

139 FERC ¶ 61,177  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Northland Power Mississippi River LLC	Project Nos. 14072-001, 14073-001, 14075-001, 14076-001, 14077-001, 14078-001, 14080-001, 14081-001, 14082-001, 14083-001, 14089-001, 14090-001, 14091-001, 14092-001, 14093-001, 14094-001, 14095-001, 14096-001, 14097-001, 14098-001, 14099-001
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Free Flow Power Corporation	Project Nos. 12817-003
FFP Project 19 LLC	12842-004
FFP Project 23 LLC	12843-004
FFP Project 24 LLC	12844-004
FFP Project 14 LLC	12845-004
FFP Project 6 LLC	12848-003
FFP Project 4 LLC	12849-004
FFP Project 7 LLC	12851-003
FFP Project 12 LLC	12853-004
FFP Project 13 LLC	12854-004
FFP Project 3 LLC	12856-004
FFP Project 18 LLC	12857-003
FFP Project 16 LLC	12858-004

FFP Project 28 LLC	12861-004
FFP Project 17 LLC	12865-003
FFP Project 20 LLC	12869-004
FFP Project 32 LLC	12921-003
FFP Project 33 LLC	12924-003
FFP Project 39 LLC	12925-003
FFP Project 30 LLC	12927-003
FFP Project 41 LLC	12930-003

## ORDER DENYING REHEARING

(Issued June 1, 2012)

1. Northland Power Mississippi River LLC has filed a request for rehearing or clarification of Commission staff orders<sup>1</sup> issuing successive preliminary permits to wholly-subsiaries of Free Flow Power Corporation to study hydrokinetic projects at sites along the Mississippi River. For the reasons discussed below, we deny rehearing.

### **Background**

2. During 2007 and 2008, Free Flow<sup>2</sup> applied for and received 55 preliminary permits to study proposed hydrokinetic projects, to be located on the middle and lower Mississippi River, between St. Louis, Missouri and New Orleans, Louisiana. The permits all had terms of three years, the maximum permitted by section 5 of the Federal Power Act (FPA).<sup>3</sup>

3. On January 3, 2011, as certain of Free Flow's permits were nearing expiration, Free Flow and Northland filed competing applications for 12 projects for which Free Flow had previously been issued permits. These applications were all time-stamped by the Commission's Secretary as being received at 8:30 a.m. Also on January 3, Northland filed applications for preliminary permits to study hydrokinetic projects at 16 sites on the Mississippi River that were not the subject of previous permits.

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<sup>1</sup> See nn. 9, 11, and 13, *infra*.

<sup>2</sup> The various applications were filed by different entities (FFP Project 3 LLC, FFP Project 7 LLC, etc.) which are wholly-owned subsidiaries of Free Flow, and Free Flow is acting as agent for the entities in the various permit proceedings. For convenience, then, we will refer to all of these entities collectively as "Free Flow".

<sup>3</sup> 16 U.S.C. § 798 (2006).

4. On January 11, 2011, Commission staff sent a letter to Free Flow and Northland rejecting their January 3, 2011 competing applications.<sup>4</sup> Staff explained that the Commission's regulations<sup>5</sup> bar it from accepting preliminary permit applications for projects that compete with projects for which there is an unexpired preliminary permit. The Commission's Rules of Practice and Procedure provide that, if the last day of a period of time falls on a Saturday, Sunday, or holiday, the period does not end until the close of business on the next workday.<sup>6</sup> The last day of the permit period for the existing preliminary permits fell on December 31, 2010, a federal holiday. Thus, the permits expired not on that date, but rather at the close of business January 3, 2011 (the next business day following the holiday). The January 3, 2011 permit applications accordingly were filed while the initial permits were still in effect, and so were required to be rejected.

5. Both Free Flow and Northland refiled their permit applications on January 11, 2011. Free Flow's applications were time-stamped between 2:12 p.m. and 2:18, while Northland's were time-stamped at 4:43 p.m.

6. On April 1, 2011, the Director of the Commission's Office of Energy Projects issued a letter to Free Flow and Northland noting that Free Flow had applied for a total of 129 permits along a stretch of the Mississippi River (24 of which had been granted and 105 of which were pending), while Northland had applied for 40 permits in the same area (28 of which competed with applications by Free Flow and 12 of which did not). The Director expressed concern that issuing to two applicants such a large number of permits covering such an expansive portion of a single river would not further the FPA's goal of promoting competition in the comprehensive development of the Nation's waterways. The Director stated that, subject to comment from the two companies, Commission staff intended to decline to issue additional preliminary permits on this stretch of the river, and instead allow potential developers to advance their projects through the Commission's licensing process.<sup>7</sup>

7. On April 29, 2011, and May 2, 2011, respectively, Free Flow and Northland responded to the Director's letter, each asking the Commission to continue processing the

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<sup>4</sup> See letter from Mark Pawlowski (Commission staff) to Ramya Swaminathan (Free Flow) and Carolyn Elefant (Northland).

<sup>5</sup> 18 C.F.R. § 4.33(a)(1) (2011).

<sup>6</sup> See 18 C.F.R. § 385.2007 (2011);

<sup>7</sup> See letter from Jeff C. Wright to Ramya Swaminathan and Carolyn Elefant.

permits at issue, to enable the development of hydrokinetic projects. After reviewing the responses, Commission staff acceded to the companies' requests.<sup>8</sup>

8. On November 16, 2011, Commission staff issued preliminary permits to Northland for the 16 projects as to which there was not competition.

9. On February 28, 2012, Commission staff issued seven of the contested permits to Free Flow and denied Northland's competing applications.<sup>9</sup> The orders first stated that Free Flow had diligently pursued the requirements of its prior permit in good faith. The orders next found that the plans of the applicants were equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region. Based on these conclusions, the orders awarded the permits to Free Flow, because its applications were filed first.<sup>10</sup> On February 29, 2012, Commission staff issued a similar order, issuing the remaining four contested permits to Free Flow and denying Northland's competing applications.<sup>11</sup>

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<sup>8</sup> See, e.g., letter from Mark Pawlowski to Ramya Swaminathan (June 9, 2011) (stating that "[a]fter reviewing all of the resulting filings, staff has determined that it is appropriate to continue processing permit applications on the lower Mississippi River"). A similar letter was sent to Northland.

<sup>9</sup> *FFP Project 20 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,177; *FFP Project 16 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,178; *FFP Project 12 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,179; *FFP Project 13 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,180; *FFP Project 4 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,181; *FFP Project 3 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,182; and *FFP Project 28 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,183.

<sup>10</sup> See 18 C.F.R. § 4.37(b)(2) (2011) (providing that, all else being equal as between competing permit applicants, the Commission will favor the applicant whose application was accepted first); *City of Angoon, Alaska, et al.*, 130 FERC ¶ 61,219, at P 16 (2010), *aff'd*, *Petersburg Municipal Power and Light v. FERC*, 2011 U.S. App. LEXIS 3886 (D.C. Cir. February 25, 2011) (stating that "[a]ny electronic filing that is received after 8:30 in the morning will be considered to have been filed as of whatever time stamp it receives in the Secretary's office").

<sup>11</sup> *FFP Project 19 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,186; *FFP Project 23 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,187; *FFP Project 24 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,188; and *FFP Project 14 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,189.

10. On February 1, 2012, Free Flow and Northland filed competing permit applications for 13 sites as to which Free Flow had held permits that expired on January 31, 2012. These applications were all filed-stamped at 8:30 a.m. As is its practice,<sup>12</sup> the Commission held a lottery with respect to each set of competing permits, to determine which application would be deemed first-filed.

11. On March 20, 2012, the Commission issued orders in which it determined that Free Flow had diligently pursued the requirements of its prior permits in good faith, and that the plans of both applicants were equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region. The orders accordingly issued the permits in each instance to the entity that had been deemed to have filed its application first by virtue of the lottery (Free Flow was awarded nine permits and Northland four permits).<sup>13</sup>

12. On March 29, 2012, Northland filed a request for rehearing of the February 28, 2012, February 29, 2012, and March 20, 2012, permit orders, except those of the orders issued on March 20, 2012 that issued permits to it.<sup>14</sup>

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<sup>12</sup> See *City of Angoon, Alaska*, n.10, *supra*.

<sup>13</sup> *Free Flow Power Corporation and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,267; *FFP Project 6 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,268; *FFP Project 7 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,269; *FFP Project 18 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,270; *FFP Project 32 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,271; *FFP Project 33 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,272; *FFP Project 39 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,273; *FFP Project 30 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,274; *FFP Project 41 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,275; *FFP Project 10 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,276; *FFP Project 17 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,277; *FFP Project 21 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,278; and *FFP Project 40 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,279.

<sup>14</sup> In its request for rehearing, Northland states that it is seeking rehearing of 21 instances in which the Commission issued successive preliminary permits to Free Flow. However, Northland refers to an order of February 28, 2012, which it indicates issued Free Flow a preliminary permit for Project No. 12865 and denied Northland's application for a permit for Project No. 14072. See request for rehearing at 4-6 (referring to permits issued to Free Flow on February 28 and 29, 2012). In fact, those two projects were among the group made subject to the lottery, and Northland was issued the permit

## **Discussion**

13. Northland argues: (1) that Free Flow did not display sufficient diligence under its initial permits to warrant receiving successive permits; (2) that granting Free Flow successive permits is inconsistent with precedent; and (3) that use of the first-to-file rule as a tiebreaker was inappropriate. We address these arguments in turn.

### **A. Free Flow's Diligence**

14. The Commission's policy with respect to the issuance of successive preliminary permits is that an applicant must "demonstrate that, under the prior permit, it pursued the proposal in good faith and with due diligence."<sup>15</sup> The Commission has not established a bright-line test for good faith and due diligence, but rather examines the facts of each case. Further, the Commission has explained that it will not impose rigid study requirements and timetables in permits, in order to allow permittees to assess in the early stages of a permit whether to pursue development proposals and the expenses associated with preparing a license application.<sup>16</sup>

15. Northland contends that, while Free Flow filed all of the progress reports required by the permits, it submitted identical reports that did not provide information on the progress of individual projects.<sup>17</sup> Northland asserts that Free Flow "has not completed many of the basic steps that one would expect of a technology developer on course to file a license application."<sup>18</sup> Specifically, Northland states that Free Flow has not conducted a meaningful "in-situ" demonstration of its technology, produced site-specific results for studies that it agreed with stakeholders to perform, or ruled out more than 9 of the original 55 sites it proposed to study.<sup>19</sup>

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on March 20, 2012, while Free Flow's application was denied. *See FFP Project 17 LLC and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,277 (2012). It thus appears that Northland seeks rehearing of the grant of 20 permits to Free Flow, not 21.

<sup>15</sup> *Little Horn Energy Wyoming, Inc.*, 58 FERC ¶ 61,132, at 61,423 (1992) (noting, at n.12, that the standard applies irrespective of whether there are competing applications for the successive permit). *See also Burke Dam Hydro Associates*, 47 FERC ¶ 61,449 (1989); *City of Redding*, 33 FERC ¶ 61,109 (1985).

<sup>16</sup> *See, e.g., Skokomish River Hydro*, 39 FERC ¶ 61,361 at 62,132-34, *reh'g denied*, 42 FERC ¶ 61,283 (1988).

<sup>17</sup> Request for rehearing at 7.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

16. Northland is correct that many of Free Flow's progress reports are identical and do not display site-specific work. If this represented the entire record, it might indeed raise a question as to Free Flow's good faith and due diligence. However, Free Flow has made other filings that expand on the information in the progress reports.

17. For example, in an April 30, 2010 quarterly report on studies that it had conducted, Free Flow explained that, with regard to the proposed Scotlandville Bend Project No. 12861, it had: used bathymetric data from the Scotlandville Bend reach to develop maps that preliminarily identified a potential turbine field meeting U.S. Army Corps of Engineers (Corps) required depth criteria; provided a preliminary plan and initiated consultation with the Corps for a test deployment of piling-based turbines; requested and began compiling baseline information for development of a risk-based decision tool, including information on revetment and bulkhead locations, weirs and dikes, dredging locations and the location of moorages and anchorages, navigation aids, utility crossings for pipelines and power lines; compiled files on collisions, allisions,<sup>20</sup> and groundings within Coast Guard District 8; collected information on debris transport in the Mississippi River, and, between July 2009 and January 2010, conducted a turbine test deployment in support of studies of debris risk and turbine recovery; identified potential laboratory facilities and sources of fish species to conduct controlled entrainment and mortality studies; and initiated the process of securing Endangered Species Act permits to test mortality of federally listed fish species and potential surrogate species. In an August 2, 2010, report, Free Flow stated that it had: finished a preliminary assessment of turbine risks, including debris loading; completed preliminary and revised designs of turbine mounting structures; identified and assessed the feasibility of turbine recovery options; and identified parks, buildings, and other shoreline structures and activities that may constitute siting constraints for substations and other proposed facilities. Free Flow's January 17, 2011 report explained that the permittee had: identified final turbine fields and specific piling locations with the permitted project boundaries; received a scope of work statement from Conte Lab for controlled tests of entrainment and turbine mortality; and compiled sampling sites and data from extensive fish survey data held by the Corps' Engineer and Research Development Center.

18. With respect to the proposed Algiers Light Project No. 12848, the proposed Gouldsboro Bend Project No. 12851, and other projects, Free Flow reported on April 30, 2010, that it had: used site-specific bathymetric data to develop maps which preliminarily identified potential turbine fields that would meet the Corps' depth criteria; requested and begun compiling base line information for development of a risk-based decision tool including site-specific information on 1) revetment and bulkhead locations, 2) weirs and dikes, 3) dredging locations, and 4) location of moorages and anchorages, navigation aids, utility crossings for pipelines and power lines; and compiled data on collision,

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<sup>20</sup> In this context, an allision involves a vessel striking a fixed object, as opposed to a collision between vessels.

allisions, and groundings within Coast Guard District 8. On August 2, 2010, Free Flow reported that it had identified parks, buildings, and other shoreline structures and activities that may constitute siting constraints for substations and other proposed facilities. Free Flow's January 17, 2011 report stated that it had reviewed extensive fish survey data held by the Corps and had identified site-specific final turbine fields and specific piling locations with the permitted project boundaries. In August 2011, Free Flow provided specific project layouts, displaying turbine fields, primary transmission line routes, substations, utility equipment yards, and existing transmission facilities.

19. We cannot conclude, based on the foregoing, that Free Flow failed to pursue its proposed projects in good faith and with due diligence.

20. Further, we do not believe that the absence of an on-site technology demonstration represents a lack of diligence. All preliminary permits state specifically that the permit does not authorize the holder to conduct ground-disturbing activities or enter onto lands.<sup>21</sup> Thus, in many cases it may not be possible for a permittee to test equipment at the proposed project site. If it is able to do so, that may constitute evidence of diligence, but Northland's simple statement that Free Flow has not conducted "meaningful" on-site tests does not show a lack of diligence on Free Flow's part.<sup>22</sup>

21. Finally, Northland's assertion that Free Flow has ruled out only 9 of the 55 sites it originally sought to study, as opposed to a greater number, is not relevant to the issue of diligence. We have not required Free Flow to determine by any given point that any particular number of sites is no longer worth pursuing. Indeed, it might have turned out that that all of the original sites had merit, and it could have been that some sites were quickly seen to not be viable, while determinations might not be able to be made as to other sites until further investigation has been conducted. By itself, this does not reflect on Free Flow's diligence or lack thereof.<sup>23</sup>

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<sup>21</sup> See, e.g., *Free Flow Power Corporation and Northland Power Mississippi River LLC*, 138 FERC ¶ 62,267 P 15 and Article 1.

<sup>22</sup> Given that, as discussed above, we do not require permittees to conduct specific studies, Northland's allegation that Free Flow has not completed certain studies it has proposed to perform is not relevant here.

<sup>23</sup> In fact, Free Flow stated in its April 29, 2011 response to Commission staff that it had withdrawn 58 permit applications, decided not to seek a successive permit for another project, and withdrawn applications for successive permits for four projects. See April 29, 2011 response at 5-6.

**B. Precedent Regarding Multiple Permits**

22. Northland claims that the Commission's grant of 21 successive permits, without added conditions, to Free Flow "is inconsistent with staff's past dealings with other multiple preliminary permit holders[s]." <sup>24</sup> Northland notes an October 3, 2003 letter from Commission staff to Symbiotics, LLC, in which staff discussed the company's effort to evaluate the viability of sites for which it held permits, in order to decide whether to withdraw application, surrender permits, or file license applications. <sup>25</sup>

23. The Commission rarely encounters cases involving large numbers of permits held by one entity, and so has not developed a policy applicable to such instances. In fact, other than the *Symbiotics* proceedings raised by Northland, we are aware of no other proceeding similar to this one. With regard to Symbiotics, staff encouraged the company to consider the viability of its proposed projects, but imposed no further requirements. <sup>26</sup> In this proceeding, as discussed above, staff expressed concern with the multiple permit applications filed by both Free Flow and Northland and decided, after considering the companies' responsive pleadings, to consider the applications by both entities. Staff's action in these proceedings is not inconsistent with precedent.

**C. The First-In-Time Tiebreaker**

24. As discussed above, the Commission's regulations provide that with respect to competing permits, if all else is equal (that is, if the applicants have the same municipal status and the applications are equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region), the Commission will award the permit to the entity that was first to file. This occurred in 11 of the instances at issue here, where Free Flow filed applications at 2:13 p.m. on January 11, 2011, and Northland filed applications at 4:43 p.m. the same day.

25. Northland argues that the first-to-file rule is not appropriate here because, while it concedes that Free Flow filed its applications first, all of the applications were filed on

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<sup>24</sup> Request for rehearing at 8.

<sup>25</sup> See letter from Joseph D. Morgan to Mr. Brent L. Smith (Accession No. 20031007-0081). Northland states that staff "directed" Symbiotics to continue the evaluation process, but staff in fact "encourage[d]" the company to do so. Northland also asks the Commission to "subject [Free Flow] to the same strict deadlines and oversight applied to Symbiotics," request for rehearing at 8, yet does not cite to any deadlines that were imposed.

<sup>26</sup> Moreover, the communications with Symbiotics did not involve successive permits, which are the issue here.

the same day.<sup>27</sup> Northland states that, although Commission staff sent the notice rejecting Free Flow's and Northland's premature applications to both entities, via electronic mail, at 1:59 pm on January 11, 2011, Northland's counsel "was not available to check e-mail until around 2:30."<sup>28</sup> In light of these circumstances and the fact that Northland refiled its applications relatively quickly, Northland states that it would be more equitable for the Commission to conduct a lottery for the 11 sites.

26. We do not agree with Northland's assertions. The Commission has a first-to-file policy that distinguishes between filings, including those made on the same day. Here, Free Flow was the first to file. In *Gem Irrigation District*, a case with similarities to this one, the Commission explained that "[t]he practice of assigning first-to-file status to applicants that file not only days, but also hours or even minutes before competitors, is long-entrenched Commission practice."<sup>29</sup> That Free Flow was able to respond more quickly than Northland to the staff letter does not provide a basis for departing from our practice.

### **Conclusion**

27. Northland has shown no error in the orders at issue. We therefore deny rehearing.<sup>30</sup>

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<sup>27</sup> Request for rehearing at 9.

<sup>28</sup> *Id.* at 10. Northland also asserts that because the message transmitting staff's letter was captioned "Letter Order Rejecting Free Flow Permit Application," its counsel had no reason to suppose it applied to Northland and thus may not have opened it until an hour after it was received. *Id.* Regardless of how the electronic message was captioned (the letter itself is addressed to both Northland and Free Flow), any uncertainty on the part of Northland's counsel is irrelevant, given that Northland concedes that she did not check her electronic mail until "around 2:30," by which time Free Flow had already refiled its applications.

<sup>29</sup> 41 FERC ¶ 61,186, at 61,487 (1987). *See City of Angoon*, 130 FERC ¶ 61,219 at P 13 (noting that "the Commission determined that the three municipal applicants had the exact same filing time, and therefore a first-filed applicant could not be determined").

<sup>30</sup> While Northland styles its requests as a petition for rehearing or in the alternative reconsideration, it does not specifically ask for reconsideration of any matters. In any event, we have dealt with all of the arguments Northland raises.

The Commission orders:

The request for rehearing or reconsideration filed by Northland Power Mississippi River LLC on March 29, 2012, is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.