

116 FERC ¶ 61, 237  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

Electric Plant Board of the City of Augusta, Kentucky      Project No. 12657-002

ORDER DENYING REQUEST FOR  
REHEARING AND MOTION FOR STAY

(Issued September 8, 2006)

1. This order denies the request for rehearing filed by the Electric Plant Board of the City of Augusta, Kentucky (Augusta) of the May 18, 2006 Order<sup>1</sup> (May 18 Order) rejecting Augusta's application for a preliminary permit to study, and notification of intent to file a license application for, the proposed Meldahl Project No. 12657.

**I. Background**

2. The background to this order was set forth in the May 18 Order and need not be repeated here in detail. In brief, the Commission issued a license to Augusta for the Meldahl Project No. 10395 in 1995 (1995 license). Augusta was granted the maximum allowable time to commence construction, but was unable to do so. Augusta then obtained legislation authorizing the Commission to grant three additional extensions, which it did. The final deadline to commence construction was July 31, 2005. Augusta failed to timely commence construction and on September 28, 2005, we issued notice of probable termination of the license.<sup>2</sup> By order issued March 1, 2006, we denied rehearing and terminated the project license.<sup>3</sup> Augusta did not seek rehearing.

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<sup>1</sup> 115 FERC ¶ 61,198 (2006).

<sup>2</sup> 112 FERC ¶ 61,342.

<sup>3</sup> 114 FERC ¶ 61,228.

3. On March 3, 2006, Augusta filed an application for a preliminary permit to study a project (Project No. 12657) at the Meldahl site. If issued, the permit would grant to Augusta the exclusive right during its three-year term to file a license application, and afford to it a preference over competing license applicants, municipal and non-municipal. Competing preliminary permit applications were filed by the City of Hamilton, Ohio (Hamilton) and E.ON U.S. Hydro I LLC (E.ON).
4. On April 17, 2006, Augusta filed a notice of intent to file a license application for Project No. 12657.
5. On May 12, 2006, the City of Hamilton, Ohio filed a license application for proposed Project No. 12667. On August 10, 2006, the Commission rejected Hamilton's application as patently deficient.<sup>4</sup>
6. In the May 18 Order, we rejected Augusta's permit application and notice of intent. Augusta timely filed a request for rehearing and motion for stay of the May 18 Order.<sup>5</sup>
7. On August 10, 2006, E.ON filed a notice of intent to file a license application, and, on August 11, 2006, filed a draft license application pursuant to Commission regulations on prefiling consultation.<sup>6</sup>

## **II. Discussion**

8. The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (*i.e.*, guaranteed first-to-file status) with respect to the filing of development applications for the affected site. Our general policy is to issue a preliminary permit unless there is a permanent legal bar to granting a license application. We may, however, make exceptions to established policies if we articulate a

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<sup>4</sup> Letter from Ann F. Miles, Director, Division of Hydropower Licensing, Office of Energy Projects, to Michael Perry.

<sup>5</sup> Hamilton filed an answer opposing Augusta's motion for a stay. As we are denying Augusta's request for rehearing, we need not address its stay request or Hamilton's answer thereto.

<sup>6</sup> See 18 C.F.R. § 4.38(c)(4) (2006).

rational basis for doing so,<sup>7</sup> and we have recently done so with regard to issuance of preliminary permits in other proceedings.<sup>8</sup>

9. In the May 18 Order, we explained that it is not in the public interest to reserve the site for the same entity which has been unable to commence construction on a project after having exclusive development rights under a license for over a decade, but rather we would allow other entities the opportunity to develop the site.<sup>9</sup>

**A. Issuance of Preliminary Permits to Former Licensees**

10. Augusta first argues that the May 18 Order adopts a new policy prohibiting former licensees from further pursuing a previously-licensed project when the prior license was terminated for failure to commence construction. It states that this new policy must be adopted on a prospective basis in order to provide it and other licensees adequate notice.<sup>10</sup>

11. We have adopted no such policy. The May 18 Order dismissed a permit application by a former licensee who failed to commence construction after holding its license for over a decade. We explained the reasons for departing from our general policy. The great majority of licenses terminated for failure to commence construction are terminated following the maximum statutory period of four years to commence construction, in the absence of Congressional authorization to the Commission to issue any further extensions of time. We have not established a blanket policy of rejecting the

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<sup>7</sup> See *Symbiotics, L.L.C. v. FERC*, 110 Fed. Appx. 76; 2004 U.S. App. LEXIS 19596 (10<sup>th</sup> Cir. 2004) (*Symbiotics*).

<sup>8</sup> See *Energie Group, LLC*, 111 FERC ¶ 61,072 (2005), *appeal filed*, *Energie Group, LLC, et al. v. FERC*, D.C. Cir. No. 05-1206 (June 15, 2005) and *Appalachian River Resources, Inc.*, 114 FERC ¶ 61,145 (2006) (permit applicants had unsatisfactory compliance records at other projects); *Symbiotics* (Commission had previously issued a final environmental document for another project at the site, concluding that it would have unmitigable adverse environmental impacts and there was no evidence of changed circumstances); *Mount Hope Waterpower Project LLP*, 115 FERC ¶ 61,315 (2006) (*Mt. Hope*) (permit applicant's license for the project had been terminated for failure to commence construction after holding the license for more than a decade).

<sup>9</sup> May 18 Order, 115 FERC ¶ 61,198 at P 10-11.

<sup>10</sup> Rehearing request at 6, 7.

permit or license application, or notice of intent to file an application, of any former licensee in such a situation, or indeed of any other former licensee. Such a dismissal is unusual and each application will be considered in light of the relevant facts.

12. In any event, even if our action here could be construed as the establishment of a new policy, Augusta errs in suggesting that it must be applied on a prospective basis. It is well-established that an administrative agency is permitted to change its policies in the context of an adjudication, as long as it provides a reasoned explanation for doing so.<sup>11</sup> Augusta's citation to *City of Vernon, CA*,<sup>12</sup> for the proposition that prospective application of our reasoning is appropriate here is unavailing. In that contested proceeding, the Commission established a new policy with respect to the cost responsibilities of transmission line owners participating in the California Independent System Operator. It determined to apply the new policy prospectively because it was faced with a case of first impression and an "equivocal situation," wherein the equities favored the party that would otherwise have been required to shoulder the costs in question. There is nothing equivocal about this situation, and we see no equities that convince us to continue to give preference for the site to Augusta.

### **B. Site-Banking**

13. Augusta charges that we improperly applied our policy against "site-banking" to this proceeding.<sup>13</sup> Site-banking occurs when an entity that is unable to develop a proposed project ties up the project site, and thus prevents others from developing it. This is inconsistent with the time limits for development of licensed projects of Federal Power Act section 13,<sup>14</sup> which reflect a Congressional intent that water power resources be used in the best possible manner and at the earliest possible time.<sup>15</sup>

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<sup>11</sup> *Symbiotics*. See also *Rupp v. U.S. Dept. of Treasury*, 52 F.3d 1510, 1521 (10<sup>th</sup> Cir. 1995); *Osei v. INS*, 305 F.3d 1205, 1210 (10<sup>th</sup> Cir. 2002).

<sup>12</sup> 111 FERC ¶ 61,092 at P 82-3 (2005).

<sup>13</sup> Rehearing request at 8-11.

<sup>14</sup> 16 U.S.C. § 806 (2000).

<sup>15</sup> See May 18 Order, 115 FERC ¶ 61,198 at P 10, citing *Idaho Power Company*, 14 FPC 55, 68 (1955), *aff'd*, *Idaho Power Co. v. FPC*, 237 F.2d 777 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924 (1956).

14. Augusta asserts that the policy against site-banking cannot be applied here, because it has previously been applied only to situations where a licensee was seeking a stay of license, while Augusta seeks a preliminary permit to study an unlicensed project.<sup>16</sup> It adds that the Commission has never before dismissed a preliminary permit application by a prior licensee. Augusta is correct that the policy against site-banking was not applied in the preliminary permit context until this proceeding. The essence of the policy, however, is that an entity which is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it. Whether that occurs in the context of a stay of license, a preliminary permit, or some other context, is immaterial.

15. Augusta also urges that a preliminary permit holder cannot “bank” a site because it has no right to develop the site.<sup>17</sup> On the contrary, a preliminary permit holder can indeed prevent development of a site by others. A preliminary permit confers several rights: (1) only the permittee can file a license application for the project during the permit term; (2) the permittee has the right to amend its license application to make it as well adapted as a later-filed competing license application (right of last amendment); and (3) the permittee's application will be selected over a competitor's if both are equally well adapted.<sup>18</sup> These rights effectively hamper or preclude efforts by any other entity to develop a site during the term of the permit and for the duration of any license application that may be filed during its term.

16. Augusta further asserts that the standard conditions in preliminary permits requiring a permittee to demonstrate its progress prevent site-banking.<sup>19</sup> The standard conditions are not, however, designed to require progress in actual development of the site, but only in the evaluation of the feasibility of development and, at the permit

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<sup>16</sup> Rehearing request at 8.

<sup>17</sup> *Id.*

<sup>18</sup> *Kamargo Corporation*, 37 FERC ¶ 61,281 at 61,843 (1986).

<sup>19</sup> Rehearing request at 11, *citing City of Richmond, VA*, 53 FERC ¶ 61,342 (1990).

holder's option, development of a license application.<sup>20</sup> The permittee is under no obligation to develop the site, or even to file a license application during the term of the permit. In fact, the vast majority of preliminary permits do not result in a license application.

17. Augusta further argues that if the policy against site-banking is relevant here, the May 18 Order is inconsistent with that policy because it implicitly treats the extensions of time granted to Augusta to commence construction under the 1995 license as site-banking, while Commission precedent holds that they are not.<sup>21</sup> There is no disagreement that the extensions of time granted to Augusta under the 1995 license were not site-banking. The May 18 Order, however, is forward-looking; it addresses Augusta's application to reserve the site for itself for an additional period of at least three years. In light of Augusta's lengthy, unsuccessful efforts to develop the same project for which it has applied for a permit, we conclude that the public interest would not thereby be served by issuance of a permit, thus delaying or possibly precluding another entity from developing the site.

### C. Fitness

18. Augusta contends that the May 18 Order impliedly rejects its filings on the ground that Augusta lacks fitness to develop a project at the Meldahl site, but the record of its conduct under the 1995 license does not support such a finding.<sup>22</sup> It adds that the Commission has previously stated that financial fitness is irrelevant at the preliminary permit stage,<sup>23</sup> which is consistent with our broadly applicable policy of limiting the scope of our inquiry into the applicant's background at the permit stage, in light of the

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<sup>20</sup> A preliminary permit requires only that the permittee provide the Commission with a progress report every six months describing the actions it has taken under the Commission's pre-filing consultation requirements. The permittee is not required to have completed any particular consultation requirements at any time during the term of the permit, and it is common for the Commission to issue successive permits for the same site to the same permittee if its progress reports demonstrate reasonable diligence. *See, e.g., Rock Creek Cattle Co., Ltd.*, 116 FERC ¶ 62,015 (2006).

<sup>21</sup> Rehearing request at 10, *citing Fieldcrest Cannon, Inc.*, 55 FERC ¶ 61,096 at 61,295 (1991).

<sup>22</sup> Rehearing request at 11-12.

<sup>23</sup> *Id.* at 13-14, *citing Baltic Associates*, 35 FERC ¶ 61,358 (1986).

potential burdens to the Commission and applicants of such an inquiry. Finally, Augusta states in this regard that examination of a permit applicant's background at the permit stage has generally been to determine if a permit applicant exhibited sufficient diligence during the term of a prior permit for a project at the same site during which it did not apply for a license to warrant issuance of a subsequent permit. Augusta asserts that such cases are not relevant here and, if they are, Augusta diligently pursued construction under the 1995 license.<sup>24</sup>

19. In fact, the May 18 Order makes no determination, express or implied, concerning Augusta's fitness or diligence. It merely finds that the public interest in timely development of the Meldahl site pursuant to the FPA and in a competitive environment will best be served if we do not reserve the site for an additional, indeterminate period for development by an applicant that has been unable, for whatever reason, to construct a licensed project at the site for over a decade.

**D. Other Arguments**

20. Augusta next asserts that the May 18 Order is based on a faulty factual predicate; *i.e.*, that Augusta's permit application would prevail over the permit applications of Hamilton and E.ON, or that an Augusta license application would prevail over permit applications by those entities. It asserts that if the Commission accepted Hamilton's license application,<sup>25</sup> and if it granted the request for waivers of regulatory deadlines accompanying Augusta's notice of intent, there would be competing license applications, which would not necessarily result in Augusta again having the site reserved to itself.<sup>26</sup> The May 18 Order is based on the facts as they existed when the order was issued, not on a speculative set of facts put forward by Augusta on rehearing. In any event, our statement in the May 18 Order that, all else being equal, Augusta's permit application would prevail, is accurate for the reasons stated.<sup>27</sup>

21. Augusta also asserts that excluding it from competition for the site is inconsistent with our affirmation of the benefits of competition, and that termination of the 1995

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<sup>24</sup> *Id.* at 15-16.

<sup>25</sup> As noted, Hamilton's license application was rejected.

<sup>26</sup> *Id.* at 19.

<sup>27</sup> May 18 Order, 115 FERC ¶ 61,198 at P 11.

license alone is sufficient to allow other entities to compete for the site.<sup>28</sup> As discussed above, however, we think the public interest in development of the site under competitive conditions is best served if we exclude one potential competitor based on its persistent inability to develop a licensed project at the site for over ten years.

22. Augusta next suggests that rejection of its filings is an abuse of discretion in the application of our regulations regarding competing permit applications.<sup>29</sup> Augusta alleges that we induced it to commence preparation of a license application by accepting its permit application for filing.<sup>30</sup> Augusta makes very much of very little. It was not informed that its permit application was accepted for filing until April 10, 2006, only five weeks before the May 18 Order.

23. In conclusion, Augusta offers no facts or arguments that persuade us to reverse the May 18 Order. Rehearing will therefore be denied. Given that Augusta requested us to stay the May 18 Order pending rehearing, and that we are now acting on rehearing, the request for stay is moot and will be denied.

The Commission orders:

The request for rehearing and for stay filed in this proceeding by the City of Augusta, Kentucky, on June 19, 2006, is denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>28</sup> *Id.* at 20. Augusta erroneously states that the Commission solicited competing permit applications. Augusta was informed by letter dated April 10, 2006, that its application was accepted for filing, but no public notice of the permit application was issued. It further suggests here that we have selected Hamilton as the preferred license applicant. As noted above, Hamilton's license application was rejected.

<sup>29</sup> Specifically, Augusta cites 18 C.F.R. § 4.37(b)(2) and (3) and 4.47(b)(3) and (4) (2006).

<sup>30</sup> Rehearing request at 21.