

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Indian River Power Supply, LLC
Alternative Light & Hydro Associates

Project Nos. 12430-001
12462-002

ORDER DENYING REHEARING

(Issued July 25, 2005)

1. On February 2, 2005, Commission staff dismissed without prejudice the preliminary permit application filed by Alternative Light & Hydro Associates (Alternative Hydro) for the Russell Falls Hydro Project No. 12430, proposed to be located on the Westfield River in the town of Russell, Hampden County, Massachusetts.¹ Alternative Hydro has filed a timely request for rehearing of staff's order. For the reasons discussed below, we deny rehearing.

Background

2. On December 27, 2002, Alternative Hydro filed a permit application to study the feasibility of acquiring and redeveloping an abandoned hydroelectric plant.² According to Alternative Hydro's application, the site consists of a small (less than 3 feet high), 365-foot-long dam; a small impoundment; an intake structure; two penstocks ranging in diameter from 7 to 12 feet; two turbine-generator units; and a powerhouse. The application stated that, with the exception of the dam and one of the generating units, the site is in a state of disrepair. Alternative Hydro proposed to study whether the intake structure, penstocks, and one of the generating units can be repaired or must be replaced. In addition, Alternative Hydro would study the feasibility of constructing another

¹ 110 FERC ¶ 62,096 (2005).

² Indian River Power Supply, LLC, currently owns the site, which it acquired in 1999. Hydropower has not been produced at the site for more than 10 years.

penstock and powerhouse (which would contain a third generating unit), of adding one-foot-high flashboards to the dam, and of interconnecting the project to the local utility by constructing a transmission line. The project would have a total installed capacity of between 800 and 1,100 kilowatts (kw).

3. The application provided a general statement about average monthly flows; general maps of the project area, project features, and proposed boundary; and a list of needed studies and cost estimates for completing them.
4. 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 Power Supply, LLC (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,³ the exemption application was due 120 days from the March 31, 2003 deadline, or by July 29, 2003.
5. On July 28, 2003, Indian River filed an exemption application for the project. Indian River proposes to rehabilitate the dam (which it describes as 30 feet high at its highest point) and other existing project facilities, install one-foot-high flashboards, and construct a 400-foot-long transmission line. The project will have a total installed capacity of 700 kW.
6. On December 22, 2004, Commission staff accepted Indian River's application for processing⁴ and subsequently dismissed without prejudice Alternative Hydro's

³ 18 C.F.R. § 4.36(a)(2)(2005).

⁴ On January 28, 2004, Commission staff issued a letter requiring Indian River to correct specified deficiencies within 90 days (by April 27, 2004), and to provide (by September 15, 2004) certain items of additional information necessary to process the application. On May 18, 2004, Commission staff extended the deadline for correcting the deficiencies to August 10, 2004. On August 6 and September 20, 2004, Indian River filed the required information in response to the deficiency letter and the additional information request.

Alternative Hydro sought rehearing of this extension of time to correct deficiencies, which the Commission denied. 109 FERC ¶ 61,066 (2004). Its subsequent appeal to the U.S. Court of Appeals for the D.C. Circuit, *Alternative Light & Hydro Associates v. FERC*, No. 04-1420 (D.C. Cir. filed 12/14/2004), was dismissed by the court for lack of finality on April 29, 2005.

preliminary permit application, to be reinstated if Indian River's exemption application is dismissed or denied. In so doing, Commission staff applied the Commission's policy, as set forth in *Dennis V. McGrew*,⁵ of dismissing a permit application that competes with a license or exemption application when the permit application has failed to substantiate the technical, environmental, and economic aspects of the proposed project.

7. Alternative Hydro filed a request for rehearing, arguing that its permit application should not have been dismissed.

Discussion

8. Alternative Hydro argues that, because its permit application and Indian River's exemption application "seek to develop the same site and utilize existing dams, equipment and other facilities without substantial modification," it should not have to substantiate its permit. Alternatively, it asserts that its permit application is sufficiently substantiated to allow a comparison with Indian River's exemption application.⁶ In support, Alternative Hydro points to the flow information provided in the application and to a 1995 engineering report included in Indian River's exemption application.

9. That a permit application proposes to use existing facilities does not obviate the need to substantiate its proposal in the event a competing development application is filed proposing to use some or all of the same facilities. Section 4.37(d)(1) of the Commission's regulations is clear. It 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 better adapted to develop, conserve, and utilize in the public interest the water resources of the region."⁷ If the

⁵ 32 FERC ¶ 61,229 (1985).

⁶ Alternative Hydro contends that such a comparison would in fact show that its application is better adapted to the site than Indian River's exemption proposal because Alternative Hydro's project will generate more power. However, a difference in proposed generation is not dispositive in determining the better adapted plan. *See City of Hibbing, Minnesota*, 24 FERC ¶ 61,020 (1983).

⁷ 18 C.F.R. § 4.37(d)(1) (2005). This regulation was promulgated in 1985. *Application for License, Permit, and Exemption from Licensing for Water Power Projects, Final Rule*, Order No. 413, 50 Fed. Reg. 11682 (Mar. 25, 1985), FERC Stats. & Regs. (1982-1985) ¶ 30,632.

exemption plan and the *substantiated* permit plan are equally well-adapted, the Commission will favor the exemption application.⁸

10. As the Commission explained in *McGrew*, in determining whether to grant a preliminary permit application over an exemption application, the Commission begins by determining whether the permit applicant has provided enough information (supporting studies and analysis) to substantiate its proposal. If the permit applicant has not provided substantiating information, the Commission will turn to processing the exemption application without comparing it to the unsubstantiated permit application. In the rare case where the permit applicant has provided substantiating information, the Commission will compare the projects and determine which proposal is superior, i.e., better adapted to the comprehensive development of the waterway, and grant that proposal. In the event the Commission determines that both projects are equally well adapted, the Commission will favor the exemption application.

11. The Westfield River flow data contained in Alternative Hydro's application do not, as Alternative Hydro asserts, substantiate its application. The application's information on river flows consists, in its entirety, of the following paragraph:⁹

Average monthly flows range from approximately 260 cfs (August) to 1550 cfs (April). The average flow is approximately 620 cfs. The existing hydraulic capacity of the two turbines is (was) approximately 543 cfs. The drainage area at the Russell Dam is approximately 331 square miles. The drainage area at the USGS gage in Westfield is approximately 497 square miles.

⁸ The Commission's policy with regard to permit applications reflects its preference for development applications, which represent plans of development ready to be implemented, in contrast to proposals to merely study a project. Permit applications are speculative in nature and often fail to result in development applications. Project proposals are frequently abandoned, not because the engineering is faulty, but because of economic and other factors associated with the project's likely environmental impacts and their mitigation. *Consumnes River Water and Power Authority*, 42 FERC ¶ 61,069 (1988).

⁹ See December 27, 2002 permit application at 6.

Information of this general nature that addresses only one aspect of a project is not sufficient to substantiate a permit application.¹⁰

12. It is clear from the application itself that Alternative Hydro is in the very early stages of project planning. The application states that Alternative Hydro must undertake numerous studies to determine the project's feasibility. As noted earlier, Alternative Hydro must study the facilities to determine whether they can be rehabilitated or will have to be replaced. In addition, Alternative Hydro plans, among other things, to undertake the following studies: (1) collect site-specific flow duration data; (2) perform exploratory soil/rock boring for design/construction of a second powerhouse; (3) analyze possible development schemes to determine which plan would optimize project features and maximize power generation while minimizing environmental impacts; (4) prepare estimates of construction costs of the selected development scheme; (5) determine the environmental characteristics of the site; (6) conduct and in-stream studies to assess the existing aquatic habitat affected by the project; (7) determine the need for minimum flow releases; (8) consult with the state's historic preservation agency to determine culturally sensitive areas; (9) determine the area's need for power; (10) establish an economic model for the use and sale of power; (11) investigate financing methods; and (12) determine the cost-benefit and risks of undertaking the redevelopment of the site.¹¹

13. Because the application contains no study results or analyses of the environmental, economic or technical aspects of the proposed project (other than the flow information), we affirm staff's conclusion that Alternative Hydro has failed to substantiate its permit

¹⁰ Alternative Hydro's contention that the flow information in its application is further supported by a 1995 study included as Appendix B to Indian River's exemption application does not help its case. It is an applicant's responsibility to adequately describe the proposal in its application so that the decision-maker can compare competing filings, and an applicant cannot rely upon a competitor's filing to support its own. *See Southern California Edison Co.*, 29 FERC ¶ 61,313 (1984). In any event, the information in the study would not have substantiated Alternative Hydro's application, inasmuch as it addresses only one aspect of the project.

¹¹ *See* December 27, 2002 permit application at 8-10. Alternative Hydro estimates the cost of the necessary studies to be \$100,000.

application, and we accordingly deny rehearing.¹² Indeed, even were Alternative Hydro's application substantiated, it has not shown that its project would be better-adapted than Indian River's. That being the case, we would then favor Indian River's development application.

The Commission orders:

The request for rehearing filed in this proceeding on March 4, 2005, by Alternative Light & Hydro Associates is denied.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

¹² Alternative Hydro's rehearing request also reiterates arguments it has raised with respect to Indian River's exemption application. The Commission has addressed some of those arguments in an earlier order. *See* n. 4, *supra*. To the extent the remaining arguments are relevant to our consideration of whether to grant Indian River's exemption application, they will be addressed in any order issued in that proceeding.