned that, “[b]ased on the comments provided during scoping and our review of your study plans, considerable effort will be required to develop an adequate license application before your permit expires.”

12. On May 5, 2010, Commission staff issued a letter to Cascade expressing concern that the configuration of Cascade’s proposed project may be inconsistent with the standards and guidelines in the Tongass National Forest Land and Resource Management Plan (Forest Plan) and inconsistent with approved development activities within an Inventoried Roadless Area (roadless area).¹⁵ Commission staff explained that Cascade’s

sought consultant estimates, held meetings, received a Forest Service permit, conducted a site visit for agency staff, and conducted initial field work.

¹³ Cascade stated that it engaged in field data collection, continued to review stakeholder comments, held more public meetings, visited the site again, further refined the project design, and prepared Scoping Document 2 and draft study plans. These pre-filing activities occurred almost three years later than presented in Cascade’s communications protocol and PAD process plan and schedule.

¹⁴ These included a Draft Wildlife Resources Study Plan, Draft Aquatic Resources Study Plan, Draft Recreational Resources Study Plan, a Visual Resources Study, and a Cultural Resources Study. Cascade’s communications protocol stated that it would make study plans available in fall 2007.

¹⁵ Certain activities within an inventoried roadless area of a national forest must be approved and permitted by the Secretary of Agriculture. These activities may include certain field studies in a national forest and hydropower project construction-related activities.

discussion of these issues with the Forest Service appeared to have been limited and these issues were unresolved. Therefore, Commission staff directed Cascade to meet with the Forest Service within 120 days to discuss options, which could include a project alternative that is acceptable to the Forest Service, and file a report that provided a description of how Cascade and the Forest Service intended to resolve these issues. Cascade filed nothing in the record indicating that it met with the Forest Service to resolve these issues.

13. On July 6, 2010, Cascade submitted a second draft of its recreational resources study plan. On July 27, 2010, Commission staff responded with comments on the plan, but reiterated that several issues still required clarification, including clarification of the study's objectives, data sources, study methodology, sampling protocol, study time frame, and the qualitative scope of the activities surveyed.

14. On August 2, 2010, Cascade submitted its fifth progress report during the term of its second permit.¹⁶

15. On October 15, 2010, Cascade filed a document titled "Scoping Document 2" (October 15 filing) that it stated was prepared to communicate Cascade's efforts to date, address comments, inform stakeholders of the proposed project design and operation, and provide final study plans.¹⁷

16. Throughout the permit term, and particularly in response to Cascade's distribution of the October 15 filing, many stakeholders, including those that had agreed to Cascade's communications protocol, submitted comments expressing concern with Cascade's management of the ALP, and stating that Cascade had not been following the schedule or terms of the communications protocol.¹⁸ In addition, the resource agencies' comments

¹⁶ Cascade's process plan and schedule proposed that Cascade would have finished preparing its draft license application by March 2010. However, in its report, Cascade stated that it had drafted responses to comments on Scoping Document 1, conducted meetings, refined the project operations plan, developed and circulated study plans, and solicited environmental analysis consultants.

¹⁷ Cascade Creek, LLC October 15, 2010 Filing. Cascade's October 15 filing was prepared and issued by Cascade as part of its ALP, and was not issued by Commission staff.

¹⁸ *See, e.g.*, June 29, 2009 Comment of Charles Wood; August 19, 2009 Comment of Petersburg Indian Association; November 15, 2010 Comment of Rebecca Knight; December 1, 2010 Comment of Petersburg Municipal Power and Light; December 7, 2010 Comment of Southeast Alaska Conservation Council.

on the October 15 Filing observed that Cascade had not included in its study plans, without explanation, specific details, including study scope and methodology, that had been requested by the agencies.¹⁹

17. Cascade's second preliminary permit expired on January 31, 2011, and on February 1, 2011, Cascade filed an application for a third preliminary permit for the proposed project.

18. On February 11, 2011, Cascade filed a draft license application and, as provided for in the Commission's regulations, a preliminary draft environmental assessment.²⁰ On February 18, 2011, the Commission issued notice of the draft license application and the preliminary draft environmental assessment, requesting preliminary terms and conditions and recommendations on the preliminary draft environmental assessment from agencies, and soliciting comments on the draft license application. Staff received numerous comment letters from federal agencies, state agencies, and private entities asserting that Cascade had not been complying with the communications protocol, nor working cooperatively with stakeholders to scope environmental issues or to analyze the completed studies.

19. On May 19, 2011, Commission staff issued a detailed letter identifying deficiencies and additional information needs in Cascade's draft license application and preliminary draft environmental assessment. The letter explained that, since Cascade's distribution of the October 15 filing, many stakeholders, including state and federal agencies had expressed concern with Cascade's implementation of pre-filing consultation under the ALP. In particular, the comment letters stated, and Commission staff agreed and reiterated, that Cascade had not been complying with components of its communications protocol; the scoping of environmental issues had not been adequate, especially since Cascade had significantly altered the design and operation of the project between Scoping Document 1 and the October 15 filing; Cascade had eliminated some

¹⁹ See, e.g., December 22, 2010 Comment of Alaska Department of Fish and Game; January 19, 2011 Comment of Forest Service.

²⁰ A draft license application is not required to be submitted under the ALP or the Commission's regulations for filing a license application for a major unconstructed project. The Commission's regulations require that any license application submitted for a major unconstructed project must include an Exhibit E, which is an Environmental Report containing information that is *commensurate with the scope of the project*. 18 C.F.R. § 4.41(f) (2012). An applicant authorized to use the alternative procedures may substitute a preliminary draft environmental review document instead of Exhibit E to its application. 18 C.F.R. § 4.34(i)(6)(iv) (2012).

studies requested by agencies without adequate consultation; study plans, including timeframes for data collection, had been changed without adequate consultation; the study plans were only made available for agency comment after the studies had commenced; and the study plans did not sufficiently cover all the resource areas potentially affected by the project. The May 19, 2011 letter warned Cascade that its ALP may be terminated if it did not show cause within 30 days by describing how Cascade would resolve the issues with stakeholders.

20. On June 20, 2011, Cascade responded to the Commission's May 19, 2011 letter. Cascade attributed the shortcomings in its filing to its haste to prepare a draft application before the second permit expired, and listed the following eight actions that it would take to resolve ongoing issues: (1) comply with the communications protocol; (2) update the project website and the Petersburg Public Library with all documents, meeting information, meeting minutes, and relevant correspondence by July 31, 2011; (3) hold a general public information meeting in Petersburg and schedule subsequent meetings to update the public about the project proposal; (4) respond to all agency comments on the draft license application by August 5, 2011, by describing when and how Cascade proposed to address the identified issues and information needs; (5) distribute proposed changes in the project design by August 16, 2011 in response to agency concerns; (6) submit new or revised study plans to agencies for the Freshwater Aquatics, Wildlife, Marine, Recreation, Scenery/Aesthetics, Geotechnical, Hydrology, and Cultural Resources Studies; (7) summarize and provide to the agencies the results of all field studies as they become available within 45 days of completing a study, and provide final study results for efforts completed in 2011 by January 30, 2012; and (8) complete and file the results of studies conducted in 2012 prior to preparing and issuing a second draft license application for stakeholder comment by mid- to late-2012, and file a final license application in late 2012.

21. On January 30, 2012, Commission staff issued a letter terminating Cascade's ALP. The January 30 letter explained that a major concern in this proceeding has been Cascade's lack of an appropriate approach to resolving study needs, and that nothing in Cascade's June 20, 2011 letter suggested that Cascade intended to alter its approach. The January 30, 2012 letter advised that constructive changes could have included a proposed schedule for holding meetings or detailed means to resolve disagreements with stakeholders over studies, such as the establishment of work groups, or engaging the ALP participants cooperatively, as required by the ALP regulations. The January 30, 2012 letter found that Cascade's approach to the ALP had not adequately demonstrated a sufficient effort to cooperatively resolve disagreements or engage stakeholders. The letter further found that Cascade's proposed measures to improve its ALP process would not adequately address Cascade's failure to engage in meaningful stakeholder

cooperation, and that Cascade had not demonstrated that continued use of the ALP would likely result in the filing of a complete license application in a timely manner.²¹

22. Also on January 30, 2012, Commission staff issued an order denying Cascade's application for a third preliminary permit.²² The order explained that Cascade's second preliminary permit was itself a successive permit, which warranted a higher degree of diligence in complying with the terms of a permit and making progress in preparing an acceptable license application.²³ The order found that Cascade had more than six years to prepare an adequate license application, and had failed to do so. The order further found that Cascade had exerted limited or minimal effort to resolve study disagreements in a timely fashion, as contemplated by the Commission's licensing regulations. Therefore, the order concluded that Cascade could not be found to have been diligent under its second permit, particularly under the heightened diligence standard warranted by a request for a third permit.

23. On February 29, 2012, Cascade filed a motion for reconsideration or, in the alternative, request for rehearing of the January 30, 2012 order denying Cascade's preliminary permit application and the letter terminating the alternative licensing process for the proposed project.

II. Discussion

A. Denial of Successive Permit

24. Sections 4(f) and 5 of the Federal Power Act (FPA) authorize the Commission to issue preliminary permits to potential development applicants for a period of up to three years.²⁴ The FPA does not address the issue of how many preliminary permits an applicant may receive for the same site. However, it is Commission policy to grant a successive permit only if it concludes that the applicant has pursued the requirements of

²¹ The January 30, 2012 letter also explained that Cascade had taken none of the steps it set forth in its June 20, 2011 letter. On August 8, 2011, Cascade did file notice of a meeting to be held on August 23, 2011. However, there is no record of Cascade's distribution of a transcript or meeting summary.

²² *Cascade Creek, LLC*, 138 FERC ¶ 62,063 (2012).

²³ *Id.* PP 10-12.

²⁴ 16 U.S.C. §§ 797(f) and 798 (2006).

its prior permit in good faith and with due diligence.²⁵ This policy applies regardless of whether there are competing applications for a site.²⁶

25. Cascade argues that it should receive a third preliminary permit because it acted in good faith and with due diligence during the term of its prior permit. Cascade contends that it has made a good faith effort to undertake studies requested by resource agencies and stakeholders, and to provide information and updates pursuant to the communications protocol. Cascade explains that, in part, its delay in conducting consultation and studies and preparing a license application has been because of design modifications as a result of stakeholder meetings and communications. Cascade contends that it has a solid foundation with which to progress with consultation as a result of detailed comments from resource agencies on the draft license application and the preliminary draft environmental assessment.

26. Cascade is correct that the Commission has issued successive preliminary permits if the applicant can show that it pursued the requirements of its prior permit in good faith and with due diligence. In general, at a minimum, pursuing the requirements of a permit with due diligence has meant that a permittee timely filed all progress reports, consulted with resource agencies, and conducted environmental studies agreed upon with the resource agencies. In addition, Commission staff must be able to discern in the content of a permittee's filings a pattern of progress toward the preparation of a development application.²⁷ Thus, while there is a minimum bar that a permittee must achieve to be diligent, each application for a successive permit is considered on a case-by-case basis.

²⁵ *City of Redding, California*, 33 FERC ¶ 61,019 (1985) (*City of Redding*) (permittee must take certain steps, including consulting with the appropriate resource agencies early in the permit term, and timely filing six-month progress reports).

²⁶ *Id.*

²⁷ Section 4(f) of the FPA, 16 U.S.C. § 797(f) (2006), states that the purpose of a preliminary permit is to enable applicants for a license to secure the data and to perform the acts required by section 9 of the FPA, 16 U.S.C. § 802 (2006). Section 9 requires license applicants to submit to the Commission such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project (i.e., an acceptable license application). In order for an applicant to submit an acceptable license application, it must have consulted with relevant resource agencies regarding the information the agencies will need in the environmental document, and therefore what studies the applicant must conduct to obtain that information prior to the filing of a license application. 18 C.F.R. § 4.38 (2012).

27. However, the Commission rarely issues a third consecutive permit to the same applicant for the same site, unless some extraordinary circumstance or factor outside the control of permittee is present.²⁸ Cascade's second permit explained that because the permit would be Cascade's second, the diligence standard would be heightened.²⁹ In most cases, three years should be enough time to consult with resource agencies and conduct requested studies to prepare a license application, and six years should certainly be more than enough time. Allowing a site to be reserved for nine years (i.e., three permit terms), absent some showing of extraordinary circumstances, would be to allow site banking.³⁰ Thus, we review whether Cascade was diligent in satisfying the terms of its second permit and the progress it made in preparing a license application during the permit's term against an even higher standard than would apply to a second permit.

28. After a review of Cascade's record, we affirm staff's finding that Cascade did not pursue development of its license application in good faith and with due diligence during the term of its second permit to warrant a third preliminary permit, and we believe the record is replete with evidence to support such a finding. In this case, we recognize that Cascade has generally filed timely progress reports, which included brief generalized descriptions of Cascade's progress, and intermediary documents such as its October 15 Filing.³¹ However, the reports consistently lacked updates on the consultation process,

²⁸ *Mokelumne River Water and Power Auth.*, 89 FERC ¶ 61,001 (1999) (*Mokelumne*) (third permit issued notwithstanding failure to complete environmental studies because of pending litigation over water rights at an adjacent downstream licensed project that could affect upstream flow requirements).

²⁹ *Cascade Creek, LLC*, 122 FERC ¶ 62,147, at 64,307 (2008).

³⁰ The essence of our policy against site banking is that an entity that is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it. *Public Utility District No. 1 of Pend Oreille County, Wash.*, 124 FERC ¶ 61,064, at P 31 (2008). *See also Idaho Power Co. v. FERC*, 767 F.2d 1359 (9th Cir. 1985) (finding Commission conclusion that site banking is inconsistent with the FPA is "not only clearly reasonable" but also supported by the terms of the FPA); *Mt. Hope Water Power Project LLP*, 116 FERC ¶ 61,232, at PP 8-13 (affirming application of policy against site banking in permit cases).

³¹ As noted in the Background section, Cascade's progress reports noted activities such as solicitation of contractors for field study work, expenditures for field study work, meetings, and reviews of comments.

even after Commission staff expressly identified this as an issue.³² Further, agency comments on Cascade's scoping documents reveal that Cascade did not incorporate agency requests into its study plans. Thus, the record indicates that Cascade did not meaningfully respond to agency and stakeholder concerns, including Commission staff's concerns, and therefore did not resolve study request issues in a timely manner. As a result, most of the documents submitted by Cascade for review by Commission staff or agencies included significant gaps and defects.³³ Cascade's progress during the term of its second permit does not rise to the level of extraordinary circumstances outside of the permittee's control that would justify a third permit.

29. Likewise, Cascade's arguments on rehearing do not demonstrate such extraordinary circumstances. Cascade's circumstances are unlike those presented in *Mokelumne*, where the Commission issued a third permit because the applicant had demonstrated that its delay in performing water flow studies necessary to prepare a license application was dependent on resolution of a pending licensing proceeding at the Commission and pending water rights litigation that could impact available flows.³⁴ The Commission determined that the circumstances in *Mokelumne* were sufficiently extraordinary to excuse the applicant's delay in completing permit studies to prepare a license application.³⁵ Because Cascade has not demonstrated such extraordinary

³² For example, Cascade has yet to adequately respond to the Commission's significant concern that the proposed project may be inconsistent with the Tongass National Forest Land and Resource Management Plan and the Inventoried Roadless Area rule.

³³ The principal problem with the documents, as noted by Commission staff, resource agencies, and stakeholders, is that Cascade did not conduct studies to the satisfaction of the resource agencies who require certain information in order to submit mandatory conditions or recommendations pursuant to the FPA and other authorities. The quality of Cascade's draft license application and preliminary draft environmental assessment confirm the inadequacy of the work performed during the term of the second permit.

³⁴ *Mokelumne*, 89 FERC ¶ 61,001 (1999). In *Mokelumne*, the applicant explained that flow information, which is an important aspect of a license application, could not be known until these outstanding proceedings concluded. The Commission also explained that, although it would grant the applicant in *Mokelumne* a third permit, given the unique circumstances presented, it is well within the Commission's discretion to deny successive permits where it concludes that the timing of the removal of an external, potentially long-term preclusion of permit studies, is speculative and likely years off.

³⁵ *Id.*

circumstances that were outside of its control, we find Cascade's lack of diligence in conducting studies to prepare a license application cannot be excused.

30. Cascade also cites *City of Redding* as support for its argument that it should receive a third permit.³⁶ However, in *City of Redding*, the applicant sought a second permit, or an additional three years for a total of six years, to complete the studies required to file a license application.³⁷ The Commission found that the applicant had been diligent during its prior three-year permit term, especially since the delays in conducting studies were the result of factors outside the applicant's control, namely the U.S. Army Corps of Engineers' delay in performing necessary repairs to two dams that were the subject of the applicant's permit. Thus, *City of Redding* does not support issuing Cascade a third permit.

31. Next, Cascade argues that issuing a third permit is consistent with Commission precedent because Cascade's proposed project is the type of project that justifies successive permits described in the Commission's rulemaking implementing the ILP regulations, Order No. 2002.³⁸ In the paragraph cited by Cascade, the Commission acknowledged agency concerns that the ILP timeframes may not be sufficient for original license applications where a lack of existing project-specific information and studies at the site of an unconstructed project could add significant time to the period needed to prepare a new development application.³⁹ However, in the next paragraph, the Commission affirmed its proposal to apply the ILP to original license applications because it is unnecessary to align the permit term and the ILP schedule since pre-filing consultation can and does go forward regardless of whether the potential applicant has a preliminary permit.⁴⁰ The lack of existing project-specific information and the need for

³⁶ 33 FERC ¶ 61,019.

³⁷ At the time *City of Redding* was issued, the Commission issued two-year permits, with an opportunity for extension up to the full three-year permit term allowed under the FPA. In *City of Redding*, the applicant first received a 12-month extension of its first permit, and then applied for a successive permit, which was granted in the cited order. Thus, *City of Redding* is an example of the Commission's diligence standard for a second three-year permit, not a third three-year permit.

³⁸ *Hydroelectric Licensing under the Federal Power Act*, Order No. 2002, FERC Stats. & Regs. ¶ 31,150, at P 351 (2003).

³⁹ *Id.*

⁴⁰ *Id.* P 352.

studies at the site of an unconstructed project can add time to the period needed to prepare a license application, but that is all the more reason for a permittee to use its permit period wisely and begin such work as early as possible. The language cited by Cascade concerns the overlap of the defined ILP timeframes with the permit timeframes. In contrast, Cascade chose to use the ALP. The ALP gives an applicant a significant amount of flexibility because it allows the potential license applicant to establish its own schedule, as well as a significant amount of responsibility to keep the process moving forward cooperatively. Nothing in Order No. 2002 supports issuing Cascade a third permit.

32. Cascade also cites *Warm Springs Irrigation District*⁴¹ and *Burke Dam Hydro Associates*,⁴² where applications for third and second permits, respectively, were denied, as cases that contrast with Cascade's situation. Cascade argues that the work it has performed is more than the applicants in either of these cases performed, thereby justifying issuing a third permit here. For example, Cascade argues that it has presented evidence of agency consultation, whereas, in *Warm Springs*, the Commission staff denied a third permit because the applicant had presented no documentation of agency consultation, and in *Burke*, the Commission denied a second permit because the applicant failed to file timely progress reports or consult with resource agencies. These cases do little to support Cascade's position. While Cascade did file progress reports, unlike *Burke*, it did not present evidence of ongoing and collaborative agency consultation or the results of studies. The agencies' dissatisfaction with Cascade's efforts makes this case similar to *Warm Springs*. In any event, diligence determinations are made on a case-by-case basis and during the term of Cascade's second permit, it was subject to a heightened diligence standard. As discussed above, Cascade did not satisfy this standard.

33. Cascade next argues that its proposed project is an original project in Southeast Alaska raising complex environmental and engineering design issues. This fact should counsel a project proponent to begin the important work of agency consultation and studies as soon as possible after receipt of a permit. In this case, Cascade did not initiate the pre-filing licensing process until one month before the first permit expired. It then provided generalized descriptions of its progress but did not specifically respond to

⁴¹ 126 FERC ¶ 62,026 (2009) (*Warm Springs*).

⁴² 47 FERC ¶ 61,449 (1989) (*Burke*).

Commission staff or agency concerns regarding consultation and study plan development.⁴³

34. Finally, Cascade states that municipalities like the City of Wrangell have invested funds in this proposed project and obtained a commitment for a portion of the electricity produced. Cascade states that, given the complexity of the project, dispute resolution is needed to resolve issues with agencies and stakeholders. Cascade argues that a new permit would allow the permit process to be reset, and Cascade would embrace appropriate conditions and timelines imposed by the Commission. Cascade argues that a preliminary permit would provide regulatory certainty for capital investment in the proposed project. Cascade notes that one of the purposes of a permit under the FPA is to allow developers to make financial arrangements for a proposed project. Cascade asserts that its past investment of over \$2.9 million should be taken into account.

35. Cascade was issued its first permit in October 2004, almost eight years ago, and has been involved in the ALP process for almost five years. The Commission's regulations implementing the ALP process include the opportunity for any stakeholder, including the potential license applicant, to petition Commission staff for assistance in resolving study plan issues.⁴⁴ Cascade has never submitted such a request. We recognize that Cascade may have invested significant funds to develop its project, and that one purpose of a permit is to allow developers to make financial arrangements. However, after almost eight years, we find that Cascade's failure to make more progress is due to its failure to work cooperatively with other stakeholders.⁴⁵

⁴³ As noted above, Cascade did not respond to Commission staff's request for resolution of the Tongass National Forest issues, nor did Cascade give reasoned explanations as to why it did not include agency-requested studies in its study plans.

⁴⁴ 18 C.F.R. § 4.34(i)(7) (2012).

⁴⁵ The resource agency comments in response to Cascade's draft license application and preliminary draft environmental assessment confirm the Commission's concerns. For example, the Forest Service's May 19, 2011 comments on Cascade's draft license application and preliminary draft environmental assessment explain that it could not provide preliminary FPA section 4(e) terms and conditions because Cascade did not include the specific resource information (i.e., results of resource studies) requested by the Forest Service in response to Scoping Document 1 and Cascade's October 15 filing.

B. Termination of Alternative Licensing Process

36. On May 19, 2011, Commission staff issued a letter to Cascade that expressed staff's concern that Cascade was not collaborating appropriately with stakeholders in the ALP, and warned Cascade that its ALP might be terminated if it did not show cause within 30 days by describing how Cascade would resolve the issues with stakeholders. Staff also reviewed Cascade's draft license application and preliminary draft environmental assessment, identifying an inventory of deficiencies to be corrected and additional information required for Cascade to submit an acceptable final license application and preliminary draft environmental assessment.

37. Cascade submitted a response on June 21, 2011, in which it committed to undertake specific actions to better manage the ALP.⁴⁶ On January 30, 2012, Commission staff issued a letter terminating Cascade's ALP.

38. Cascade requests rehearing of the January 30, 2012 letter terminating the ALP asserting that staff erred in terminating the ALP because such an action is not consistent with the regulatory process set forth in section 4.34(i)(7) of the Commission's ALP regulations,⁴⁷ and not based on substantial evidence. Cascade argues that it acted with good faith to resolve the issues identified in Commission staff's May 19, 2011 letter warning Cascade of possible termination of its ALP. Cascade also argues that the Commission should provide an opportunity to develop alternative procedures that will allow Cascade and stakeholders to resolve differences of opinion with respect to environmental studies. Cascade contends that it was caught in a "catch-22" by the show cause letter, and that "regulatory uncertainty," rather than an unwillingness to meet the requirements of the ALP, prompted its inaction. Cascade asserts that it is committed to acting diligently and with good faith to submit a viable license application within a collaborative process.

39. Between June 2011 and January 2012, Cascade completed none of its proposed actions. As staff explained in the January 30, 2012 termination letter, no additional filings were placed in the record by Cascade indicating that it had updated the project website or the project record at a local public library; a public meeting was held on August 8, 2011, but no transcript or summary of the meeting had been placed in the record; and Cascade had filed nothing to indicate that it had submitted revised study plans to agencies, responded to agency comments on the draft license application, or distributed revised project descriptions. The January 30, 2012 letter further identified staff's

⁴⁶ See *supra* at P 20.

⁴⁷ 18 C.F.R. § 4.34(i)(7) (2012).

ongoing concern regarding Cascade's approach to resolving agency study needs, and found that Cascade had not meaningfully proposed to resolve this issue either in Cascade's June 21 letter nor through Cascade's actions between June 2011 and January 2012. Commission staff concluded that Cascade had failed to demonstrate that continued use of the ALP would result in an acceptable license application, and therefore terminated Cascade's ALP.

40. We find that the record supports staff's conclusion. As described above, there are numerous comments in the record from stakeholders and agencies describing Cascade's failure to resolve environmental scoping and study issues. Cascade did not meet a single deadline identified in its schedule in the communications protocol, which is the guidance document for an ALP proceeding. Further, Cascade failed to resolve specific issues identified by staff, such as the Tongass National Forest roadless area issue, and failed to meaningfully respond to agency study requests. Staff communicated these concerns to Cascade and warned of the potential termination of the ALP. Despite its explicit assertions of specified future actions to correct past deficiencies, Cascade did little to nothing in the six months following staff's May 19, 2011 show cause letter. Given this record, staff acted within its discretion to terminate Cascade's ALP.

41. Moreover, contrary to Cascade's assertion, we find that staff's determination to terminate the ALP was not inconsistent with section 4.34(i)(7) of the Commission's regulations.⁴⁸ This section states that if a participant, including the applicant using the ALP process, "can show that it has cooperated in the process but a consensus supporting the use of the process no longer exists and that continued use of the alternative process will not be productive, the participant may petition the Commission for an order directing the use of appropriate procedures to complete its application." The participant's request must recommend specific procedures that are appropriate under the circumstances. Section 4.34(i)(7) is a tool that can be used by an entity participating in an ALP to move a licensing process forward if the alternative process has devolved and lost consensus. However, Cascade never filed a petition with the Commission requesting an order directing the use of appropriate procedures to complete its application.⁴⁹

42. If Cascade wishes to pursue this project, it must submit sufficient information to Commission staff to demonstrate that it intends to meaningfully pursue the Commission's

⁴⁸ 18 C.F.R. § 4.34(i)(7) (2012).

⁴⁹ To the extent that Cascade considers its rehearing or reconsideration request to be a petition under section 4.34(i)(7), Cascade has not stated so explicitly, nor recommended specific procedures that it believes are appropriate under the circumstances, as required by section 4.34(i)(7).

pre-filing requirements to prepare a license application. At a minimum, any submission by Cascade should include: (1) documentation of consultation with relevant resource agencies, including specific responses to agency comments on Cascade's study plans; (2) a process plan and schedule for completing pre-filing consultation, including completing studies and filing a license application; and (3) documentation of consultation with the Forest Service explaining how Cascade and the Forest Service intend to resolve the potential inconsistencies between the proposed hydropower project and the Tongass National Forest Land and Resource Management Plan and Inventoried Roadless Area designation. Commission staff will determine whether Cascade's filing sufficiently demonstrates an intent to meaningfully pursue development of a license application.

The Commission orders:

Cascade Creek, LLC's request for rehearing or reconsideration is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.