

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Green Island Power Authority

Project No. 12522-001

ORDER DENYING REHEARING

(Issued March 24, 2005)

1. Green Island Power Authority (GIPA) has filed a request for rehearing of the Commission's January 21, 2005 Order dismissing GIPA's application for a preliminary permit for the proposed Cohoes Falls Project No. 12522, to be located on the Mohawk River in the Town of Waterford and the City of Cohoes, New York, near the site of the existing School Street Project.¹ As discussed below, we deny rehearing. This order is in the public interest because it is consistent with the requirements of the Federal Power Act (FPA).

Background

2. The 38.8-megawatt (MW) School Street Project No. 2539, licensed to Erie Boulevard Hydropower, L.P. (Erie), is located on the Mohawk River in Albany and Saratoga Counties, New York. As discussed in the January 21 Order, in December 1991 Erie's predecessor filed applications for new licenses for the School Street Project and nine other projects, the licenses for which all expired in 1993. The School Street licensing proceeding is ongoing.

3. On July 19, 2004, GIPA, a power authority created by the State of New York, filed an application for a preliminary permit to study the potential development of the 100-megawatt (MW) Cohoes Falls Project. GIPA explained that construction of the

¹ 110 FERC ¶ 61,034.

Cohoes Falls Project would inundate the School Street powerhouse and also involve the decommissioning of various other facilities of the School Street Project.

4. GIPA recognized that, pursuant to its regulations, the Commission has rejected preliminary permit applications to study projects that would utilize all or part of the resources that are currently held under an existing license or would interfere with such projects but asked the Commission to waive the regulations to the extent necessary to consider GIPA's application, in view of the failure to complete the School Street relicensing and the alleged superiority of the Cohoes Falls Project.

5. On January 21, 2005, we dismissed GIPA's application. We explained that section 15(c)(1) of the FPA² requires that all applications for new licenses, whether filed by the current licensee or by a competing applicant, be filed with the Commission at least 24 months before the expiration of the term of the existing license. Since GIPA itself stated that construction of the Cohoes Falls Project would require the decommissioning of the School Street Project, we found that any development application for the Cohoes Falls Project would in essence be a relicense application filed in competition with the School Street application. We stated that the section 15(c)(1) deadline for filing relicense applications for the School Street Project fell in 1991, two years before the School Street license expired and that thus any development application GIPA might file would be more than 13 years late, and consequently would not be permitted by section 15(c)(1).³ We also stated that issuance of a license to GIPA for a project that would require decommissioning of School Street, over the licensee's manifest objection, would constitute either a revocation or an alteration of the School Street license in a manner inconsistent with FPA section 6.⁴ We therefore concluded that there was no reason for us to process a preliminary permit to study a project that we cannot license.⁵

² 16 U.S.C. § 808(c)(1),

³ See 110 FERC ¶ 61,034 at PP 13-14.

⁴ *Id.* at P. 15. Section 6, 16 U.S.C. § 799, states that hydropower licenses "may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice. . . ."

⁵ On March 9, 2005, Erie filed a settlement in the School Street relicensing proceeding, signed by the U.S. Fish and Wildlife Service, the National Park Service, the
(continued...)

6. In addition, we noted that GIPA's application is barred by section 4.33(a) of our regulations,⁶ which provides that the Commission will not accept applications for preliminary permits that would interfere with licensed projects in a manner precluded by section 6 or that would develop the same water resources as those subject to a previously-filed development application.⁷

7. On February 22, 2005, GIPA filed a timely request for rehearing.

Discussion

8. In essence, GIPA does not dispute our legal analysis, such as our conclusions that section 15(c)(1) requires competing proposals to be filed within two years of the expiration of a license, that GIPA's project would compete with School Street, and that GIPA did not file an application by the deadline.⁸ Instead, it asserts that dismissal of its preliminary permit application was not required by law, because the Commission could waive any of its regulations that bar acceptance of the application, and suggests that the Commission could take action with respect to the School Street Project that would thereafter permit consideration of an application for the Cohoes Falls Project.

9. GIPA is correct that the FPA itself does not require dismissal of the Cohoes Falls application. Nothing in the FPA places any limits on the Commission's ability to accept any preliminary permit application at any time. What GIPA fails to deal with is the fact that the FPA does preclude it from filing an application for the Cohoes Falls Project under current circumstances, and there is thus no reason for us to entertain a preliminary permit application for a project that cannot be licensed.

New York State Department of Environmental Conservation, New York Power Authority, New York Rivers United, the New York State Conservation Council, and the Rensselaer County Conservation Alliance. The settlement package included a letter from the Mayor of the City of Cohoes expressing his support for the settlement.

⁶ 18 C.F.R. § 4.33(a) (2004).

⁷ 110 FERC ¶ 61,034 at PP 16-20.

⁸ For example, it states that the Commission's reading of the section 15 is "plausible," request for rehearing at 4-5.

10. GIPA states that the Commission is obligated under FPA sections 10(a)(1)⁹ and 4(e)¹⁰ to ensure that licensed projects are best adapted to a comprehensive plan for developing a waterway, giving equal consideration to power and development purposes, and to nondevelopmental (environmental) purposes. In order to make the “best adapted” finding, GIPA asserts, the Commission must consider alternatives to an applicant’s proposal.¹¹ GIPA goes on to argue that the Commission cannot make a comprehensive development/equal consideration finding with respect to the School Street Project without considering the Cohoes Falls proposal as an alternative.¹²

11. These arguments are misplaced. Which alternatives the Commission considers to the applicant’s proposal in the School Street relicensing is a matter to be dealt with exclusively in that proceeding, not here.¹³ Indeed, even assuming that GIPA’s proposal is an alternative to School Street for purposes of environmental review of School Street, that does not overcome the fact that section 15(c)(1) bars GIPA from filing an application for Cohoes Falls. Further, the dismissal of GIPA’s application for a preliminary permit has no bearing on whether, and under what conditions, to relicense the School Street Project. We can, and will, require whatever revisions to Erie’s proposal we consider necessary to meet the comprehensive development/equal consideration standard, regardless of whether GIPA holds a preliminary permit for the Cohoes Falls Project.

⁹ 16 U.S.C. § 803(a)(1).

¹⁰ 16 U.S.C. § 797(e).

¹¹ Request for rehearing at 4-5.

¹² *Id.* at 6-7.

¹³ This is true with respect to all of GIPA’s assertions with respect to procedural matters in the School Street relicensing, including GIPA’s late motion to intervene, requests for a technical conference, and the Commission’s environmental procedures in that case. *See* request for rehearing at 11.

12. GIPA next argues that the Commission's conclusion that GIPA's project is barred by law is incorrect because it rests on the assumption that the Commission will relicense the School Street Project as proposed by Erie.¹⁴ GIPA maintains that the Commission could issue a license for the School Street Project that allows for future development of the Cohoes Falls Project,¹⁵ could issue a nonpower license for the

¹⁴ Request for rehearing at 7-10.

¹⁵ GIPA cites *Moon Lake Electric Association, Inc.*, 46 FERC ¶ 62,203 (1989) as an instance of a license that included reservations for the federal government to take over the project and for the Commission to grant a license for future projects that the Commission determined to be better adapted to the comprehensive development of the waterway. *Moon Lake* was a unique instance in which the license was issued against the backdrop of the Department of the Interior having recommended various projects to fully develop the Colorado River Basin, in which the licensed project was located, and Congress having authorized, although not yet funded, a Bureau of Reclamation dam that would have prevented any flows from reaching the project. Thus, the license took account of the possibility that future, government-recommended or -sponsored development might adversely affect the project, or that government takeover might occur. While the issue of how we condition any license we issue to Erie is a matter to be determined in the School Street proceeding, and not here, we note that the unusual circumstances of *Moon Lake* do not appear to be present in the School Street proceeding. Moreover, as a general matter, we would not be likely as a matter of policy to issue a license with conditions that indicated that we anticipated taking action during the license term to render a project inoperable, since this would remove all regulatory certainty and render it difficult, or very expensive, for a licensee to obtain funding for a project with such an uncertain future.

project,¹⁶ or could deny Erie's application or recommend federal takeover of the project.¹⁷

13. GIPA is incorrect that our decision was premised on an assumption of a particular result in the School Street relicensing. On the contrary, our holding rested on the facts as they now exist – it is GIPA that asks us to assume that the current legal bars to a Cohoes Falls application will at some point be removed. It is possible that any of the results GIPA posits could occur. However, the facts remain -- and GIPA does not argue to the contrary -- that GIPA's proposal would compete with the School Street relicensing application, that an application by GIPA in competition with the School Street application is currently precluded by FPA section 15(a)(1), and that, unless and until Erie no longer holds a license for School Street, issuance of a license for the Cohoes Falls Project is barred by FPA section 6.¹⁸

¹⁶ Section 15(f), 16 U.S.C. § 809(f), authorizes the Commission, where it finds that all or part of any licensed project should be longer be used for power purposes to issue a temporary, nonpower license until a state, municipality, interstate agency, or federal agency is prepared to assume regulatory control over the land and facilities included in the nonpower license. The Commission has never issued a nonpower license over the objection of a licensee, and, other than GIPA, no entity involved in the School Street relicensing has proposed that the Commission do so in that proceeding.

¹⁷ Section 14 of the FPA, 16 U.S.C. § 807, provides that, at the conclusion of a license term, the United States may take over any project. No federal government entity has expressed any interest in acquiring the School Street Project. We also note that, other than GIPA, none of the many federal, state, local, or private entities involved in the School Street proceeding has suggested that we should not issue a new license for the project.

¹⁸ *See* 110 FERC ¶ 61,034 at PP 13-15. With respect to section 6, GIPA states only that the Commission's conclusion that that section would bar issuance of a license for the Cohoes Falls Project is incorrect because the School Street Project is in relicensing and the Commission could issue Erie a nonpower license or a license that could be terminated upon the issuance of a license for Cohoes Falls. Request for rehearing at 6. As discussed above, this argument ignores the fact that Erie currently holds a license for the School Street Project that is not conditioned in either of the manners that GIPA suggests and so, unless and until that situation changes, section 6 indeed bars issuing a license for Cohoes Falls.

14. In *Symbiotics, LLC*,¹⁹ we recently affirmed the dismissal of a license application where license issuance was barred by the Wild and Scenic Rivers Act. Although the applicant argued that we should keep its application on file in the event that the Wild and Scenic River designation were removed from the river reach at issue, we declined to do so. The same logic applies here – there is no reason to issue a preliminary permit where, as long as Erie holds a license for the School Street Project and its relicensing application is being processed, we cannot license Cohoes Falls. Should the facts change in the future – for example, if, as GIPA posits, we ultimately deny a new license to Erie or issue one on terms that permit licensing of Cohoes Falls, or if Erie were to withdraw its application – GIPA would then be free to compete for the School Street site. In the absence of such events occurring, we continue to believe that the statutory bars to a Cohoes falls application render issuance to GIPA of a preliminary permit pointless.

15. GIPA continues to argue that we can waive our regulations to allow consideration of its permit application.²⁰ It is true as a general matter that we can waive our own regulations. However, as discussed in detail in the January 21 Order, we have consistently rejected preliminary permit applications to study projects that would use all or part of the resources that are currently held under an existing license or that would interfere with the operation of an existing, licensed project. Moreover, we have previously rejected late-filed permit applications that would compete with filed license applications,²¹ a result the courts have concluded is required by our regulations.²² GIPA advances no reason that would justify a reversal of our consistent, long-term policy.

16. Finally, we note that a preliminary permit is not a prerequisite for an entity to develop a license application. A preliminary permit does not give the permittee anything other than priority in the event that competing development applications are filed with

¹⁹ 110 FERC ¶ 61,235 (2005).

²⁰ Request for rehearing at 10-12.

²¹ See 18 C.F.R. § 4.33(a) (2004).

²² See 110 FERC ¶ 61,034 at 16-20, citing *Skokomish Indian Tribe v. FERC*, 121 F. 3d 1303 (9th Cir. 1997).

respect to the project at issue.²³ To the extent that GIPA is willing, as it suggests, to proceed with developing a license application for its proposal based on the possibility that the School Street Project will ultimately not be licensed, or will be licensed in such a way as to permit consideration of an application for the Cohoes Falls Project, it is free to do so regardless of our dismissal of the permit application. Given that we have indicated that we will not at this point accept preliminary permit applications for projects in competition with School Street, should the facts change, GIPA will be on an equal footing with any other entity that seeks to develop the School Street or Cohoes Falls site.

The Commission orders:

The request for rehearing filed by Green Island Power Authority on February 22, 2005 is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

²³ In addition, issuance of a permit application does not in any way imply that we will accept or grant a subsequent license application. In *Symbiotics, supra*, we sustained the dismissal of a license application where the project was barred by law, notwithstanding the fact that applicant had previously held a preliminary permit.