

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Indian River Power Supply, LLC

Project No. 12462-001

ORDER DENYING REQUEST FOR REHEARING

(Issued October 15, 2004)

1. On May 18, 2004, Commission staff, via letter, granted Indian River Power Supply, LLC (Indian River), an extension of time to correct deficiencies in its application for an exemption for its existing, unlicensed Indian River Project No. 12462, located on the Westfield River in the town of Russell, Hampden County, Massachusetts. Alternative Light & Hydro Associates (Alternative Hydro), applicant for a preliminary permit for the same site (Project No. 12430), has filed a timely request for rehearing of staff's letter. For the reasons discussed below, we deny rehearing. This action is in the public interest because it is consistent with fair competition.

Background

2. On December 27, 2002, Alternative Hydro filed a preliminary permit application for the Indian River Project site. The Commission issued notice of the application on January 28, 2003, setting March 31, 2003, as the deadline for, among other things, filing a competing development application or a notice of intent to make such a filing. On March 3, 2003, Indian River, which owns the project site, filed a notice of intent to file an exemption application for the Indian River Project No. 12462. Pursuant to the Commission's regulations, 18 C.F.R. § 4.36(a)(2)(2004), the exemption application was due 120 days from the March 31, 2003 deadline, or by July 29, 2003. On July 28, 2003, Indian River filed an exemption application for the project.

3. On January 28, 2004, Commission staff issued a letter requiring Indian River to correct, within 90 days (that is, by April 27, 2004), deficiencies in the application.¹ Staff also requested Indian River to provide specified additional information necessary to complete the application by September 15, 2004.
4. On May 3, 2004, Indian River filed a letter with the Commission explaining that it had settled state court litigation between itself and another party, as a result of which Indian River was to be headed by new management.² In order to give the new managers the time to get up to speed on the project, Indian River requested that staff reissue the deficiency letter 60 days after May 3, still with a 90-day response time, thus extending the deadline by 150 days.
5. By letter dated May 18, 2004, Commission staff extended the deadline for responding to the deficiency letter to August 10, 2004, -- an extension of 105 days -- and reminded Indian River that the additional information was still due on September 15, 2004.
6. On June 17, 2004, Alternative Hydro filed a request for rehearing of the May 18 letter.
7. On August 6, 2004, and September 20, 2004, Indian River filed information in response to the deficiency letter and the additional information request.

Discussion

8. Alternative Hydro contends that staff's May 18, 2004 deadline-extension letter ignored the Commission's policy of limiting the use of notices of intent in situations involving competition to prospective applicants who have already completed or can quickly complete all necessary studies and pre-filing agency consultation under 18 C.F.R. § 4.38 (2004). It argues that Indian River truncated the pre-filing consultation process in order to file its exemption application by the 120-day deadline triggered by the filing of

¹ The deficiencies included failure to include documentation of certain agency consultation and descriptions of certain project works, as well as illegible exhibit drawings.

² See letter to Magalie R. Salas (Commission Secretary) from Peter B. Clark (dated April 27, 2004).

its notice of intent. Specifically, it points out that Indian River filed its exemption application before the end of the 60-day comment period following the joint agency meeting under the initial consultation stage of the Commission's three-stage pre-filing consultation process.³ Thus, it argues, Indian River's failure to complete even stage one of the three-stage consultation process rendered its application patently deficient under 18 C.F.R. § 4.32(e)(2), and consequently, the staff should have rejected Indian River's application instead of granting Indian River an extension of time to file additional information to complete it.

9. While Indian River indeed did not complete the requirements of the three-stage pre-filing consultation process, and was not at the point that it could complete its application within the 120-day deadline triggered by the filing of its notice of intent, we find that, under the facts of this case, staff's extension of the deadline for completion of Indian River's application, and not rejection of the application, was appropriate.

10. The Commission's regulations provide that, if two competing preliminary permit applications are filed, and if both are equally in the public interest and the applicants are equally able to carry out their plans, the Commission will favor the applicant with the earliest application acceptance date. *See* 18 C.F.R. § 385.437(b)(2) (2004). When Indian River, which was in the process of attempting to rehabilitate its unlicensed project,⁴ received notice that Alternative Hydro had filed a preliminary permit application with respect to a site owned by Indian River, Indian River's options were limited.

11. Had Indian River filed a competing preliminary permit, there was a significant likelihood that Alternative Hydro's first-filed application would be favored. Instead, Indian River chose to file an exemption application, which would, assuming the

³ The three-stage consultation process involves: (1) an extensive exchange of information between a potential applicant and relevant federal, state, and interstate resource agencies, tribes, members of the public, and other interested entities, including the development of an initial consultation document with information about the proposed project, a public meeting, (2) the performance of necessary studies and the preparation of, and opportunity to comment on, a draft application, and (3) the filing of an application. *See* 18 C.F.R. § 4.38 (2003).

⁴ The project ceased hydropower operations in 1994, and was purchased by Indian River in 1999. *See* exemption application at 1.

Commission found it to be equally in the public interest as Alternative Hydro's application, be preferred by the Commission. *See* 18 C.F.R. § 4.37(d)(1) (2004). Pursuant to our regulations, Indian River had 120 days from the date that Alternative Hydro's application was publicly-noticed to file an application. As noted above, it met that deadline.

12. The record demonstrates that, while Indian River did not complete the three-stage consultation process before filing its application, it did make substantial efforts in that regard.⁵ Indian River published notice of its proposal, contacted municipalities, federal and state resource agencies, and non-governmental organizations, sent a description of the proposed project to those entities, prepared an initial consultation document, and conducted a public meeting to discuss the project.⁶ While we have held generally that the mere fact that an entity wishes to file a competing application but is not prepared to do so will not excuse a failure to complete consultation,⁷ we believe that a different result is called for under the facts of this case. Indian River was the owner of the project site, and was attempting to rehabilitate its project when Alternative Hydro filed its permit application. Indian River was then faced with Alternative Hydro tying up the site for development for up to the maximum three-year term of a preliminary permit, and possibly ultimately losing its property, should Alternative Hydro apply for, and receive, a license. Indian River attempted to fulfill the requirements of the three-stage, pre-filing consultation process, but could not do so within the 120-day deadline. To preclude a project owner with no record of dilatory behavior from competing with an entity

⁵ *See, e.g.*, letter to Magalie Salas (Commission Secretary) from William Neidermyer (U.S. Fish and Wildlife Service) (filed September 26, 2003) (referencing receipt of and comment on initial consultation document); letter to Richard E. Lynch, Sr. (Indian River) from Stephen Morowski (Trout Unlimited) (filed September 2, 2003) (discussing initial consultation document); Indian River exemption application at 25 *et seq.* (describing information sent to a list of parties; documenting instances of public notice, providing summary of and attendance list for public meeting).

⁶ *See* Indian River's application at 35-36.

⁷*See, e.g., Manter Corporation*, 52 FERC ¶ 61,071 (1990).

proposing to take control of its property would be to countenance the type of “claim-jumping” that we have indicated in analogous contexts is not our preference.⁸ Based on the foregoing, we believe that it was appropriate for Commission staff to grant an extension to Indian River to remedy the deficiencies in its application.⁹

13. Alternative Hydro also argues that extending the deadline for Indian River to correct deficiencies in its exemption application all but decides the competition between Alternative Hydro’s preliminary permit application and Indian River’s exemption application in Indian River’s favor, in light of the tie-breaker preference in 18 C.F.R. § 4.37(d)(1)(2004) of the Commission’s regulations favoring exemption applications over competing permit applications.¹⁰

14. Staff’s May 18, 2004 letter does not impose an obligation on any party or adjudicate anyone’s substantive rights; rather, the letter simply provides additional time for Indian River to correct deficiencies in its exemption application.¹¹ Moreover, contrary to Alternative Hydro’s assertion, continuing to process Indian River’s application does not prejudge the result of the competition between the two entities. As

⁸ See, e.g., *Inghams Corporation*, 52 FERC ¶ 61,107 (1990).

⁹ Alternative Hydro itself could have filed a development application within the 120-day period.

¹⁰ Section 4.37(d)(1) provides that, if the Commission receives applications for a preliminary permit and for an exemption for mutually exclusive small hydroelectric projects, the Commission will favor the application “whose substantiated plans in the application received by the Commission are a better adapted to develop, conserve, and utilize in the public interest the water resources of the region.” If the plans are equally well-adapted, the Commission will favor the exemption application.

¹¹ While we reach the merits of Alternative Hydro’s rehearing request because of the particular facts of this case, we also note in the alternative that the Commission has a longstanding policy of rejecting challenges to decisions on requests for extensions of time to meet filing deadlines. See, e.g., *Mitex, Inc.*, 40 FERC ¶ 61,216 at 61,735 (1987); *Niagara Mohawk Power Corporation, et al.*, 46 FERC ¶ 61,159 at 61,552-53 (1989); *Wisconsin Valley Improvement Company*, 80 FERC ¶ 61,319, at 62,092-93 (1997); *Bangor Hydro-Electric Co.*, 84 FERC 61,187 at 61,962 (1998); and *Felts Mills Energy Partners, L.P.*, 93 FERC ¶ 61,169 (2000).

noted above, our regulations provide a two-part test for selection between competing exemption and preliminary permit applications. The Commission would only apply its preference for an exemption (the second part of the test) if it first concluded that both applications were equally in the public interest. Nothing in staff's grant of an extension of time bears on that determination, which we have not yet made. Should the Commission ultimately grant Indian River's application, Alternative Hydro would at that time have the opportunity to raise on rehearing any substantive issues it wishes to pursue with respect to such an order. If the application is not granted, those issues will become moot.

15. Alternative Hydro asserts that Commission staff's deadline-extension letter did not address the standard in Rule 2008(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2008(b) (2004), requiring a movant to show extraordinary circumstances to support the grant of an extension of time request filed after the deadline sought to be extended. This is correct. However, during the time that Indian River was required to file the deficiency responses, the company's management was engaged in litigation concerning corporate control. As noted above, Indian River's May 3, 2004 deadline-extension request notified the Commission of the successful settlement of the litigation, which included a change in Indian River's management. We find that the litigation and the subsequent change in management constitute extraordinary circumstances justifying Indian River's failure to file its response or to request an extension prior to the April 27, 2004 deadline. Accordingly, we affirm Commission staff's grant of Indian River's request.

The Commission orders:

The request for rehearing filed in this proceeding on June 17, 2004, by Alternative Light & Hydro Associates is denied.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.