

129 FERC ¶ 61,140
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Marseilles Land and Water Company	Project No. 13351-001
Marseilles Land and Water Company	Project No. 13176-001
Marseilles Land and Water Company	Project No. 13231-001
City of Marseilles, Illinois	Project No. 13159-001
City of Marseilles, Illinois	Project No. 13230-002
City of Marseilles, Illinois	Project No. 13394-001

ORDER DENYING REHEARING

(Issued November 19, 2009)

1. On June 23, 2009, Commission staff issued an order dismissing five preliminary permit applications proposing to study the feasibility of developing hydropower at the U.S. Army Corps of Engineers' (Corps) Marseilles Lock and Dam on the Illinois River in LaSalle County, Illinois. On July 20, 2009, the City of Marseilles, Illinois (City) filed a timely request for rehearing of the order. As discussed below, we deny the City's rehearing request on various grounds. Among the grounds for upholding staff's dismissal is our new policy that, to avoid a potential conflict and preserve our ability to ensure that licensed projects best meet the public interest, we will not issue a preliminary permit where the proposed project would develop, conserve, or utilize the same water resources as a license proposal and would be located in close proximity to a project that is in the licensing or construction phase.

Background

2. The Corps operates the Marseilles Lock and Dam as part of the Illinois Waterway that connects the Illinois River with Lake Michigan. In addition to the lock and dam, the facility includes a reservoir, powerhouse, and two intake canals (the North Channel and South Channel Headraces).

3. In 2003, the Commission issued an original license to Marseilles Hydro Power, LLC (Marseilles Hydro) for the 4.75-megawatt (MW) Marseilles Hydroelectric Project No. 12020, to be located in the North Headrace at the Marseilles site.¹ On April 8, 2005, the Commission issued a preliminary permit to Marseilles Land and Water Company (Marseilles Land and Water) to study the proposed 6.4-MW Project No. 12552 that would use surplus capacity not covered under the original license issued to Marseilles Hydro.² The permit expired on March 31, 2008. The Commission terminated the license on April 17, 2008, due to the licensee's failure to timely commence construction.³

4. On April 1, 2008, the City filed a permit application for the 4.755-MW Marseilles Project No. 13159, to be located in the North Headrace. Also on April 1, 2008, Marseilles Land and Water filed a permit application for a successive permit for the Marseilles Lock and Dam Project No. 13176 (the same project for which it had previously held the expired Project No. 12552 permit). On May 20, 2008, the City filed another permit application, this one for the Marseilles Hydroelectric Project No. 13230, a 9.450 project also to be located in the North Headrace. Also on May 20, 2008, Marseilles Land and Water filed a permit application for the 10.26-MW Boyce Hydro-Marseilles Project No. 13231, to be located at both the North and South Headraces.

5. On December 24, 2008, the Commission issued notice of the City's two permit applications (Project Nos. 13159 and 13230) and Marseilles Land and Water's permit application for Project No. 13231.⁴ The notice set February 23, 2009, as the deadline for filing comments, interventions, and competing permit or development applications, or notices of intent to file a competing development application.

6. On December 30, 2008, within the deadline for filing competitive permit or license applications in response to the December 24 notice, Marseilles Land and Water filed an original license application for the Marseilles Lock and Dam Project No. 13351,

¹ See *Marseilles Hydro Power, LLC*, 105 FERC ¶ 62,131 (2003), *order on reh'g*, 107 FERC ¶ 61,066 (2004).

² *Marseilles Land and Water Company*, 111 FERC ¶ 62,037 (2005).

³ *Marseilles Hydro Power, LLC*, 123 FERC ¶ 61,041 (2008), *reh'g denied*, 124 FERC ¶ 61,036 (2008).

⁴ Notice was not issued for the application for a successive permit in Project No. 13176. The subsequently-filed application for Project No. 13231 was for a more comprehensive development and superseded the application for Project No. 13176.

proposing to develop the 10.26-MW project that was the subject of its permit application for Project No. 13231.

7. On March 11, 2009, the City filed a third preliminary permit application, for the Marseilles Bypass Flow Hydroelectric Project No. 13394, proposing to study the feasibility of a 1.5-MW project at the South Headrace. The City proposed to study two alternatives, one (which the City preferred) including the South Headrace, and one assuming that the South Headrace was not available.

8. By letter dated April 8, 2009, Commission staff informed the City that its application for a permit to study Project No. 13394 was deficient due to internal inconsistencies and the failure to completely describe the project.⁵ Staff asked the City to file a revised application providing the necessary information.

9. On April 21, 2009, Marseilles Land and Water filed a motion to dismiss the City's application for a permit to study Project No. 13394 on the ground that it was an untimely application in competition with the company's preliminary permit application for Project No. 13231. The company asserted: (1) that the City's proposed project would divert water away from the company's proposed project, thus reducing its generating capability, and (2) that the proposed boundary for Project No. 13394 includes the South Headrace, which the company had included as part of Project Nos. 13231 (the permit application) and 13351 (the license application).

10. On May 26, 2009, the City filed a revised application. The City acknowledged that the South Headrace, which was included in its proposed project, also was included within the project boundary of proposed Project No. 13351, but asserted that since Project No. 13351 is located in the North Headrace, the South Headrace "is not necessary for the operation of [Project No. 13351] . . . and should not be included in [Marseilles Land and Water's] project, when and if it is licensed."⁶

11. On June 11, 2009, the Commission issued notice of acceptance of Marseilles Land and Water's license application for Project No. 13351. The notice established August 10, 2009, as the deadline for comments and interventions, and stated that there would be no additional opportunity for the filing of competing applications or notices of intent.⁷

⁵ See letter to Ms. Jacquelyn Spence from Vince Yearick.

⁶ Revised application at 7.

⁷ Where a license application is filed in response to a notice of a preliminary

12. On June 17, 2009, Marseilles Land and Water filed a supplemental motion to dismiss the permit application for Project No. 13394. The company reiterated its previous contentions, adding that the City's revised application described a project that would be developed by using the same water resources as, and otherwise interfering with, Project No. 13351. The company argued that the City's proposal to use and then release flows released by the Corps for environmental purposes⁸ would reduce the benefits of those flows and interfere with the company's ability to use releases by the Corps. The company also contended that the South Channel Headrace is unnecessary for the City's project, which would use only the last few feet of the approximately 80-foot-long headrace. In contrast, the company stated it will need the South Headrace for Project No. 13351, because water for the project powerhouse will flow directly through the South Headrace, and the South Headrace with its connection to the North Headrace will provide generation flows and a means of continued power production when one or both of the North Headrace gates are not operating, will enable the company to better control flow velocities in the North Headrace leading to the powerhouse, and will provide an on-site sediment-disposal site for accumulated sediment in the North Headrace.⁹ The company also alleged that the City's preferred Alternative I for Project No. 13394 would divert flows at the South Channel Headrace in such a way as to strongly affect flows into the company's facilities, and that the City's revised application includes a proposed transmission line interconnecting with an existing transmission line. This would interfere with the company's plans for developing Project No. 13351, because the company intends to relocate the existing transmission line and use the land for the powerhouse, office, and other works of Project No. 13351.¹⁰

13. On June 23, 2009, Commission staff issued an order dismissing, without prejudice, the City's permit applications for Project Nos. 13159, 13230, and 13394 and Marseilles Land and Water's permit applications for 13176 and 13231. Staff explained that because the permit applications proposed to use in whole or in part the same

permit application, the Commission does not allow a second round of competition in response to the license application. *Marseilles Hydro Power, LLC and Marseilles Land and Water Power Company*, 99 FERC ¶ 61,101 (2002), *aff'd*, *Marseilles Land and Water Company v. FERC*, 345 F.3d 916 (D.C. Cir. 2003).

⁸ The Corps currently releases 1,000 cubic feet per second through the gates across the face of its dam to improve dissolved oxygen and provide aquatic habitat downstream of the dam.

⁹ See supplemental motion to dismiss at 4-6.

¹⁰ *Id.* at 6.

resources as the license application and failed to substantiate the technical, environmental, and economic aspects of the proposals, staff was following the Commission's policy of dismissing such permit applications without prejudice to the applications' automatic reinstatement in the event the license application is subsequently dismissed, denied, or withdrawn.¹¹ Staff stated that Alternative I of Project No. 13394 would use the same south headgate structure and South Headrace as Project No. 13351, and would be located on the same river reach and have an overlapping project boundary. As to Alternative II of Project No. 13394, staff found that the proposed project would generate power by using between 1,000 and 1,500 cubic feet per second of water that is currently spilled over the Corps Dam into the bypassed reach. Staff concluded that "[s]ince the preliminary permit application for P-13394 contains two alternatives, and Alternative I clearly competes with P-13351, the proposed project would utilize in whole or in part the same water resources as P-13351."¹²

14. On July 20, 2009, the City filed a timely request for rehearing of the June 23, 2009 Order, arguing that one of the alternatives in its permit proposal for Project No. 13394 does not compete with Marseilles Land and Water's license proposal for Project No. 13351 and that therefore its application should not have been dismissed.

15. On August 3, 2009, Marseilles Land and Water filed a motion for leave to answer the City's request for rehearing.¹³

¹¹ The Commission's policy is set forth in *Dennis V. McGrew*, 32 FERC ¶ 61,229 (1985). The fact that a permit application does not fully substantiate the technical, environmental, and economic aspects of a proposed project does not necessarily make the application deficient; the Commission does not expect permit applications to provide substantial detail. *See, e.g., Renaissance Ketchikan Group, LLC*, 127 FERC ¶ 61,151 (2009).

¹² 127 FERC ¶ 62,229 at P10.

¹³ Our regulations generally prohibit answers to requests for rehearing. *See* 18 C.F.R. § 385.213(a)(2) (2009). However, because, as the company points out, the City introduces new evidence and arguments in its request for rehearing, we will, for fairness, grant the company's motion.

Discussion

A. The Dismissal of the Permit Application for Project No. 13394

16. Section 4.37 of the Commission's regulations¹⁴ sets forth the Commission's rules of preference among competing hydropower applications. The regulations state that:

[i]f an accepted application for a preliminary permit and an accepted application for a license propose project works that would develop, conserve, and utilize, in whole or in part, the same water resources, and the applicant for a license has demonstrated its ability to carry out its plans, the Commission will favor the license applicant unless the permit applicant substantiates in its filed application that its plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region.[¹⁵]

17. Here, Marseilles Land and Water's license application is substantially more detailed than the City's permit application (as is to be expected when comparing a license application with a permit application), so we cannot conclude that the City has substantiated that its plans are better adapted to use the water resources at issue. Indeed, the City does not claim that it has made such a demonstration. By filing an acceptable application, including a statement that it is in compliance with Illinois corporate law,¹⁶ and because neither the City nor anything in the record suggests that Marseilles Land and Water lacks the ability to move forward with the proposed project, we are satisfied that the company is able to carry out its plans. Thus, the only remaining issue is whether proposed Project No. 13394 would develop, in whole or in part, the same water resources as proposed Project No. 13351.

18. Marseilles Land and Water's proposed Marseilles Lock and Dam Project No. 13351 would use the Corps' existing 779-foot-long, 24-foot-high Marseilles Dam and two existing headgate structures. A 160-foot-long section of the existing South Headrace would be filled in and joined to the 1,400-foot-long existing North Headrace, which in turn would be deepened to accommodate the flow from both headraces. The restructured headrace would lead to a new intake structure and forebay, connecting to a

¹⁴ 18 C.F.R. § 4.37 (2009).

¹⁵ 18 C.F.R. § 4.37(a)(2009).

¹⁶ Marseilles Land and Water Company license application, Volume I, initial statement at 2.

new powerhouse containing four generating units. A new tailrace would discharge water back to the Illinois River. The project would also include a new, 400-foot-long, 34-kilovolt (kV) underground transmission line.

19. The City's proposed Marseilles Bypass Flow Hydroelectric Project No. 13394 would utilize one of two alternatives involving the Corps' dam and reservoir at the Marseilles site. Alternative I would use the south headgate structure and would consist of a 1,000-foot-long section of the existing South Headrace, a new powerhouse containing two generating units having a total installed capacity of 1.5 MW, and a new 2,700-foot-long, 2.4-kV transmission line. Alternative II would consist of a new powerhouse containing two generating units having a total installed capacity of 1.5 MW located at an ice chute on the north end of the Marseilles Dam, and a new 2,700-foot-long, 2.4-kV transmission line.

20. In the June 23, 2009 Order, staff concluded that:

. . . . Alternative 1 of Project No. 13394 would utilize in whole or in part the same water resources as P-13351 in that they would use the same existing Corps headgate structures and the North and/or South Head Races, would be located on the same river reach and would have overlapping project boundaries, would use the same water supply in the bypassed reach, and are otherwise mutually exclusive. Project No. 13394 (Alternative 2) would use between 1,000 and 1,500 cubic-feet-per-second of water to generate project power that is currently spilled over the entire dam into the bypassed reach. Since the preliminary permit application for P-13394 contains two alternatives, and Alternative 1 clearly competes with P-13351, the proposed project would utilize in whole or in part the same water resources as P-13351.^{17]}

21. Staff's conclusions are supported by the record. In its motion to dismiss, the company asserted, based on United States Geological Survey flow data, that some 75 percent of the time, the City would have to either divert the Corps' habitat augmentation flows or remove 1,000 cubic feet per second from the water that would be available for the company's project.¹⁸ We think it is reasonable to assume that the Corps, which controls flows at the dam, will not agree to lessen the flows it releases for environmental purposes. Thus, the flows would likely detract from the company's ability

¹⁷ 127 FERC ¶ 62,229 at P 10.

¹⁸ Motion to dismiss at 4-5 and Attachment 1. *See also* supplemental motion to dismiss at 3-5.

to generate power.¹⁹ Because the City elected not to respond to either the company's initial or supplemental motions to dismiss, these assertions by the company are uncontroverted.

22. The City acknowledges that the South Headrace, which is included in Alternative 1, is within the boundaries of both proposed projects, but contends that, because Project No. 13351 is located on the North Headrace, the South Headrace need not be included in the company's project boundary.²⁰ However, as set forth above, the company responded that it will need the South Headrace for a number of project-related purposes.²¹

23. In addition, Alternatives I and II both include the same proposed transmission line route that would interconnect with the existing transmission line, which is proposed to be relocated for Project No. 13351. The City does not contest Marseilles Land and Water's assertion that the City's proposed transmission line would occupy lands on which the company proposes to place a powerhouse, office, parking lot, and historical museum.²²

24. In fact, while the City "does not concede"²³ that Alternative I conflicts with Marseilles Land and Water's proposed Project No. 13351, it also does not assert that Commission staff erred in finding that there was such a conflict. The City asserts that common ownership of the headraces is not necessary to properly allocate flows, maintain structural integrity and make capital improvement.²⁴

¹⁹ The company estimates that diverting 1,000 cfs would lessen generation by 10 percent.

²⁰ Revised preliminary permit application at 7.

²¹ See P 12, *supra*, and supplemental motion to dismiss at 5-6.

²² See Marseilles Land and Water supplemental motion to dismiss at 6. Our regulations refer to the development of the same *water* resources, and the conflict between the transmission line and the company's proposed facilities related to land-based facilities. However, this potential conflict between the company's development application and the City's permit application serves to support our conclusion that it would be unwise to encourage the simultaneous exploration of both projects, given their many potential points of conflict.

²³ Request for rehearing at 6.

²⁴ By way of support, the City appends documents purporting to show that when the company owned the two headraces in the past, the North and South Headraces served

25. While there is less evidence that Alternative 2 clearly would develop the same water resources as Project No. 13351, we conclude that there is enough to justify the dismissal. As the company points out, both alternatives would be located on the same reach as Project No. 13351 and would develop, conserve, and use the same water resources. Moreover, the diversion by the City of flows that would otherwise be released into the bypassed reach could well result in less flow being available to Project No. 13351, given the need to satisfy environmental concerns.²⁵ Moreover, the company's proposal is based on the assumption that the Corps will continue to release 1,000 cfs across the entire face of the dam, which would not be the case if the City's project diverts some of that water.²⁶

26. Based on the foregoing, we conclude that there is sufficient evidence that Project Nos. 13394 and 13351 would develop the same water resources to support dismissing the City's permit application.

27. Even were there only a conflict between the City's Alternative I and Project No. 13351, we think that staff's decision to dismiss the entire application was reasonable. The City chose to file Alternatives I and II as a single proposal, when it could have filed two separate permit applications. We do not think that our staff is required to parse applications to the extent of dismissing a portion of an application while retaining another portion. Thus, if staff properly concluded that any part of the City's application would use the same water resources as Project No. 13351 (as indeed was the case here), it was appropriate to dismiss the entire application.

as different projects with no obvious problems. Request for rehearing at 7. Because we generally do not permit the introduction of new evidence in requests for rehearing, *see McCallum Enterprises I, Limited Partnership*, 126 FERC ¶ 61,127 (2008), and the City has made no showing as to why it should be allowed to do so, we reject the portion of the City's rehearing request that contains new evidence. In any case, the company argues convincingly, that the state of affairs in the past with respect to different projects than those now proposed does not prove that there is no conflict here. *See* Marseilles Land and Water answer filed August 3, 2009, at 6.

²⁵ Marseilles Land and Water answer at 3-5. The company also argues that it is not likely that the Corps will agree to the City's proposed project. However, the project's feasibility is not an issue at the preliminary permit stage.

²⁶ *Id.* at 3.

28. In addition to our conclusion that Project No. 13394 would in fact use the same water resources as Project No. 13351, there are other grounds for dismissing the application.

29. Exhibit 1 of the City's permit application for Project No. 13394 states that "the purpose of the project is to produce power from the expected bypass flows that will arise from any FERC license(s) issued for projects located on the North Headrace."²⁷ The City thus proposes to study a project that itself is dependent upon the development of another project, the latter of which has not even been licensed, let alone developed. The application is also dependent on the Corps' future decisions regarding flow releases. We conclude that the City's proposal is too speculative to support issuance of a preliminary permit.²⁸

30. Finally, Marseilles Land and Water argues that, while the Commission has a policy of considering permit applications that may conflict with existing projects, different considerations apply with respect to projects that are still in the application phase. We agree. Where a project has been developed and is in operation, the Commission has a clear basis for determining whether a project proposed for study under a preliminary permit conflicts with the existing project; the project works, project boundary, and mode of operation are clearly delineated, and the impacts of a proposed

²⁷ See revised application for Project No. 13394 at 6 (filed May 26, 2009). Marseilles Land and Water's Project No. 13351 would be located on the North Headrace.

²⁸ The City's proposal is in effect similar to one where a permit applicant sought to study a project at a non-existent dam site, in the event that such a dam were to be constructed. Our conclusion here is consistent with the spirit of section 4.32(j) of our regulations, 18 C.F.R. § 385.4.32(j) (2009), which provides that "[a]ny application, the effectiveness of which is conditioned upon the future occurrence of any event or circumstance, will be rejected." While the City did not state that its application for Project No. 13394 would only be effective if the Commission licensed a project at the North Headrace, so the application is not literally conditioned on the future occurrence of an event, the feasibility of the proposed project is nonetheless based on speculation.

The Commission has rejected a license application as conditional when the applicant's ability to use a reservoir owned by the Bureau of Reclamation (Reclamation) was dependent on future decisions of the Reclamation. See *City of Redding, California*, 56 FERC ¶ 61,146 (1991). The Commission has also indicated that section 4.32(j) could provide a basis for rejecting preliminary permit applications where the development of a project would depend on the outcome of a relicensing proceeding. See *Skokomish Indian Tribe*, 71 FERC ¶ 61,023, at 61,099, *reh'g denied*, 72 FERC ¶ 61,268 (1995).

new project can be considered in light of these facts. This is not the case with projects that are still in the application or construction phase.

31. During the Commission's consideration of a license application, the specifics of a proposed project may change, whether because the applicant decides that some reconfiguration of the project is appropriate, because the Commission accepts conditions recommended by participants in the proceeding (or mandated by other agencies under sections 4(e) and 18 of the Federal Power Act, section 401 of the Clean Water Act, or the Endangered Species Act), as the result of a settlement, or because the Commission determines that the project best adapted to the comprehensive development of the waterway in question is to some extent different from that proposed by the applicant. Such changes may include alteration in the lands and waters occupied by the project, or in the nature, location, and operation of project works. Even after a license has been issued, some changes in project configuration may be found necessary during the construction phase. Were we to issue a preliminary permit for a project in close proximity to a project that is either in the licensing or the development phase, an argument could be made that we could not make certain changes to the project because those changes would conflict with the right of the permit holder to have priority of application with respect to its proposal.²⁹

32. To avoid this type of conflict and preserve our ability to ensure that licensed projects best meet the public interest, we conclude that, as a matter of policy, we will not issue preliminary permits for proposed projects that would develop, conserve, and use the same water resources and are located in close proximity to projects that are in the licensing or development phase.³⁰ In this case, this provides another ground for denying rehearing with respect to the dismissal of Project No. 13394.

33. The City cites *Cosumnes River Water and Power Authority*³¹ for the proposition that where the Commission finds that a project proposed in an application for a preliminary permit can be configured so that there would be no interference with a filed

²⁹ For example, if it were to be determined during licensing that the powerhouse of a proposed project should be moved to a different location than that proposed, a permit holder might claim that its permit gave it the right to study and apply for a project in the new location.

³⁰ What constitutes a potentially problematic close proximity will vary in different circumstances, and we therefore will examine the issue from case to case, rather than attempting to establish a brightline test.

³¹ 39 FERC ¶ 61,272 (1987).

license application, it will issue a permit with a condition directing that the permitted project be designed to avoid conflict with the project for which a license application has been filed.³² In *Cosumnes*, the Commission found, based on an explanation by the permit applicant, that the project proposed under the permit could be configured so that there was no conflict with the project for which an application had been filed.³³ As discussed above, we cannot make that finding here. The City does not dispute that its proposed transmission line would cross lands within the proposed boundary of Project No. 13351, or that its project might use flows that the company also plans to use; nor does it assert that its use of the South Headrace is not in conflict with the company's proposal, but rather that the company does not need to use that facility. Thus, *Cosumnes* does not conflict with the result here. Moreover, our experience with competing permit and license applications in the 20 years since *Cosumnes* has shown that potential conflicts between proposed permit and license applications can be so complex and disruptive as to justify our holding in this case.

34. We also see no evidence that dismissing the permit applications will adversely affect the City. During the licensing proceeding regarding Project No. 13351, we will determine what lands and waters are required for that project. At such time as we issue a license, if the City's assertion that certain facilities are not necessary parts of the company's project is borne out, those facilities will not be included in the license, and will be available for the City's use. If we do not issue a license to the company, the City's permit application will be reinstated.

B. The Potential Competing License Application

35. The City asserts that the Commission erred by not stating in the June 23, 2009 Order that dismissal of the City's permit applications does not prohibit the City from filing a license application in competition with Marseilles Land and Water's license application for Project No. 13351. We decline to do so. The question whether the City may file a development application in competition with Project No. 13351 is not germane to the order dismissing the permit applications. That order dealt solely with whether the permit applications in question should be dismissed, based on the Commission's acceptance of the license application for Project No. 13351. Whether the City may file a development application has no bearing on whether the permit applications were properly

³² Request for rehearing at 7.

³³ 39 FERC ¶ 61,272 at 61,886.

dismissed. That matter can be resolved if and when the City proffers the application it references.³⁴ There was no error in not addressing that matter in the June 23, 2009 Order.

The Commission orders:

(A) The motion for leave to file answer, filed on August 3, 2009, by Marseilles Land and Water Company, is granted.

(B) The request for rehearing filed in this proceeding on July 20, 2009, by the City of Marseilles, Illinois is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁴ We note that, as mentioned above, in the June 11, 2009 notice of Marseilles Land and Water's application in Project No. 13351, we solicited motions to intervene and protests, but specifically stated that "[c]ompeting development applications, notices of intent to file such an application [*sic*], and applications for preliminary permits will not be accepted in response to this notice."