

135 FERC ¶ 61,156
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.

KC LLC
Pine Creek Mine, LLC

Project No. 13090-001
Project No. 13091-001

ORDER DENYING REHEARING

(Issued May 19, 2011)

1. On March 2, 2011, Commission staff issued a preliminary permit to KC LLC (KC) for the Morgan Creek Hydroelectric Project No. 13090, and denied a competing application filed by Pine Creek Mine, LLC (Pine Creek) for Project No. 13091.¹ Both proposed projects would be located on Morgan Creek in Inyo National Forest, in Inyo County, California. On March 31, 2011, Pine Creek filed a request for rehearing. As discussed below, we deny rehearing.

Background

2. Section 7(a) of the Federal Power Act (FPA) states that “the Commission may give preference to the applicant the plans of which it finds and determines are best-adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.”² The Commission’s implementing regulations direct the Commission to select among competing applications according to a specified hierarchy. If, as is the case here, the competing applicants are non-municipalities, then 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.”³ If the plans of the non-municipal applicants “are

¹ *KC LLC*, 134 FERC ¶ 62,195 (2011) (March 2, 2011 Order).

² 16 U.S.C. § 800(a) (2006).

³ 18 C.F.R. § 4.37(b)(1) (2010).

equally well 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, the Commission will favor the applicant with the earliest application acceptance date.”⁴

3. On December 20, 2007, at 8:31 a.m., KC filed an application for a preliminary permit to study the feasibility of the Morgan Creek Hydroelectric Project No. 13090 (December 2007 application).⁵ Also on December 20, 2007, at 8:35 a.m., Pine Creek filed a competing permit application for the same site.

4. On March 3, 2008, KC filed a supplement to its permit application (March 2008 supplement). The Commission issued a joint public notice of the competing applications for Project Nos. 13090 and 13091 on May 5, 2008.⁶

5. In the March 2, 2011 Order, Commission staff determined that KC and Pine Creek’s plans to develop the water resource of the region were equally well adapted and found no basis for concluding that either applicant’s plan is superior to the other. Because KC’s application was the first-filed application, the preliminary permit was issued to KC.

6. On March 31, 2011, Pine Creek filed a request for a rehearing of the March 2, 2011 order, arguing that its application should be considered first-filed.

Discussion

A. Material Amendment

7. On rehearing, Pine Creek argues that KC’s March 2008 supplement constituted a material amendment to its December 2007 permit application. Specifically, Pine Creek asserts that KC “changed the location of the powerhouse, changed the size and location of the reservoir, [and] reduced the area of the body of water of the proposed impoundment.”⁷

⁴ 18 C.F.R. § 4.37(b)(2) (2010).

⁵ KC’s December 2007 application called its project the Muir Waters Hydropower Project; its filing of March 3, 2008, renamed it the Morgan Creek Hydroelectric Project.

⁶ Pine Creek named its project the Mine Water Discharge and Conduit Extension Project, but both projects were called the Morgan Creek Hydroelectric Project in the notice.

⁷ Request for Rehearing at 1.

8. Section 4.35 of the Commission's regulations provides that, if an applicant materially amends its filed preliminary permit application, the date of acceptance of the application is the date on which the amendment was filed.⁸ Under section 4.35(f)(2) of the Commission's regulations, a "material amendment to plans of development proposed in an application for a preliminary permit means a material change in the location of the powerhouse or the size and elevation of the reservoir if the change would enlarge, reduce, or relocate the area of the body of water that would lie between the farthest reach of the proposed impoundment and the point of discharge from the powerhouse."⁹ When promulgating the regulation, the Commission explained that material amendments to permit applications are changes that are sufficiently substantial to warrant treating the proposal as a new application, with a new opportunity to file comments, motions to intervene, and competing application.¹⁰ Changes that would be considered material are those that "are of such a fundamental nature as to constitute the proposal of a different project."¹¹ If we were to conclude here that KC had materially amended its application, such that it required a new filing date, then, all else being equal, we would award the permit to Pine Creek as the first to file.¹²

9. A review of the project descriptions and the maps submitted by KC in its December 2007 application and March 2008 supplement indicates that the supplement simply cured several minor deficiencies and provided additional detail regarding the proposed project.¹³

⁸ 18 C.F.R. § 4.35(a) (2010).

⁹ 18 C.F.R. § 4.35(f)(2) (2010).

¹⁰ *See Revisions to Certain Regulations Governing Applications for Preliminary Permit and License for Water Power Project*, Order No. 183, 46 Fed. Reg. 55,245, at 55,249 (Nov. 9, 1981), FERC Stats. & Regs., Regulations Preambles 1977-1981 ¶ 30,305, at 31,723 (1981).

¹¹ *Erie Boulevard, L.P.*, 131 FERC ¶ 61,036, at 61,224 (2010), *quoting* Order No. 183.

¹² *See* 18 C.F.R. § 4.37(b)(2) (2010).

¹³ Pine Creek also asserts that KC's December 20, 2007 application was patently deficient because it was "intentionally vague and confusing as to the project it was proposing to pursue," but Pine Creek does not identify any specific deficiencies in KC's application. We disagree. Although KC's December 2007 application had some deficiencies (e.g., failure to provide Inyo County's address, as required by section 4.32(a)(2)(i) of the regulations, and some of the information regarding the project

(continued...)

10. The Exhibit 3 map filed with the December 2007 application showed the general location of the proposed project, including the proposed powerhouse. The March 2008 Exhibit 3 map shows the project boundary and project facilities in greater detail. It appears that the powerhouse lies within the area contemplated in the original map. The specification of a smaller location within a larger area where the powerhouse would be placed does not change the project in a fundamental way.

11. In addition, the March 2008 supplement does not constitute a material amendment to the reservoir. KC's December 2007 application stated that the project's diversion would be a notched-weir design that would "create no significant impoundment behind it."¹⁴ The application further states that "the project would be operated as run-of-the river with no reservoirs or other impoundments."¹⁵ In its March 2008 supplement, KC resolved the above inconsistencies by clarifying that "the project would be operated as run-of-river with a de minimus reservoir at the diversion..."¹⁶ Providing a project description that is more specific and corrects an error in the earlier filing is not a material change to the size or elevation of the reservoir.

12. These modifications merely refine KC's existing preliminary permit application while still using the same water resource and a similar project configuration.¹⁷ We therefore deny rehearing on this issue.

B. First-to-File Analysis

13. Pine Creek also argues that, if the Commission determines that it was not the first to file its application, then both KC and Pine Creek's applications should be given the same filing time on December 20, 2007, because, Pine Creek asserts, both had messengers waiting to submit preliminary permit applications when the Commission's offices opened. In support, Pine Creek cites the Commission's March 2010 decision in

boundary and federal lands required by section 4.81(d) of the regulations), the application substantially complied with the Commission's requirements and thus was not patently deficient. Moreover, KC's March 2008 supplement cured the deficiencies.

¹⁴ December 2007 application, Exhibit 1-1.

¹⁵ *Id.*

¹⁶ March 2008 supplement, Exhibit 1-1.

¹⁷ Pine Creek also asserts that KC changed the project name, the project boundaries, and the diversion point. However, section 4.35(f)(2) of the regulations does not consider these types of changes, independent of the change in powerhouse and reservoir, material.

the *City of Angoon*, where the Commission announced that those waiting in line when the Commission's offices open would all receive the same filing time, and a lottery would be used as a tie breaker to determine who receives the preliminary permit.¹⁸ We disagree. The Commission established this new policy in March 2010 on a prospective basis, and it therefore does not apply to this proceeding.¹⁹ We accordingly deny rehearing on this issue.

The Commission orders:

The request for rehearing filed by Pine Creek, LLC on March 31, 2011, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁸ Pine Creek incorrectly cites to Commission staff's November 5, 2009 order in *City of Angoon*, 129 FERC ¶ 62,101 (2009). The correct cite is to the Commission's order on rehearing of the November 5, 2009 order. *City of Angoon, Alaska*, 130 FERC ¶ 61,219 (2010).

¹⁹ See *City of Angoon, Alaska*, 130 FERC ¶ 61,219 at P 14 (explaining that under then-current Commission policy "[t]he filing received from the first person in line would typically receive a time stamp of 8:30 a.m., while filings received from those further in line may receive later time stamps") and 16 (directing the Secretary's office to in the future time stamp all filings made by persons waiting in line when the docket office opens for business at 8:30 a.m. as being received at 8:30 a.m.). Indeed, it would not have been possible to implement the new policy retroactively inasmuch as the Commission's Secretary, prior to *City of Angoon*, had no reason to determine whether an entity was in line at the Commission's offices when the Commission opened for business.