

129 FERC ¶ 61,229  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

McGinnis, Inc.

Project Nos. 13443-001  
13448-001  
13454-001

ORDER DENYING REHEARING

(Issued December 17, 2009)

1. On October 7, 2009, Commission staff issued a preliminary permit to McGinnis, Inc. (McGinnis), for the Racine Hydrokinetic Project No. 13454-000<sup>1</sup> (Racine). On October 14, 2009, Commission staff issued permits to McGinnis for the Winfield Hydrokinetic Project No. 13443-000<sup>2</sup> (Winfield), and for the Marmet Hydrokinetic Project No. 13448-000<sup>3</sup> (Marmet) (collectively, McGinnis projects). On November 6, 2009, Appalachian Power Company (Appalachian Power) and Ohio Power Company (Ohio Power) jointly filed a request for rehearing of the three preliminary permits. For the reasons discussed below, we deny rehearing.

**Background**

2. On April 29, 2009, McGinnis filed preliminary permit applications for the Racine, Winfield, and Marmet hydrokinetic projects. Each of the proposed projects would have an average annual generation of 1,533 megawatt-hours, and would consist of a single barge with up to ten 35 kilowatt turbine-generator units having a total installed capacity of 0.35 megawatts, a transmission line, and appurtenant facilities.

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<sup>1</sup> 129 FERC ¶ 62,014 (2009). An errata notice correcting language in the permit was issued on October 9, 2009.

<sup>2</sup> 129 FERC ¶ 62,036 (2009).

<sup>3</sup> 129 FERC ¶ 62,035 (2009).

3. The proposed Racine Project No. 13454 would be located downstream from the existing U.S. Army Corps of Engineers (Corps) Racine Lock and Dam on the Ohio River in Meigs County, Ohio, and Mason County, West Virginia. Ohio Power's Racine Project No. 2570 is located at the Racine Lock and Dam and includes a powerhouse with two turbine-generator units, a tailrace channel that discharges into the river approximately 450 feet downstream from the dam, and a substation.

4. The proposed Winfield Project No. 13443 would be located on the Kanawha River in Putnam County, West Virginia, downstream from the Corps' Winfield Lock and Dam. Appalachian Power's Winfield Hydroelectric Project No. 1290 is located at the Winfield Lock and Dam and includes a powerhouse with three turbine-generator units, a 410-foot-long tailrace, and a substation.

5. The proposed Marmet Project No. 13448 would be located on the Kanawha River in Kanawha County, West Virginia, downstream from the Corps' Marmet Dam. Appalachian Power's London/Marmet Hydroelectric Project No. 1175 is located at the Corps' London and Marmet Dams and includes a powerhouse with three turbine-generator units, a 420-foot-long tailrace, and a substation.

6. On July 29, 2009, Commission staff issued public notice of the Winfield Project No. 13443 and the Marmet Project No. 13448, and on August 7, 2009, Commission staff issued public notice of the Racine Project No. 13454. Appalachian Power filed timely motions to intervene in the Winfield and Marmet proceedings, and Ohio Power filed a timely motion to intervene in the Racine proceeding. The companies objected to the issuance of the preliminary permits because the proposed projects are adjacent to their licensed projects, and allegedly may affect the property rights and power generation of the companies' existing licensed projects, in violation of section 4.33(a)(2) of the Commission's regulations.<sup>4</sup>

7. The Commission issued preliminary permits to McGinnis on October 7, 2009, for the proposed Racine project, and on October 14, 2009, for the proposed Winfield and Marmet projects. In issuing the permits, Commission staff concluded that the companies' objections relate to the potential impacts of actually constructing and operating the

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<sup>4</sup> 18 C.F.R. § 4.33(a)(2) (2009). This section states that a preliminary permit application will not be accepted for a permit that "would interfere with a licensed project in a manner that, absent the licensee's consent, would be precluded by Section 6 of the Federal Power Act."

projects, and therefore are premature at the preliminary permit stage. On November 6, 2009, the companies filed a request for rehearing.<sup>5</sup>

## **Discussion**

8. Section 6 of the Federal Power Act protects licensees, in part, by ensuring that licenses “may be altered . . . only upon mutual agreement between the licensee and the Commission.”<sup>6</sup> Section 6 bars substantial unilateral alterations of a licensed project, but may permit “such encroachments on a license, comparable in their adverse impact to variations in conditions that investors might expect from other causes such as, for example, annual fluctuations in water supply.”<sup>7</sup> Accordingly, it is Commission policy to deny permit applications only where it is clear the proposed development would cause alterations in a licensed project without the licensee’s consent.<sup>8</sup> Where, however, the proposed development could avoid conflict with a licensee’s section 6 protections, the Commission will issue a preliminary permit.<sup>9</sup>

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<sup>5</sup> Because Ohio Power intervened only in the Racine Project No. 13454 proceeding, it can only seek rehearing as to that proceeding. Similarly, Appalachian Power intervened only in the Winfield Project No. 13443 and the Marmet Project No. 13448 proceedings, and thus can only seek rehearing in those proceedings.

<sup>6</sup> 16 U.S.C. § 799 (2006).

<sup>7</sup> *Pacific Gas and Electric Co. v. FERC*, 720 F.2d 78, 90 (D.C. Cir. 1983).

<sup>8</sup> 18 C.F.R. § 4.33(a)(2) (2009). The types of project proposals that the Commission has found would “clearly alter” a licensed project are those in which the permit application specifically proposes to remove or alter a licensed project feature as part of its proposed project. *See, e.g., Mokelumne River Water and Power Auth.*, 78 FERC ¶ 61,213 (1997) (permit application dismissed where application proposed to remove features of upstream licensed project); *JDJ Energy Co.*, 41 FERC ¶ 61,354 (1987) (permit application denied where application proposed altering an existing licensee’s dam and powerhouse).

<sup>9</sup> *See, e.g., City of Oswego, New York*, 61 FERC ¶ 61,056 (1992) (permit issued over existing licensee’s objections that proposed project would cause operational impacts on licensed project – including raised water levels in tailrace, reduced head, and reduced generation – because such impacts were specious at the preliminary permit stage); *Phoenix Hydro Corp.*, 58 FERC ¶ 61,205 (1992) (permit application reinstated where Commission could not determine on the record that the proposed project was precluded by section 6 where application did not describe project configuration, except to state that it will use the licensed project’s dam).

9. On rehearing, Appalachian Power and Ohio Power argue that the issued permits violate section 6 because the proposed projects' barges could interfere with discharges from the companies' projects thereby reducing their ability to generate power, and the proposed projects could interfere with the use of recreational facilities at the existing projects.

10. In *City of Oswego, New York (Oswego)*, the existing licensee argued that a preliminary permit should not be issued because the proposed project would raise water levels in the tailrace, reduce head, and reduce generation capacity.<sup>10</sup> The Commission concluded that there was insufficient data in the permit application to ascertain whether such impacts would actually occur, and determined that the operational impacts of the proposed project on the existing project were speculative at the permit stage. As in *Oswego*, the Racine, Winfield, and Marmet permit applications do not include specific details that would allow us to affirmatively conclude that McGinnis' projects would impermissibly alter the companies' licensed projects. Since any eventual license application by McGinnis may differ in important respects from the permit proposals, the companies' allegations that the proposals will reduce generation or interfere with recreational facilities are speculative.<sup>11</sup> Indeed, one purpose of the permit is to afford the permittee an opportunity to study the potential for operational impacts and to design the project in such a manner as to avoid or mitigate those impacts. Therefore, rehearing is denied on this issue.

11. In the alternative, the companies request that we revise and condition the permits for the McGinnis projects: (1) to avoid overlap of the project area between McGinnis' and the existing projects; (2) to require that any subsequent license cannot interfere with the existing projects; (3) to relieve the companies of any liability for damages to the McGinnis projects caused by the operation of their projects; and (4) to require that the companies will be compensated for any loss of generation or other additional costs caused by the construction and operation of the McGinnis projects. Because a permit does not authorize construction and operation of a project, these requests are premature at this stage in the proceedings. Should McGinnis file development applications for any of its proposed projects, the companies' concerns will be addressed at that time. Furthermore, a preliminary permit grants no land-disturbing or other property rights, so a permittee can only enter lands it does not own with the permission of the landholder. Therefore, the boundaries of the proposed McGinnis projects in the permits do not grant

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<sup>10</sup> 61 FERC ¶ 61,056 (1992).

<sup>11</sup> In fact, the companies consistently voice their concerns regarding the impacts the proposed projects "may," "could," or "might" have on their existing projects. The companies never state affirmatively that the projects "will" have any definite negative impact.

McGinnis any additional entry rights to those lands than it otherwise would have had without a permit.

12. Given that there is no convincing evidence that McGinnis' permits will impermissibly alter the companies' existing licensed projects without their permission, and that the companies' alternative requests to revise the permits or condition future licenses are premature at the preliminary permit stage, we affirm issuance of the preliminary permits for McGinnis' proposed projects. Therefore, rehearing is denied.

The Commission orders:

(A) The request for rehearing filed by Ohio Power Company on November 6, 2009, in Project No. 13454-000 is denied.

(B) The request for rehearing filed by Appalachian Power Company on November 6, 2009, in Project Nos. 13443-000 and 13448-000 is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.