

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Marseilles Land and Water Company

Project No. 12552-002

ORDER REJECTING REHEARING AND ON CLARIFICATION

(Issued November 2, 2005)

1. Marseilles Land and Water Company (Land and Water or permittee) has filed a request for rehearing or clarification of a July 13, 2005, staff letter and of a September 2, 2005, notice dismissing a rehearing request filed by Marseilles Hydro Power LLC (Hydro Power or licensee). We reject Land and Water's request for rehearing but provide clarification, as sought, of the relationship between a permit issued to Land and Water and a license issued to Hydro Power.

Background

2. On April 8, 2005, the Commission issued a preliminary permit to Land and Water to study the proposed 6.4-megawatt Marseilles Lock and Dam Project No. 12552, to be located on the Illinois River, in LaSalle County, Illinois.¹ The proposed project would use, among other facilities, the U.S. Army Corps of Engineers' Marseilles Lock and Dam, a proposed powerhouse containing two generating units, and two existing intake canals. One of these canals, the 3,100-foot-long North Channel, is among the project works included in the Marseilles Project No. 12020, for which Hydro Power was issued a license in 2003.²

¹ *Marseilles Land and Water Company*, 111 FERC ¶ 62,037 (2005).

² *Marseilles Hydro Power LLC*, 105 FERC ¶ 62,131 (2003), *order on reh'g* 107 FERC ¶ 61,066 (2004).

3. Hydro Power intervened in the preliminary permit proceeding and opposed issuance of the permit, on the ground that Land and Water's project would interfere with Hydro Power's efforts to rehabilitate the project works included in its license.³ In particular, Hydro Power explained that the proposed project would require alteration of its own licensed project works and changes in the operating regime of its project, inasmuch as the North Channel head water elevation would be nearly two feet higher under the proposed project than was authorized in the Marseilles Project license and would require reconstruction of the North Channel headrace walls.

4. In issuing the preliminary permit, staff cited the Commission's practice of issuing a preliminary permit unless it is clear at the permit stage that the proposed development would involve an alteration of an existing license that would be impermissible under section 6 of the Federal Power Act (FPA),⁴ which prohibits alteration of existing licenses without the mutual agreement of the licensee and the Commission. Staff concluded that, under Land and Water's proposal, it was not clear that such an alteration would occur, since the permit application did not propose any modification of the licensed project's major physical structures and since Land and Water stated that it would develop its project so as not to affect the licensed project.

5. Hydro Power filed a request for rehearing or clarification of the staff's order. Hydro Power explained that, in restoring and rehabilitating the existing project facilities, it would have to rebuild the walls of the North Channel. In connection with this work, Hydro Power would seek Commission approval to increase the height of the canal walls as a cost-effective means of improving the safety of the project work, a measure that would have the additional benefit of increasing the head and, potentially, the project's hydraulic capacity and generation. Hydro Power sought clarification that the existence of the preliminary permit would not preclude it from receiving approval for such a modification. In the event that the requested clarification was not provided, Hydro Power sought rehearing of the staff's order to the extent that it included the North Channel as a project work in the preliminary permit.

6. On July 13, 2005, Commission staff issued a letter responding to licensee's clarification request. The staff letter stated that:⁵

³ A hydroelectric project had been built at the site in 1911 and was decommissioned in 1988. *See Marseilles Hydro Power LLC*, 105 FERC ¶ 62,131 at n.2.

⁴ 16 U.S.C. § 799 (2000).

⁵ Staff denoted Hydro Power as MHP and Land and Water as MLWC.

the priority of application for a license accorded to MLWC under its permit does not limit MHP's rights under its license for the Marseilles Project with respect to licensed project works such as the North Channel works. During the term of MLWC's preliminary permit for Project No. 12552, MHP as licensee of Project No. 12020 may proceed with Commission-approved modifications of the project's North Channel works despite inclusion of the North Channel works as potential project works in MLWC's preliminary permit.

On September 2, 2005, the Commission's Secretary issued a notice dismissing Hydro Power's request for rehearing as moot.

7. On October 3, 2005, Land and Water filed a request for rehearing or clarification of the September 2 notice and the July 13 letter. Land and Water seeks rehearing to the extent that the effect or intent of the letter and notice is to hold that the Commission would accept an amendment application or otherwise permit Hydro Power to increase hydraulic and generating capacity at its existing project during the term of the preliminary permit and thereby develop water resources not authorized by the current license. In the alternative, Land and Water seeks clarification that, under the Commission's regulations, the Commission would not accept an application by Hydro Power for developing incremental electric generation and hydraulic capacity at the site during the term of the permit and would treat Land and Water as the priority applicant for unutilized hydro capacity at the site should its license application be accepted for filing before expiration of the permit.

Discussion

8. Although Land and Water seeks rehearing and clarification of both the staff letter and the notice, the substance of its filing concerns staff's explanation in the July 13 letter, not the notice's dismissal of the licensee's rehearing request. Pursuant to section 313(a) of the FPA,⁶ an aggrieved party must file a request for rehearing of a final order within thirty days after the issuance of such order, in this case no later than August 12, 2005. Land and Water's request was filed on October 3, 2005. Because the 30-day rehearing deadline is statutorily based, it cannot be extended. Thus, we need not reach the issue of whether rehearing lies here, because Land and Water's request for rehearing was untimely.

9. For this reason, we are rejecting Land and Water Company's filing to the extent

⁶ 16 U.S.C. § 8251(a) (2000).

that it seeks rehearing. Nevertheless, we think it appropriate to respond to the request for clarification.

10. Section 4(f) of the FPA⁷ authorizes the Commission to issue preliminary permits to enable applicants for a license to secure necessary data and to perform the filing requirements of section 9 of the FPA. Section 5 of the FPA⁸ provides that each preliminary permit shall be for the sole purpose of maintaining priority of application for a license under the terms of the FPA for such period, not exceeding three years, as may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.

11. The preliminary permit was issued on the basis that the proposed project would not interfere with any of the existing project's physical structures, including the North Channel. Issuance of the permit does not prevent the licensee from seeking to modify those physical structures during the term of the permit. If the Commission determined that sought modifications were necessary or reasonable for project purposes, it would not be constrained by the permit from approving them on the basis that they might also increase the project's hydraulic capacity and generation. Land and Water's permit was issued for the purpose of studying the development of additional capacity at the site through the construction of a powerhouse and the use of an existing dam and two existing channels. Land and Water has a priority to develop increased capacity in accordance with this proposal, but the permit does not bestow on it the right to prevent the licensee from increasing the hydraulic potential of its own project facilities.

12. In the absence of actual license or license amendment proposals from the permittee or the licensee, respectively, we cannot with certainty conclude here how we would resolve a particular potential conflict involving the rights granted to these entities by their respective authorizations. If Hydro Power submits a proposal for the modification of its project works, Land and Water can contest that proposal if it thinks that the proposal will interfere with its rights under its permit, and the Commission will resolve the issue at that time based on the facts presented.

The Commission orders:

The request filed October 3, 2005, by Marseilles Land and Water Company for rehearing and clarification of the Commission staff's letter of July 13, 2005 and the

⁷ 16 U.S.C. § 797(f) (2000).

⁸ 16 U.S.C. § 798 (2000).

Commission notice issued September 2, 2005, in this proceeding, is rejected insofar as it seeks rehearing and is granted insofar as it seeks clarification, as indicated in this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.