

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

Canada Creek Corporation

Project No. 12154-001

ORDER DENYING REHEARING

(Issued May 22, 2003)

1. This order denies rehearing of the dismissal of a third-party application for a preliminary permit to study increasing the hydroelectric generating capacity of an unlicensed operating project.

**BACKGROUND**

**A. 1980 Jurisdiction Order**

2. The existing East Canada Creek Project comprises two developments – Inghams and Beardsley – located about two miles apart on East Canada Creek, a tributary of the Mohawk River, in Fulton, Montgomery, and Herkimer Counties, New York. Each development consists of a dam or dams, a reservoir, and a generating unit.<sup>1</sup>

3. In 1980, the Commission dismissed a license application filed for the project by then owner Niagara Mohawk Power Corporation.<sup>2</sup> The basis for the dismissal was that there was no showing that the project was required to be licensed; notably, the Commission had not found substantial evidence that the project is located on a navigable river or that the project had been the subject of new construction since 1935 (new or post-

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<sup>1</sup>The Inghams development has an installed capacity of 6.4 megawatts (MW), and the Beardslee development has an installed capacity of 16.5 MW.

<sup>2</sup>Niagara Mohawk Power Corporation, 11 FERC ¶ 62,061 (1980).

1935 construction).<sup>3</sup> The order stated that dismissal was without prejudice to a subsequent determination, based on new or additional evidence, that licensing the project is required.

4. The 1980 dismissal order predated the Commission's ruling that there is a category of hydroelectric projects that is not required to be licensed under FPA Section 23(b)(1) but that the Commission is authorized to license under FPA Section 4(e), 16 U.S.C. § 796(e): projects on non-navigable Commerce Clause waters with no post-1935 construction. See Clifton Power Corp., 39 FERC ¶ 61,117 (1987), aff'd, Cooley v. FERC, 843 F.2d 1464 (D.C. Cir. 1988).<sup>4</sup> This led to much attention being focused on the so-called "claim-jumper" threat to this category of "4(e) projects."<sup>5</sup>

#### **B. 1990 Inghams order**

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<sup>3</sup>Pursuant to Section 23(b)(1) of the Federal Power Act (FPA), 16 U.S.C. § 817(1), a non-federal hydroelectric project must, unless it has a still-valid pre-1920 federal permit, be licensed if it (1) is located on a navigable stream of the United States; (2) occupies lands of the United States; (3) utilizes surplus water or waterpower from a Government dam; or (4) is located on a body of water over which Congress has Commerce Clause jurisdiction, project construction occurred on or after August 26, 1935, and the project affects the interests of interstate or foreign commerce.

The post-1935 construction requirement stems from the specific language and legislative history of Section 23(b). See Farmington River Power Co. v. Federal Power Commission, 455 F.2d 86 (2d Cir. 1972). Ordinary maintenance, repair, and reconstruction activity with respect to a project built before 1935 does not constitute post-1935 construction for Section 23(b) purposes. Rather, such construction must entail the enlargement of generating capacity, of the impoundment/diversion structure, or of other significant physical plant. See Puget Sound Power & Light v. Federal Power Commission, 557 F.2d 1311 (9th Cir. 1977).

<sup>4</sup>The Commission noted in Clifton Power, 39 FERC ¶ 61,117 at 61,452, that its prior practice had been to dismiss license applications for projects it determined were not required to be licensed, but that such determinations did not constitute disclaimers of Section 4(e) jurisdiction.

<sup>5</sup>Several bills were introduced to protect 4(e) projects from claim-jumpers, and a hearing was held. See S. Rep. No. 101-133 (1989). No legislation was enacted.

5. In 1990, the Commission denied separate preliminary permit applications filed by third parties to study adding capacity at the Inghams Mills and Beardslee developments.<sup>6</sup> The lead order, involving Inghams Mills, began by stating that, "as a general rule, it is good public policy to favor the retention by project owners of projects that are operating legally."<sup>7</sup> Thus, the order continued, if the Commission were to determine that no valid purpose was served by the mere substitution at a 4(e) project of one operator by another, it could decline to grant a license to the third-party applicant. Recognizing, however, that, while "very unlikely,"<sup>8</sup> there might be circumstances in which licensing a 4(e) project essentially unchanged to a third party might advance the public interest, the Commission stated that it would review any such license application on the merits.<sup>9</sup>

### 1. Permit applications for operating 4(e) projects

6. That being said, the Commission concluded that "no regulatory purpose would be served by entertaining a third party's preliminary permit application for a 4(e) project where the application proposes no new construction."<sup>10</sup>

7. The Commission also stated that it would not issue a permit to a third party proposing post-1935 construction at a 4(e) project (which construction would nearly always turn it into a "23(b)(1)" project; see n. 3, *supra*). The Commission's reasoning was that, while such construction might be in the public interest, it declined, in light of the high attrition rate between permits and license applications and the considerable expense of preparing a license application, to confront the owner of a 4(e) project with a third party's

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<sup>6</sup>Inghams Corporation, 52 FERC ¶ 61,107 (1990), *reh'g denied*, 58 FERC ¶ 61,033 (1992) (*Inghams*); Beardslee Corporation, 52 FERC ¶ 61,108 (1990), *reh'g denied*, 58 FERC ¶ 61,030 (1992).

<sup>7</sup>52 FERC ¶ 61,107 at 61,508.

<sup>8</sup>The Commission stated that it was aware of no case where one entity had received a license for an unlicensed operating hydroelectric project over the objection of the owner of the project, a fact it ascribed in part to the high financial threshold – fair market value – for buying out an operating project. *Id.* at 61,509.

<sup>9</sup>*Id.* It would also review on the merits any third-party license application proposing to enlarge an unlicensed operating 4(e) project, or third-party license application, with or without enlargement proposal, for an unlicensed, illegally operating 23(b)(1) project. *Id.* at 61,510; 58 FERC ¶ 61,030 at 61,075 n. 6.

<sup>10</sup>52 FERC ¶ 61,107 at 61,508.

proposal to take over and enlarge the project unless and until the third party actually filed a license application.<sup>11</sup>

## **2. Permit applications for operating 23(b)(1) projects**

8. With respect to permit applications for unlicensed operating 23(b)(1) projects, the Commission stated that there is insufficient public policy reason to award anyone but the project owner a permit for a project for which the owner is in the process of obtaining a license and for which no one is proposing significant changes.<sup>12</sup>

9. The Commission did not address what would be its policy if presented with a permit application filed on a 23(b)(1) project by a third party proposing significant changes.

## **3. Rehearing of 1990 Inghams Order**

10. On rehearing of its 1990 Inghams order, the Commission affirmed its policy with respect to the case before it – a third party permit application to add capacity to a 4(e) project – and deferred discussion what its policy would be in other fact scenarios.<sup>13</sup>

### **C. Canada Creek's permit application in Project No. 12154**

11. On March 11, 2003, Canada Creek Corporation (Canada Creek) filed a preliminary permit application to study adding capacity at the Inghams and Beardslee developments, currently owned by Erie Boulevard Hydropower, L.P. (Erie). The application proposed studying the installation at each development of an underground powerhouse (and associated intake and discharge tunnels) on the opposite bank from the current Inghams and Beardslee developments. Canada Creek asserts that the only existing project features it

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<sup>11</sup>Id. at 61,510.

<sup>12</sup>Id. at 61,509. The Commission noted that there is no bar to issuing a permit to the owner of an operating 4(e) or 23(b)(1) project while he prepares a license application, citing Orange and Rockland Utilities, Inc., 44 FERC ¶ 61,236 (1988) (id. n. 15). But it stated that it would not issue a permit to a project owner who has been "dilatory in obtaining the license once the Commission directs it to," citing Wolverine Power Corp., 47 FERC ¶ 61,274 (1989) (permit applications filed by projects' owner denied for projects Commission had determined, years earlier, required licenses).

<sup>13</sup>58 FERC ¶ 61,033 at 61,075.

would use would be the Inghams and Beardslee dams, although it would also use the same water as the unlicensed Erie projects.<sup>14</sup>

12. On March 20, 2002, Erie filed motions to intervene and to dismiss the permit application, citing the Inghams orders. Canada Creek filed in opposition to the motion to dismiss.<sup>15</sup> On February 4, 2003, the Commission staff dismissed Canada Creek's application,<sup>16</sup> and on March 6, 2003, Canada Creek timely filed for rehearing.

13. On rehearing, Canada Creek argues that the dismissal of its permit application for the East Canada Creek Project was improper, because the Inghams orders indicated that the Commission would address permit applications for unlicensed operating projects on the merits. Canada Creek adds that by accepting its permit application for filing and issuing public notice, the Commission's ultimate decision on the application will be better informed. It notes, as well, the "dramatic changes in the regulatory environment since 1992," a current capacity shortage in New York State, the growing value of "green [non-fossil fuel] kilowatt-hours," and the fact that the East Canada Creek Project is no longer owned by a traditionally-regulated utility with captive native-load customers who would bear the cost of licensing the project, but rather is owned by a merchant utility with market-based rate authority and no native-load customers.<sup>17</sup> In light of these new circumstances, Canada Creek asks the Commission to reconsider the policy considerations articulated in Inghams.

14. Finally, Canada Creek asserts that the East Canada Creek Project is in fact a 23(b)(1) project, in that it has undergone "substantial modifications" constituting post-1935

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<sup>14</sup>Canada Creek filing of April 4, 2002, at 10.

<sup>15</sup>Since the Commission did not issue public notice of the permit application before dismissing it, no intervention deadline had been established, and therefore Erie's motion to intervene was timely (see, e.g., Orange and Rockland Utilities, 40 FERC ¶ 61,222 at 61,766 (1987)). Because it was unopposed, it was automatically granted pursuant to 18 C.F.R. § 385.214(c)(2) (2002)).

<sup>16</sup>Letter order issued by Office of Energy Projects, Division of Hydropower Administration and Compliance (unreported). Canada Creek correctly notes (rehearing request at 21) that, since Erie had intervened in opposition to the permit application, the Division Director lacked the delegated authority to act on the application. See 18 C.F.R. §§ 375.308(a), 375.301. This order ratifies the dismissal of the application.

<sup>17</sup>Rehearing request at 15-17.

construction (an assertion Erie denies),<sup>18</sup> and is moreover situated on a navigable stream, a separate basis for requiring licensing (see n. 3, *supra*). In support of its navigability claim, which it raised for the first time on rehearing, Canada Creek submitted a report on the historical use of East Canada Creek by logging companies and other industries, as well as current use of the creek for recreational boating.<sup>19</sup> It notes that Inghams did not discuss how the Commission might rule on a third-party permit application proposing to add capacity to an operating unlicensed 23(b)(1) project, and argues that the public interest would be served by granting its permit application to study such proposal.

## DISCUSSION

15. Canada Creek argues that dismissal of its permit application based on the Inghams precedent was improper, since the Inghams orders refer not to the dismissal of third-party permits but to their denial. But on re-examination, the Inghams orders' description of how the Commission would treat third-party permit applications proposing no new construction at operating, unlicensed 4(e) and 23(b)(1) projects amounts to a policy decision to never grant such applications. The Commission stated:<sup>20</sup>

[I]f the only such permit application is filed by a third party, we will deny it. If the only permit application is filed by the project owner, we will grant it. . . . If both the project owner and a third party file permit applications, and if both are or neither is a state or municipality, we will grant the owner's application, waiving if necessary the first-to-file preference of 18 C.F.R. § 4.37(b)(2). If both the project owner and a third party file permit applications, and only the third party is a state or municipality, and therefore has statutory tie-breaker preference pursuant to section 7(a) of the FPA, 16 U.S.C. § 800(a), then we will deny both applications.

16. This statement's reference to competing permit applications reflects the general processing rules, followed in that proceeding, that acceptable permit applications are the subject of notice, intervention, and competing applications. However, in light of the policy framed in Inghams and affirmed in this order, such processing is pointless, since the policy precludes issuance of a permit to a third-party applicant in any of the described situations

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<sup>18</sup>Erie filing of April 16, 2002.

<sup>19</sup>See "Preliminary Navigability Assessment of East Canada Creek," Exhibit A to the rehearing request.

<sup>20</sup>52 FERC at ¶ 61,107 at 61,508-09 nn. 13, 18.

and irrespective of the application's merits. In short, after Inghams the appropriate action on third-party permit applications was dismissal.<sup>21</sup>

17. We next turn to Canada Creek's assertion (rehearing request at 14) that its permit application was improperly dismissed because Inghams did not establish a policy, but rather merely gave potential applicants "information" about the Commission's abstract thoughts on the matter, whereas actual policy decisions would be made in the context of specific applications.<sup>22</sup> Canada Creek points to the Inghams rehearing order's statement (58 FERC ¶ 61,033 at 61,075) that:

many of the policies enunciated in [the first Inghams order] are premised on hypothetical facts that may be presented to the Commission in future proceedings but are not presented by the application Inghams filed that is before us for decision today. Accordingly, we will defer discussion of these other policies to such time as they may become ripe in the context of specific applications, and will confine the discussion in this order on rehearing to the facts, law, and policy that are pertinent to Inghams' application.

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<sup>21</sup>Canada Creek notes that in reliance on Inghams eight permit applications have been denied, Western Massachusetts Electric Co., 53 FERC ¶ 61,173 (1990), but none has been dismissed. Rehearing request at 10 n. 5. Dismissal would have been more appropriate.

<sup>22</sup>Canada Creek also argues that, if Inghams were a statement of new policy, it was required to be formulated in a rulemaking after notice and comment. Rehearing request at 12-13. However, it is well settled that an agency may establish rules of general application either by rulemaking or in an individual adjudication. *NLRB v. Bell Aerospace*, 416 U.S. 267, 293 (1974). Nor has Canada Creek asserted that it lacked actual and timely notice of the Inghams policy, which after all involved the same project as does its permit application.

18. However, Canada Creek's application is the same as Inghams' application: both are third-party permit applications proposing to add capacity to a 4(e) project.<sup>23</sup> Thus,

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<sup>23</sup>We take this occasion to correct a misimpression left by a Commissioner opinion concurring in part and dissenting in part in the first Inghams order (52 FERC ¶ 61,107 at 61,510):

The balance is a difficult one: between favoring the continued ownership of otherwise lawfully operating, unlicensed projects and encouraging the development of the nation's hydropower resources. For the most part, I agree with the majority that the balance falls on the side of continued ownership. But that balance falls differently when we speak of developing energy resources that are outside the existing project works and that would be subject to a separate license. In such circumstances, the better choice is to encourage potential development. . . .

However, as Inghams pointed out, id. at 61,509 n. 22, a license application involving any aspect of an unlicensed project, whether 4(e) or 23(b)(1), must encompass the entire project, because the Commission licenses the entire unit of hydroelectric development. Sections 4(e) and 3(11) of the FPA, 16 U.S.C. §§ 797(e), 796(11). This means that, where the project owner, or anyone else, files a license application to add capacity to or otherwise expand an unlicensed project, the license must encompass not only the new capacity but also the existing project. Thus, while Canada Creek states that the only features of the existing projects that its proposed projects will use are the dams, any license for the proposed projects would have to include the entire unit of development. Canada Creek states (April 4, 2002 filing at 10) that its projects would use the same water as the existing projects, in which case it appears the existing projects' generating stations could no longer be used.

By contrast, a third-party application to add capacity at the site of an already licensed project could be granted by a license for just that increment, (1) if not barred by FPA Section 6, 16 U.S.C. § 799, which requires the existing licensee's consent for any substantial alteration to (or interference with) the existing licensed project (see Pacific Gas and Electric Co. v. FERC, 720 F.2d 78 (D.C. Cir. 1983)); or (2) contemporaneously with a relicense proceeding for the existing project; see Preferences at Relicensing of Units of Development, Statement of Policy, 57 FERC ¶ 61,349 (1991) ("Kamargo" policy). This is because, so long as the entire unit of development is under license, it can, where appropriate, be split between two (or more) licenses whose requirements are integrated.

(continued...)

Canada Creek's application is squarely within the Inghams policy determination (id.) that,

[w]hile we will rule on the merits of license applications filed by third parties proposing to add post-1935 construction to 4(e) projects, we have decided to issue no permits to third parties proposing to develop such applications.

19. Canada Creek's next argument is that we should in any event revisit and revise this policy, in light of the changes it pointed out in the electric energy industry. We conclude that the considerations that led to the Inghams policy are largely untouched by the changes Canada Creek references. Inghams stated (id.):

Once again, we begin with the fact that these 4(e) projects are operating legally without a license. There may well be public interest benefits to be derived from the licensing of an enhanced hydroelectric development, and it may well be that the filing by a third party of a permit application may be an incentive for the project owner to reexamine the project for its enhancement potential. However, only about one in four issued permits leads to a license application, and a percentage of license applications is eventually dismissed for lack of adequate information. Therefore, and in light of the considerable expense that a license application can entail, we do not believe that the owner of a 4(e) project should be confronted with a third party's proposal to take over and develop unused water power at its project unless and until the third party develops a concrete proposal, files an actual license application, and that application is accepted for filing.

We affirm this policy for third-party permit applications proposing to expand hydroelectric development at a 4(e) project.

20. For the reasons articulated in the first Inghams order, we also adopt the other two policies described in that order, which, as discussed above, call for dismissal of third-party permit applications proposing no new construction at a 4(e) project, or proposing no new

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<sup>23</sup>(...continued)

Where a part of the unit of development is beyond the Commission's jurisdiction, by dint of being in another country (Lake Ontario Land Develop. v. Federal Power Commission, 212 F.2d 227 (D.C. Cir. 1954)), in a federal project (Natural Energy Resources Co., 59 FERC ¶ 61,374 (1992)), or authorized by a still-valid pre-1920 federal permit (Georgia Pacific Corp., 98 FERC ¶ 61,312 (2002)), the Commission will license that part of the unit which is within its jurisdiction.

construction at a 23(b)(1) project for which the owner has not been dilatory in preparing and prosecuting a license application.

21. The fourth scenario, which Inghams did not discuss, is a third-party permit application proposing new construction at an operating, unlicensed 23(b)(1) project. We see no reason to distinguish our treatment of this type of permit application from the other scenarios, so long as the project owner is in good faith preparing and prosecuting a license application for the project.

22. In summary, our policy with respect to third-party permit applications at operating, unlicensed hydroelectric project is as follows:

4(e) project: dismiss all third-party permit applications, whether or not they propose new construction.

23(b)(1) project: dismiss all third-party permit applications, whether or not they propose new construction, if the owner has not been dilatory in preparing and prosecuting a license application.

23. We reiterate that this policy applies only to preliminary permits; a third party's license application for a 4(e) or a 23(b)(1) project will, if it otherwise complies with the applicable requirements, be accepted for filing and processed.

24. Canada Creek's final argument is that the East Canada Creek Project is in reality a 23(b)(1) project, and that such a project should not be protected from a third-party permit application proposing new construction. As noted above, we would dismiss such an application in any event, unless the project owner was not pursuing licensing in good faith.

The jurisdictional status of the project is therefore not relevant for purposes of the instant order.

The Commission orders:

Canada Creek Corporation's request for rehearing, filed March 6, 2003, is denied.

Project No. 12154-001

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By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.