

134 FERC ¶ 61,034
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Claverack Creek, LLC

Project No. 13653-001

ORDER DENYING REHEARING

(Issued January 20, 2011)

1. Claverack Creek, LLC has filed a request for rehearing of a Commission staff order cancelling the preliminary permit for the Claverack Creek Hydroelectric Project No. 13653 for failure to file a required progress report. Because the request for rehearing shows no error in staff's order, we deny rehearing.

Background

2. On April 8, 2010, the Commission issued Claverack Creek a preliminary permit to study the feasibility of the proposed 450-kilowatt Claverack Creek Hydroelectric Project, to be located at the existing Stottville Mill Dam, on Claverack Creek, in Columbia County, New York.¹

3. Article 2 of the permit stated that the permit might, "after notice and opportunity for hearing, be cancelled by order of the Commission upon failure of the permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown."² Article 4 of the permit required the permittee to file a progress report detailing its activities at the close of each six-month period from the effective date of the permit.³

¹ *Claverack Creek, LLC*, 131 FERC ¶ 62,032 (2010).

² *Claverack Creek, LLC*, 131 FERC at 64,067.

³ *Id.*

4. Because the permit was made effective April 1, 2010, Claverack Creek's first progress report was due on September 30, 2010. No report was filed on that date. On October 12, 2010 Commission staff sent Claverack Creek a letter providing notice of the probable cancellation of the permit within 30 days for failure to file the progress report.⁴ The Commission received no response from the company. On November 30, 2010, Commission staff issued an order cancelling the permit.⁵

5. On December 29, 2010, Claverack Creek filed a timely request for rehearing.

Discussion

6. Claverack Creek asserts that, in response to the October 12, 2010 letter, it mailed the Commission a progress report, a copy of which is attached to the request for rehearing, on October 15, 2010. The company states that it did not use certified mail or request a return receipt because the Commission's regulations do not require that. Claverack Creek states that it was surprised to receive the cancellation order and, asserting that it is in compliance with the permit, requests rehearing.

7. Claverack Creek provides no explanation why it did not file a progress report, as required, by September 30, 2010. Even putting the best possible face on its actions, the company admits that it did nothing before receiving a letter indicating that its permit was subject to cancellation. We require progress reports in order to ensure that there is continuing justification for maintaining a permittee's first to file preference and to ensure that potential hydropower sites are not tied up by entities that are not seriously exploring the feasibility of project development. We impose only necessary filing requirements, and we expect regulated entities to meet them. If, as in this case, Commission staff alerts an entity that its authorization is subject to cancellation for failure to make a filing, it is not sufficient for the entity to simply belatedly file. It must also demonstrate good cause for having failed to meet the requirement in the first place. While we have not had occasion to determine whether particular reasons for failing to timely meet permit requirements are justified, failure to give any explanation whatsoever for not meeting clearly-established deadlines, as is the case here, is clearly unacceptable.

8. In addition, while the company has attached to its request for rehearing a copy of a progress report, under an October 15, 2010 cover letter, it has provided no proof that the report was actually sent on that date. The report was not received by the Commission; our e-library, which contains records of all items filed with the Commission, shows no filings by the company from the date the permit was issued until the request for rehearing

⁴ Letter from John B. Smith to Ronald L. Johnson (Claverack Creek, LLC).

⁵ *Claverack Creek, LLC*, 133 FERC ¶ 62,188 (2010).

was electronically filed, on December 29, 2010. Therefore, we cannot conclude that the progress report was filed with the Commission.⁶ It is the responsibility of regulated entities to ensure that filings are timely made with the Commission. Claverack Creek, which has demonstrated familiarity with our electronic system, should have checked the e-library to ensure that its filing was received.⁷

9. Claverack Creek has shown neither good cause for failing to timely file a required progress report nor that it in fact submitted the report before its permit was cancelled. We therefore deny rehearing. This in no way precludes Claverack Creek from continuing to pursue development of the project.

The Commission orders:

The request for rehearing filed by Claverack Creek, LLC on December 29, 2010, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁶ See, e.g. *Gillette, Wyoming v. FERC*, 737 F.2d 883 (10th Cir. 1984) (affirming Commission conclusions that filing of papers requires their receipt by the Commission and that document that was not received by the Commission could not have been filed); *Gerald Ohs*, 33 FERC ¶ 61,266 (1985) (holding that person mailing material to Commission is responsible for ascertaining whether it has been filed).

⁷ As noted above, Claverack Creek's request for rehearing was electronically filed. Moreover, Claverack Creek's principals are not unfamiliar with Commission requirements, being the owners of two exempted projects, the Golden Pond Project No. 5638 and the Tannery Pond Project No. 8895.