

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Nicholas E. Josten

Project No. 12053-003

ORDER DENYING REHEARING AND
GRANTING REQUEST TO CONVERT APPLICATION

(Issued October 31, 2006)

1. On September 21, 2006, the Director, Office of Energy Projects (Director), issued a letter order dismissing the exemption application filed by Nicholas Josten (applicant) for the 2.36-megawatt (MW) West Valley A&B Hydro Project No. 12053, proposed to be located on the South Fork of the Pit River in Modoc County, California, because the project did not qualify for an exemption from the licensing requirements of Part I of the Federal Power Act (FPA), and the application did not comply with the Commission's regulations.¹ On October 6, 2006, the applicant filed a timely request for rehearing of the Director's order. We conclude that the Director's findings were correct, and we therefore deny rehearing. However, as discussed below, we will allow the application to be converted to a license application.

Background

1. On July 18, 2003, Nicholas Josten filed an exemption application for the proposed project, which would occupy approximately 31 acres of federal lands managed by the U.S. Forest Service and the Bureau of Land Management, and consist of two developments: West Valley A and West Valley Alternative B-1. The upper development, West Valley A, would be a run-of-river development with a capacity of 1.0 MW and would include a diversion structure, irrigation canal, penstock, powerhouse (upper powerhouse), tailrace pipe, and 3,000-foot-long transmission line.

¹ Unpublished letter from J. Mark Robinson to Nicholas E. Josten..

2. The lower development, West Valley Alternative B-1, would be a run-of-river development with a capacity of 1.36 MW and would include the West Valley Dam and reservoir, outlet works, penstock, powerhouse (lower powerhouse), tailrace canal, and 4.5-mile-long transmission line.

3. The upper development would divert water from the South Fork Pit River into the irrigation canal. The water would travel approximately three miles through the canal and drop about 140 feet through a penstock to the upper powerhouse. Water would exit the upper powerhouse through a tailrace pipe. The water, as supplemented by irrigation flows from the reservoir, would leave through the outlet pipe in the dam and drop about 100 feet through a penstock to the lower powerhouse.² The lower powerhouse would discharge water into a tailrace canal, which would discharge into the South Fork Pit River two and one half miles downstream from the upper development diversion structure.

4. On September 21, 2006, the Director dismissed the exemption application. The Director concluded that the upper development did not qualify as an exemption because it would neither be located at, nor use the water power potential of, an existing dam. The Director further found that, regarding the lower development, the applicant did not provide documentary evidence that he had the real property interests for the West Valley Dam and reservoir (which is owned and operated by the South Fork Irrigation District) or for the proposed 4.5-mile-long transmission line.

5. On October 6, 2006, the applicant filed a request for rehearing of the Director's order, arguing that the project would use a natural water feature to generate power, and that he had provided evidence of sufficient property rights to operate the project.³ On October 12, 2006, he filed a second pleading in which he asked that, if his rehearing request is not granted, his exemption application be converted to a license application.

Discussion

A. Qualification of Project as Exemption

6. The Commission is authorized to exempt from the licensing requirements of Part I of the Federal Power Act (FPA) small hydroelectric projects with an installed capacity of 5 MW or less that use for the generation of electricity either an existing dam (*i.e.*, one in

² When there are no irrigation releases, the upper development would operate as a closed system without any mixing with waters of the reservoir.

³ He does not dispute the finding that the upper development is not located at an existing dam.

existence on or before July 22, 2005) or a "natural water feature" without the need for any dam or impoundment.⁴

7. As pertinent here, the Commission's regulations define a "small hydro-electric power project" as one that will have a total installed capacity of not more than 5 megawatts and will use "for the generation of electricity a natural water feature, such as a natural lake, waterfall, or the gradient of a natural stream without the need for a dam or man-made impoundment...."⁵

8. On rehearing, the applicant argues that the exemption application should not have been dismissed because the proposed project would use the hydropower potential of a natural water feature, in that it will use the gradient of a natural stream, the South Fork Pit River. He states that water is diverted from the South Fork River at an elevation of approximately 4,920 feet and is then transported by a canal to an elevation of 4,910 feet, where it enters a penstock and flows through the upper powerhouse and then into the West Valley Reservoir. The water then leaves the reservoir, passes through the lower powerhouse and reenters the river at an elevation of 4,610 feet. The applicant argues that the project uses the hydropower potential of the natural gradient of the South Fork River between the point of diversion from the South Fork River at elevation 4,920 feet and the point of return to the South Fork River at elevation 4,610 feet.

9. In fact, the project would not use the gradient of a natural stream. The project would be located on a man-made system of irrigation canals and penstocks. As we have explained in the past, neither Congress nor the Commission intended such structures to be included in the definition of "natural water features."⁶ Rather, these canals and penstocks can be said to use at most the gradient of the land.⁷ In other words, it is the drop in elevation of the canals and penstocks, not the gradient of a natural stream, that would provide the water power to turn the project's turbines.

⁴ See sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2705 and 2708 (2000), as amended by section 246 of the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 679.

⁵ 18 C.F.R. § 4.30(b)(29) (2006).

⁶ See, e.g., *Birch Power Co.*, 113 FERC ¶ 61,268 at P 8 (2005).

⁷ *Id.*

B. Property Rights

10. Even if the upper development met the statutory requirements, the application would still have to be denied because the applicant lacks the requisite property rights for the lower development.

11. In order to implement the congressional intent that small hydropower resources be developed expeditiously under the exemption program,⁸ the Commission requires that exemption applicants possess at the time of application the private property interests necessary to develop and operate the project.⁹ This policy, which has been affirmed on judicial review,¹⁰ is designed to prevent delays often associated with property disputes and reflects the significant fact that exemption holders do not obtain use of the federal power of eminent domain that licensees obtain pursuant to section 21 of the FPA.¹¹

12. With regard to the West Valley Dam and reservoir, the applicant states that the dam's owner, South Fork Irrigation District, has been a participating party in all public meetings and site visits for the project. The applicant further states that he provided a preliminary operation plan agreement coordinating operations with South Fork Irrigation District as part of his additional information response filed on July 18, 2003.¹²

13. With regard to the proposed transmission line, the applicant states that the transmission line would be located in an existing Modoc County right-of-way on an

⁸ See H. Conf. Rep. No. 96-1104, 96th Cong., 2nd Sess. 276 (1980).

⁹ 18 C.F.R. § 4.31(c)(2)(ii) (2006).

¹⁰ See *Pankratz Lumber Co. v. FERC*, 824 F.2d 774, 777-78 (9th Cir. 1987); see also *Phoenix Hydro Corp. v. FERC*, 775 F.2d 1187, 1190-91 (D.C. Cir. 1985).

¹¹ 16 U.S.C. § 814 (2000). See, e.g., *Pankratz Lumber Co.*, 25 FERC ¶ 61,437 (1983).

¹² The preliminary operation plan was actually filed on July 18, 2003, as part of the exemption application. It is an unsigned document that describes how the project will operate and states that South Fork Irrigation District is satisfied that the project will not adversely affect irrigation operations and will accommodate required water storage and delivery to South Fork Irrigation District water users and their existing water rights.

existing transmission line owned by Surprise Valley Electrification Corporation (Surprise Valley) that the applicant proposes to upgrade.¹³

14. To be sufficient, an exemption applicant's property interest with respect to lands within the project boundary must permit the exemption applicant to construct and operate the project in the manner authorized and conditioned by the Commission, without interference from or the need for subsequent approval by the entity conveying the property interest to the applicant. Furthermore, the applicant's right to use the property cannot depend on the subsequent approval of any party other than the applicant.¹⁴

15. The evidence proffered by the applicant regarding South Fork Irrigation District's dam and reservoir and Surprise Valley's transmission line shows that approvals by both those entities are required and is therefore not adequate to show that the applicant has sufficient rights to construct and operate the proposed project without approval of others.

C. Request to Convert Application

16. In his October 12 letter, the applicant requests that, if his rehearing request is not granted, the Commission convert his exemption application to a license application. The applicant recounts that he applied for, and was granted, a preliminary permit for this site in 2001.¹⁵ He consulted with, and funded the consultation efforts of, several agencies regarding his proposal, responded to additional information requests from the Commission, and held public meetings to discuss his project.

¹³ The applicant filed a February 7, 2003 letter of interest from Surprise Valley as part of his January 19, 2005 response to staff's September 13, 2004 additional information request. The one page letter states that Surprise Valley is willing to explore the possibility of upgrading its existing line to accommodate interconnection with the project.

¹⁴ See *Power Authority of State of New York*, 23 FERC ¶ 61,429 (1983); *Pankratz Lumber Company*, 25 FERC ¶ 61,031 (1983), *aff'd on rehearing*, 25 FERC ¶ 61,437 (1983), *aff'd*, *Pankratz Lumber Company v. FERC*, 824 F.2d at 778.

¹⁵ No competing applications for this site were filed.

17. While there is a provision in our regulations to allow the conversion of a conduit exemption application to a license application,¹⁶ there is no corresponding provision for a 5-MW exemption application.¹⁷ However, based on the facts of this case, it appears that a comparable approach would be appropriate here. We will therefore grant the applicant's request to convert his exemption application to a license application. We direct the Office of Energy Projects to issue a letter identifying any additional information required to conform the applicant's application to the licensing regulations and to allow the applicant 90 days from the date of the letter to provide such information.

18. For the above reasons, we deny the request for rehearing, but grant the request to convert the exemption application to a license application.

The Commission orders:

(A) The October 6, 2006 request for rehearing of the Director's order of September 21, 2006, dismissing the application for the West Valley A&B Hydroelectric Project No. 12053, is denied.

(B) The request filed on October 12, 2006, by Mr. Nicholas Josten, to convert his exemption application for the West Valley A&B Hydroelectric Project No. 12053 to a license application is granted.

¹⁶ 18 C.F.R. § 4.93(d)(2006). Under this provision, an applicant has 30 days from the date its conduit exemption is denied to inform the Commission that it intends to convert its application. 18 C.F.R. § 4.93(d)(2). The applicant then has 90 days from the date its conduit exemption is denied to file any additional information that is necessary to conform the exemption application to the relevant regulations for a license application. 18 C.F.R. § 4.93(d)(3). If the information timely submitted is found to be sufficient to conform to the license application regulations, the converted application will be considered accepted for filing as of the date the exemption application was filed. 18 C.F.R. § 4.93(d)(3).

¹⁷ The rulemakings promulgating the exemption regulations do not address this distinction. See, *Exemptions of Small Conduit Hydroelectric Facilities from Part I of the Federal Power Act*, Order No. 76, 45 Fed. Reg. 28085 (April 28, 1980), FERC Stats & Regs. ¶ 30,146 (1980); and *Exemptions from all or part of Part I of the Federal Power Act of Small Hydroelectric Power Projects with an Installed Capacity of Five Megawatts or Less*, Order No. 106, 45 Fed. Reg. 76115 (November 18, 1980), FERC Stats & Regs. ¶ 30,204 (1980).

(C) The Director, Office of Energy Projects, is directed to issue a letter identifying any additional information required to conform the applicant's application to the licensing regulations and to allow the applicant 90 days from the date of the letter to provide such information.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.