

131 FERC ¶ 61,030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Lock + TM Hydro Friends Fund XXVII, LLC
Coastal Hydropower, LLC

Project Nos. 13533-001
13613-001

ORDER DENYING REHEARING

(Issued April 15, 2010)

1. On February 5, 2010, Commission staff issued a preliminary permit to Lock + TM Hydro Friends Fund XXVII, LLC (Lock + TM Hydro) for the Redd Foxx Hydroelectric Project No. 13533 and denied a competing preliminary permit application by Coastal Hydropower, LLC (Coastal Hydropower) for Project No. 13613.¹
2. On March 5, 2010, Coastal Hydropower filed a request for rehearing. For the reasons discussed below, we deny rehearing.

Background

3. Lock + TM Hydro filed a preliminary permit application on July 6, 2009. Lock + TM Hydro's proposed Redd Foxx Project would be located at the existing U.S. Army Corps of Engineers (Corps) Fox River Menasha Locks Dam near Menasha, Wisconsin. On September 4, 2009, Commission staff issued a notice of the application that gave interested parties sixty days to file motions to intervene, comments, and competing applications or notices of intent to file competing applications.
4. On November 2, 2009, Coastal Hydropower filed a timely competing preliminary permit application.²

¹ *Lock + TM Hydro Friends Fund XXVII, LLC and Coastal Hydropower, LCC*, 130 FERC ¶ 62,132 (2010).

² On November 20, 2009, Commission staff issued notice of Coastal Hydropower's competing permit application.

5. On February 5, 2010, Commission staff issued a preliminary permit to Lock + TM Hydro because its application was the first filed and denied Coastal Hydropower'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.³

6. On March 5, 2010, Coastal Hydropower filed a timely request for rehearing.⁴

Discussion

7. 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."⁵

8. Section 4.37(b)(1) of the Commission's regulations provides where, as here, 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.⁶ 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 date.⁷

9. On rehearing, Coastal Hydropower essentially argues that its proposed project is better adapted than Lock + TM Hydro's and the Commission should, therefore, grant the permit to Coastal Hydropower. Coastal Hydropower asserts that Lock + TM Hydro's planned project configuration is not technically feasible because it would require the diversion of all releases from the Corps' Lake Winnebago into the existing navigation canal, resulting in high-velocity flows through the canal that would cause excessive scour

³ *Id.* P 5.

⁴ On March 23, 2010, Lock + TM Hydro filed an answer to Coastal Hydropower's rehearing request. The Commission's Rules of Practice and Procedures do not permit answers to a request for rehearing. 18 C.F.R. § 385.713(d)(1) (2009). Therefore we will not accept Lock + TM Hydro's answer.

⁵ 16 U.S.C. § 800(a) (2006).

⁶ 18 C.F.R. § 4.37(b)(1) (2009).

⁷ 18 C.F.R. § 4.37(b)(2) (2009).

and disrupt navigation. In addition, Coastal Hydropower argues that Lock + TM Hydro's permit application demonstrates a lack of knowledge of the project site, does not reflect a realistic assessment of potential power generation, and that Lock + TM Hydro cannot demonstrate that its project is economically feasible.

10. Coastal Hydropower contends that its proposal offers "a more comprehensive utilization of this water resource" and will not adversely affect navigation. Coastal Hydropower also states that its project would "use proven ... generating equipment to operate in accordance with current operation plans and river flow distributions established by the [Corps] to regulate flow through the Fox River and will not adversely affect flood control, recreation, cultural and other relevant resources of the state."⁸

11. We find that both plans are equally well adapted, hence Coastal Hydropower does not overcome Lock + TM Hydro's first-in-time preference. We have consistently stated that we are unable, except in unusual cases, to determine that one applicant's plans are better adapted than another's.⁹ 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.¹⁰ Such is the case here.¹¹ While Coastal Hydropower contends that its proposed project is

⁸ See Coastal Hydropower's request for rehearing at 1-2.

⁹ E.g., *BPUS Generation Development, LLC*, 126 FERC ¶ 61,132 (2009) (*BPUS*); *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).

¹⁰ See *BPUS*, 126 FERC ¶ 61,132 at P 9 and cases cited therein.

¹¹ Indeed, the Commission has specifically found that the factors cited by Coastal Hydropower 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.*, 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); *Brasfield Development, Ltd.*, 20 FERC ¶ 61,358 (1982) (applicant's assertions of superior knowledge of the project site is not dispositive at the preliminary permit phase); *Town of New Roads, Louisiana*, 12 FERC ¶ 61,093, at 61,179 (1980) (purpose of preliminary

(continued)

superior, it is in essence arguing that its unsupported, hypothetical project is better than Lock + TM Hydro's unsupported, hypothetical project. However, Coastal Hydropower submitted no detailed plans whatsoever to support its application. Therefore, there is no substantial evidence supporting its claims.

12. 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 Lock + TM Hydro, the first to file a preliminary permit application. Therefore, we deny rehearing.

The Commission orders:

The request for rehearing filed in this proceeding on March 5, 2010, by Coastal Hydropower, LLC is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

permit is to afford permittee priority of application for a license while the permittee studies such matters as economic feasibility).