

126 FERC ¶ 61,132  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Acting Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
and Philip D. Moeller.

BPUS Generation Development, LLC  
Forest County Hydroelectric Corporation

Project No. 12897-001  
Project No. 13117-001

ORDER DENYING REHEARING

(Issued February 19, 2009)

1. On November 10, 2008, Commission staff issued a preliminary permit to BPUS Generation Development, LLC (BPUS), for the Tionesta Dam Project No. 12897, and denied a competing preliminary permit application by Forest County Hydroelectric Corporation (Forest County) for Project No. 13117.<sup>1</sup> On December 9, 2008, Forest County filed a request for rehearing. For the reasons discussed below, we deny rehearing.

**Background**

2. BPUS filed a preliminary permit application on July 30, 2007. On November 16, 2007, Commission staff issued a notice of the application that solicited motions to intervene, comments, and competing applications or notices of intent to file competing applications. On January 15, 2008, the deadline established in the notice, Forest County filed a “*Notice of Intent to File Competing Preliminary Permit Application for Project P-12897-000*.” Forest County subsequently filed a timely competing preliminary permit application on February 13, 2008.<sup>2</sup>

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<sup>1</sup> *BPUS Generation Development, LLC and Forest County Hydroelectric Corporation*, 125 FERC ¶ 62,139 (2008).

<sup>2</sup> A competing preliminary permit application filed pursuant to a notice of intent must be filed no later than 30 days after the prescribed intervention deadline. *See* 18 C.F.R. § 4.36(a)(2) (2008).

3. On August 21, 2008, Commission staff issued notice of Forest County's competing permit application. On September 15, 2008, in response to the notice, BPUS filed a timely motion to intervene in the Forest County proceeding.<sup>3</sup>
4. On November 10, 2008, Commission staff issued a preliminary permit to BPUS and denied Forest County's competing preliminary permit application. In issuing the permit, Commission staff concluded that neither applicant's plan would be superior to the other since neither applicant had presented a plan based on detailed studies.<sup>4</sup> On December 9, 2008, Forest County sought rehearing.

### **Discussion**

5. Section 7(a) of the Federal Power Act (FPA) provides that the Commission may give preference to the preliminary permit applicant whose plans are "best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if [the Commission] is satisfied as to the ability of the applicant to carry out such plans."<sup>5</sup>
6. Section 4.37(b)(1) of the Commission's regulations provides where there are competing non-municipal applicants for a preliminary permit, the Commission will favor the applicant whose plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans.<sup>6</sup> Section 4.37(b)(2) further provides that where competing non-municipal applicants' plans are equally well adapted to develop, conserve, and utilize in the public interest the water resources in the region, the Commission will favor the applicant with the earliest application acceptance date.<sup>7</sup>
7. On rehearing, Forest County argues that the first-in-time tie-breaker provision of section 4.37(b)(2) should not be applied here. Forest County contends that its proposed

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<sup>3</sup> If no answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene, the movant automatically becomes a party at the end of the 15 day period. 18 C.F.R. § 385.214(c)(1) (2008).

<sup>4</sup> *BPUS Generation Development, LLC and Forest County Hydroelectric Corporation*, 125 FERC ¶ 62,139 at 64,480.

<sup>5</sup> 16 U.S.C. § 800(a) (2006).

<sup>6</sup> 18 C.F.R. § 4.37(b)(1) (2008).

<sup>7</sup> 18 C.F.R. § 4.37(b)(2) (2008).

project is better adapted than BPUS' to develop the site from financial, technical, environmental, and public interest points of view. Therefore, Forest County argues, it should be awarded the permit.<sup>8</sup>

8. Financially, Forest County states that its proposal is more economical than BPUS' because Forest County's turbine selection would reduce construction costs relative to annual revenues produced by the project. Technically, Forest County states that BPUS' plan to pressurize an existing channel to be used as a penstock is infeasible, and asserts that its own plan to use a free flowing hydrokinetic device is superior. Environmentally, Forest County states that under BPUS' proposal fish will be threatened if the riverbed and the Tionesta Dam outlet tunnel are disturbed, and a campground adjacent to BPUS' proposed powerhouse will be adversely affected. Forest County asserts that its proposal will cause no visible or audible disturbance to the riverbed, outlet tunnel, or campground. Finally, Forest County states that its proposal is in the public interest because Forest County is a Pennsylvania corporation, and it has invited the Forest County Industrial Development Authority to participate in its project.

9. We find that both plans are equally well adapted, hence Forest County does not overcome BPUS's first-in-time preference. We are unable, except in unusual cases, to determine that one applicant's plans are better adapted than another's.<sup>9</sup> It is typically not the case that the Commission can conclude that a permit applicant has substantiated its proposal through supporting studies and analyses on the economic, technical, or environmental aspects of a proposed action, since permit applications are usually speculative in nature and applicants cannot support their proposals or demonstrate the superiority of one competing proposal over another without the results of the detailed studies they seek to conduct under the permit.<sup>10</sup> Such is the case here.<sup>11</sup>

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<sup>8</sup> See 18 C.F.R. § 4.37(b)(1) (2008).

<sup>9</sup> *Wind River Hydro, LLC*, 115 FERC ¶ 61,009 (2006); *City of Ellensburg, Washington*, 36 FERC ¶ 61,301 (1986). See also *Sullivan Island Associates*, 58 FERC ¶ 61,129 (1992) (a second-in-time applicant can overcome the first-in-time preference only by submitting detailed information substantiating the superiority of the proposal).

<sup>10</sup> *Dennis V. McGrew*, 32 FERC ¶ 61,229 (1985); *Continental HydroCorp.*, 20 FERC ¶ 61,347 (1982).

<sup>11</sup> Indeed, the Commission has specifically found that many, if not all, of the factors cited by Forest County are not relevant or dispositive at the preliminary permit stage. See, e.g., *Robert A. Davis*, 53 FERC ¶ 61,040 (1990) (the Commission does not consider the potential lack of technical feasibility of a project to be a relevant consideration in deciding whether to issue a permit); *Alpyn Creek Development Corp.*,

(continued...)

10. Given that there is no convincing evidence that either of the proposed plans is better adapted than the other, Commission staff correctly issued the permit to BPUS, the first to file a preliminary permit application. Therefore, we deny rehearing.<sup>12</sup>

The Commission orders:

The request for rehearing filed by Forest County on December 9, 2008, in Project Nos. 12897-001 and 13117-001 is denied.

By the Commission. Commissioner Kelliher is not participating.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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49 FERC ¶ 61,380 (1989) (comments and objections relating to the potential effects of actually constructing and operating a project are premature at the preliminary permit stage); *Michael Arkoosh*, 30 FERC ¶ 61,002 (1985) (the FPA does not condition the issuance of a preliminary permit upon a finding that the proposed project is in the public interest, because to make such a finding would require the information and conclusions that are to be developed during the permit phase); *Eastern States Energy Resources, Inc.*, 22 FERC ¶ 61,185 (1983) (allegations of superior experience, greater ability to finance, and lower ultimate cost of power are not relevant at the permit phase); *Brasfield Development, Ltd.*, 20 FERC ¶ 61,358 (1982) (applicant's assertions of closer proximity to, and knowledge of, project site and needs of region are not dispositive at the preliminary permit phase).

<sup>12</sup> Forest County also argues that it should have been given 105 days from the Commission's notice of its competing application to respond to BPUS' September 15, 2008 motion to intervene. Forest County cites to section 4.34(b) of our regulations, 18 C.F.R. § 4.34(b) (2008), but that section by its terms applies only to license and exemption applications. Had Forest County wished to respond to BPUS' motion, it had 15 days to do so. See 18 C.F.R. §§ 385.213(d) and 385.214(c) (2008). In any event, BPUS' motion to intervene raised procedural issues, which were not relevant to the disposition of the preliminary permit applications.