

135 FERC ¶ 61,151  
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.

Great River Hydropower, LLC  
Mississippi River No. 21 Hydropower Company

Project No. 13637-002

ORDER DENYING REHEARING

(Issued May 19, 2011)

1. On February 17, 2011, Commission staff dismissed a permit application filed by Mississippi River No. 21 Hydropower Company (Mississippi Hydro) and a license application filed by Great River Hydropower, LLC (Great River),<sup>1</sup> based on a finding that there had been a misuse of the municipal preference established by section 7(a) of the Federal Power Act (FPA).<sup>2</sup> On March 18, 2011, Mississippi Hydro and Great River (collectively, the Quincy entities) requested rehearing of the dismissals. For the reasons discussed below, the request for rehearing is denied.

**I. Background**

2. The Mississippi River Lock and Dam No. 21 are operated by the U.S. Army Corps of Engineers on the Mississippi River in Marion County, Missouri. On December 6, 2006, the Commission issued a three-year preliminary permit to the City of Quincy, Illinois (City) to study the feasibility of developing a hydropower project at the Corps' Lock and Dam No. 21.<sup>3</sup> In its permit application, the City claimed municipal preference

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<sup>1</sup> *Great River Hydropower LLC*, 134 FERC ¶ 62,154 (2011) (February 17 Order).

<sup>2</sup> 16 U.S.C. § 800(a) (2006).

<sup>3</sup> *City of Quincy, Illinois*, Project No. 12724-000 (December 6, 2006) (unpublished order).

pursuant to section 7(a) of the FPA, which, all else being equal, requires the Commission to favor a municipal applicant over a non-municipal applicant.<sup>4</sup>

3. During the permit term, on June 2, 2008, the City submitted a notice of intent to file a license application, as well as a pre-application document and a request to use the traditional licensing process to prepare its license application.<sup>5</sup> On July 30, 2008, Commission staff issued notice of the City's notice of intent to file a license application, its pre-application document, and of staff's approval of the request to use the traditional licensing process, which had been granted on July 25, 2008.<sup>6</sup> Several state resource agencies submitted comments on the pre-application document. For the remainder of the permit term, the City continued to work on preparing its license application.<sup>7</sup>

4. The City's preliminary permit expired on November 30, 2009. On December 1, 2009, Mississippi L & D 21, LLC (L&D 21), a private corporation, filed a preliminary permit application (Project No. 13636) to study the feasibility of developing hydropower at the Corps' Lock and Dam No. 21. On December 2, 2009, Mississippi Hydro, a private entity formed by the City,<sup>8</sup> filed a competing preliminary permit application (Project No. 13637-000) to study the feasibility of developing the same site. On January 8, 2010, Lock+ Hydro Friends Fund XXXII, LLC (Hydro Friends), another private entity

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<sup>4</sup> See 18 C.F.R. § 4.37(b)(4) (2010).

<sup>5</sup> Part 5 of the Commission's regulations describe the Commission's default integrated licensing process (ILP) and require potential license applicants to submit a notice of intent to file a license application, 18 C.F.R. § 5.5 (2010), which alerts Commission staff and interested parties to an anticipated license proceeding, and a pre-application document, 18 C.F.R. § 5.6 (2010), which summarizes the known information for the site. At this stage, potential license applicants may also request to use the alternative licensing process or the traditional licensing process (TLP) to prepare a license application. 18 C.F.R. § 5.3 (2010).

<sup>6</sup> In contrast to the ILP, the TLP allows potential license applicants to develop a license application without the compulsory timelines of the ILP schedule.

<sup>7</sup> The City filed progress reports in Project No. 12724-000 on November 28, 2008, August 31, 2009, and November 20, 2009, describing its continuing progress in developing a license application.

<sup>8</sup> In its permit application, Mississippi Hydro states that it is a for-profit corporation formed by the City to become the licensee and develop hydropower at the Corps' Lock and Dam No. 21. Mississippi Hydro was formed on December 1, 2009.

unaffiliated with the City, also filed a competing preliminary permit application (Project No. 13650). The City did not seek a successive permit.

5. On January 22, 2010, Commission staff issued public notice of the three competing preliminary permit applications, soliciting comments, motions to intervene, competing applications, or notices of intent to file competing applications. In response, on January 27, 2010, Mississippi Hydro timely filed a notice of intent to file a license application in competition with the three permit applications.<sup>9</sup> Although Mississippi Hydro did file a draft application on March 2, 2010, it did not file a final application.

6. On March 19, 2010, Great River filed a timely notice of intent to file a license application in competition with the permit applications. Great River's notice of intent stated that it is an Illinois limited liability company and a wholly-owned subsidiary of Mississippi Hydro.<sup>10</sup> The notice of intent stated that:

[I]t is the intent of the City of Quincy, the Mississippi River No. 21 Hydropower Company, and Great River Hydropower, LLC to carry on activities initiated with the filing in 2008 of the Pre-Application Document for development of the Lock & Dam 21 site. Pursuant to that process, Mississippi River No. 21 Hydropower Company filed a Draft Application for an Original License for a Major Water Power Project with the FERC, resource [agencies] and Indian tribes on March 2, 2010. *It is the City of Quincy's intent that Great River Hydropower, LLC will finalize the draft application on the Mississippi River No. 21 Hydropower Company's behalf, and file a final application for license.*<sup>[11]</sup>

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<sup>9</sup> Filing a notice of intent to file a competing license application affords a potential license applicant an additional 120 days after the initial comment period to finish preparing a license application for submission in competition with the permit applications. 18 C.F.R. § 4.36(a)(3) (2010). If a license application is accepted, it will receive priority over competing permit applications. 18 C.F.R. § 4.37(a) (2010). These provisions further the "fundamental policy in our regulations and in the Federal Power Act itself that favors the processing of applications for a license over applications for a preliminary permit." *Town of Summersville, W. Va.*, 55 FERC ¶ 61,271, at 61,863 (1991) (footnotes omitted).

<sup>10</sup> Great River March 19, 2010 Filing at 1. Great River was formed on March 16, 2010.

<sup>11</sup> *Id.* (emphasis added).

7. On July 12, 2010, Great River filed a license application to develop the Upper Mississippi River Lock and Dam No. 21 Hydroelectric Project No. 13637-001. After Great River corrected deficiencies in its application, Commission staff accepted the application on January 5, 2011.

8. On February 17, 2011, Commission staff dismissed Great River's license application and Mississippi Hydro's permit application for a proposed project at the Corps' Lock and Dam No. 21 based on the conclusion that the entities had misused the City's municipal preference. The order explained that misuse of municipal preference occurs when the actions of a municipality and a non-municipality are coordinated in such a manner that uses the municipal preference available to the municipality alone to place the non-municipal applicant in a competitively advantageous position.<sup>12</sup> The non-municipal applicant obtains an unfair competitive advantage if it is positioned to file the first license application as a result of using the municipality as essentially a proxy to continue holding the permit while it, in coordination with the municipal permittee, prepares and files a license application.<sup>13</sup>

9. The February 17 Order found that this was the situation with the City and the Quincy entities at Lock and Dam No. 21. The City was awarded a permit based on municipal preference, and held the permit while a license application was prepared. After the permit had expired and a new permit competition for the site had been initiated by the filing of a permit application by a non-Quincy entity, L&D 21, Great River submitted a notice of intent to file a license application in competition with the permit applications.

10. Great River subsequently submitted a license application within the 120 days afforded by the Commission's regulations, stating that it had used the City's advance preparation of a license application under the prior permit to prepare its license application.<sup>14</sup> Given these facts, the February 17 Order found that Great River had a competitive advantage over other potential license applicants, and over competing permit applications, because of its coordination with the City.<sup>15</sup> The order concluded that such

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<sup>12</sup> February 17 Order at P 11.

<sup>13</sup> *Id.*

<sup>14</sup> Great River March 19, 2010 Filing at 1.

<sup>15</sup> February 17 Order at P 12. Once a license application has been accepted, permit applications competing for the same site are dismissed without prejudice. *Summersville*, 55 FERC ¶ 61,271 at 61,863. Thus, in the normal course of events, once the Commission

coordination prejudices other parties who, in light of the City's decision not to develop the project itself, are entitled to a fair opportunity to compete to develop the project.<sup>16</sup>

11. Consistent with Commission policy regarding remedies for the misuse of municipal preference, the February 17 Order dismissed Great River's license application and Mississippi Hydro's permit application, and prohibited either entity and the City from filing an application for the site for one year.<sup>17</sup>

12. On March 18, 2011, Great River and Mississippi Hydro sought rehearing of the February 17 Order, arguing that they had not misused municipal preference.

13. On April 20, 2011, in response to a Commission staff request for additional information, the Quincy entities submitted a letter of intent executed between private developers Coastal Hydropower Corporation and Coastal Hydropower, LLC (Coastal) and the City, Mississippi Hydro, and Great River, with respect to the development of Project No. 13637. The letter of intent states, under the heading of "nonbinding provisions," that Coastal and the City and the Quincy entities will make capital contributions to Great River for the completion of the project, and that ownership shares in Great River will be determined according to the relative contributions.<sup>18</sup> The document further states that the possible ownership and control ultimately held by Coastal could range from 50 percent to 80 percent, but that "the objective of Coastal is to obtain an 80 [percent] equity interest."<sup>19</sup> The letter of intent also contemplates that additional investors may be allowed to acquire interests in Great River and the project.<sup>20</sup> The parties contemplated executing a definitive agreement by March 31, 2011.<sup>21</sup>

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accepted Great River's license application, the three permit applications would be dismissed. Because of the February 17, 2011 letter, that step has not yet been taken.

<sup>16</sup> February 17 Order at P 12.

<sup>17</sup> *Id.* at P 13.

<sup>18</sup> Great River April 20, 2011 Filing at 7.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 8.

<sup>21</sup> *Id.* at 9.

## II. Discussion

### A. Municipal Preference

14. Section 7(a) of the FPA provides, in pertinent part, that “[i]n issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefore by States and municipalities . . . .”<sup>22</sup> Municipal preference is one of a limited set of preferences that give an advantage to certain applicants in what is otherwise a strictly competitive licensing scheme.<sup>23</sup>

15. The cases in which the Commission construed municipal preference arose largely in the 1980s, at a time when a number of municipalities were investigating the possibility of developing hydropower projects. The Commission first considered whether the preference established by section 7(a) would apply to the grant of permits or licenses to “hybrid” applicants that included both municipal and private entities in *City of Fayetteville Public Works Commission*.<sup>24</sup> There, the Commission found that a joint application by the City of Jefferson, North Carolina, and the North Carolina Electric Membership Corporation (an entity composed of not-for-profit electric cooperatives) was not entitled to municipal preference.

16. The Commission explained that, while section 7(a) does not speak directly to the issue of granting a preference to an entity that is not entirely public, that section

clearly provides a competitive advantage to proposals for public [i.e., state and municipal] development of water power projects, and it was Congress’ concern for protecting the public interest in the Nation’s water resources which led to its enactment. An appreciation of this legislative design militates against any proposal to accord the preference to hybrid applicants. We therefore conclude that municipal preference under Section 7(a) should not be extended to hybrid applicants.[<sup>25</sup>]

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<sup>22</sup> 16 U.S.C. § 800(a) (2006).

<sup>23</sup> Other preferences include permittee preference for an original license application and incumbent licensee preference for a relicense application.

<sup>24</sup> *City of Fayetteville Public Works Commission*, 16 FERC ¶ 61,209 (1981) (*Fayetteville*).

<sup>25</sup> *Id.* at 61,456. See also *Northern Colorado Water Conservancy Dist. v. FERC*, 730 F.2d 1509, 1512 (D.C. Cir. 1984) (“To promote development of hydroelectric power

17. The Commission stated that extending municipal preference to hybrid applicants could have various “unsatisfactory consequences” because municipal-private joint ventures could become merely devices for private developers to obtain a statutory privilege reserved for public entities, to the potential detriment of genuine municipalities, resulting in a “triumph of form over substance which would contradict the statutory purpose of encouraging public control of water development.”<sup>26</sup>

18. The Commission also concluded that, in light of Congressional directives to expedite hydropower licensing and to reduce paperwork and administrative delay, “neither the Act nor the public interest requires the Commission to attempt to draw distinctions between eligible and unqualified hybrid applications for purposes of municipal preference.”<sup>27</sup> In other words, all hybrids, regardless of the extent of the municipality’s interest, were to be denied preference. The Commission would not require its staff to review all partnership and other working agreements, “a process which could be a great drain of staff resources, futile, or both” in an attempt to distinguish between situations in which a municipality had a token as opposed to a substantial interest in a hybrid.<sup>28</sup> The Commission also made clear that it was premature to examine issues of misuse of municipal preference at the preliminary permit stage, and that it would do so only during licensing proceedings.<sup>29</sup>

19. The Commission noted, however, that municipal preference would not be jeopardized by contractual arrangements in which a non-municipal entity provides

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and to assure that the development would serve the public interest, Congress created a licensing scheme. . . structured to account for at least two related policy goals: promoting extensive data collection by applicants prior to their receipt of licenses and *promoting public development and operation of hydroelectric projects.*”) (emphasis added).

<sup>26</sup> *Fayetteville*, 16 FERC ¶ 61,209 at 61,456.

<sup>27</sup> *Id.* at 61,458-59, n.5.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* See also *Pa. Renewable Resources Inc.*, 19 FERC ¶ 61,033 (1982); *Summersville*, 19 FERC ¶ 61,032 (1982); *Western Mont. Elec. Generating and Transmission Coop.*, 18 FERC ¶ 61,050 (1982). This policy has been affirmed by the courts. See, e.g., *Petersburg Mun. Power & Light v. FERC*, No. 10-1096, 2011 U.S. App. LEXIS 3886, at \*7 (D.C. Cir. Feb. 25, 2011); *City of Bedford v. FERC*, 718 F.2d 1164, 1168-70 (D.C. Cir. 1983).

assistance with financing, studying, constructing, or operating a project.<sup>30</sup> To retain its entitlement to municipal preference, “the municipality must retain in such contractual relationships the requisite control over the operation of the project and may not relinquish any property or other rights necessary for project purposes.”<sup>31</sup>

20. The Commission recognized that its policy of not extending municipal preference to hybrid applicants could result in municipal-private joint ventures attempting to circumvent the policy by filing applications in the municipality’s name only (i.e., creating a “hidden hybrid”). However, the Commission believed that such actions would be self-defeating, in light of license requirements that licensees hold title to all lands and property necessary for a project.<sup>32</sup> A municipality that only served as a screen for a non-municipality that in reality controlled project assets would not be able to meet this requirement. The Commission further explained that, if a preliminary permit applicant intends to hold the necessary rights jointly with another party, those parties should file as joint applicants at the preliminary permit stage. Otherwise any subsequent license application of the joint applicants would not be eligible for the permit-based priority.<sup>33</sup> Thus, it would be entirely proper for a municipality to file a permit or license application in conjunction with a non-municipality: the co-applicants simply would not be entitled to municipal preference.

21. Within a few years, however, the Commission began identifying and remedying misuses of municipal preference that had not been anticipated in *Fayetteville*. In *Gregory Wilcox*, the Commission confronted a situation in which a municipality was awarded six permits based on municipal preference (only three of which had been subject to competing permit applications), with a private entity acting as its agent. The municipality then surrendered the permits, and, on the same day, the private entity filed license applications for the six sites, thereby establishing itself as the first-filed license applicant.<sup>34</sup>

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<sup>30</sup> *Fayetteville*, 16 FERC ¶ 61,209 at 61,456.

<sup>31</sup> *Id.* (footnote omitted).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 61,457.

<sup>34</sup> *Gregory Wilcox*, 24 FERC ¶ 61,317 (1983), *reconsideration denied*, 26 FERC ¶ 61,113 (1984), *reh’g denied*, 27 FERC ¶ 61,403 (1984), *vacated on other grounds sub nom.*, *Uncompaghre Valley Water Users Ass’n v. FERC*, 785 F.2d 269 (10<sup>th</sup> Cir. 1986), *cert. denied*, 479 U.S. 829 (1986). These orders have subsequently been discussed by the

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22. The Commission found that two specific improper actions had occurred. First, the private entity used the municipality as a proxy to obtain the permits, to the disadvantage of other private applicants. Second, the private entity was able to ensure that it was able to file the license applications after it had acquired the requisite information. Therefore, the Commission concluded, the private entity had “obtained an unjustified competitive advantage over other applicants.”<sup>35</sup> Among other things, the Commission noted that it was unlikely that a competitor would prepare a competitive license application in the limited time allowed for such action, particularly given that, all else being equal, the first-filed application is given a preference.<sup>36</sup>

23. The Commission concluded that a mere showing that the actions of a municipal and non-municipal entity were coordinated in a manner that used the municipal preference to place the non-municipal applicant in a competitively advantageous position would be enough to raise the issue of misuse of municipal preference.<sup>37</sup> In consequence, it created a rebuttable presumption that municipal preference has been misused where a municipality obtains and surrenders a permit and, within 90 days, a non-municipality, in apparent coordination with the municipality files a license application for the same site.<sup>38</sup> As a remedy for such actions, the Commission held, it would dismiss the non-municipal entity’s license application and prohibit that entity from competing for the site for one year.<sup>39</sup> The Commission noted that even though each of the separate actions involved in *Wilcox* may have been consistent with the Commission’s regulations, the Commission was not thereby precluded from considering whether those actions, taken together, nonetheless misused the preference available to the municipality alone under the FPA.<sup>40</sup> The Commission further explained that

[n]o license applicant who enjoys a competitive advantage as a result of such coordinated action can legitimately claim surprise at the action taken

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court of appeals at some length, indicating that the analysis expressed in them remains valid. *See Malta Irrigation Dist. v. FERC*, 955 F.2d 59 (D.C. Cir. 1992).

<sup>35</sup> *Wilcox*, 24 FERC ¶ 61,317 at 61,682.

<sup>36</sup> *Id.* at 61,683-84, n.18.

<sup>37</sup> *Id.* at 61,682.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

here. In *Fayetteville*, the Commission made it clear that the benefits of municipal preference are intended for municipalities *alone*. Whether a non-municipality seeks to gain the benefits of municipal preference by acting as the concealed partner in a hidden hybrid license application or coordinates the surrender of its municipal partner's permit with the filing of its license application, it is clear that municipal preference is being impermissibly employed for the benefit of a non-municipality and to the detriment of other competing applicants and potential competitors.<sup>[41]</sup>

24. In *Orofino Falls Hydro Limited Partnership*, the Commission found a misuse of municipal preference where, during the term of a permit held by a city, the municipality and a private partnership agreed that the city would surrender its permit and the partnership would file an exemption application.<sup>42</sup> However, the permit expired before this plan could be executed, and the private entity filed a license application one day after the permit expired. The Commission stated that “it appears that the Partnership obtained an unjustifiable competitive advantage over other potential competitors by using the City as a proxy to continue to hold a preliminary permit while it prepared its license application.”<sup>43</sup> The Commission found no meaningful distinction between those cases in which a municipality's permit was surrendered and those where the permit expired before the filing of a license application by a cooperating private entity because, “[a]lthough the City did not surrender its permit, the Partnership was nonetheless positioned to file the first license application when the permit expired.”<sup>44</sup> The Commission stated that

[t]he Partnership's competitively advantageous position appears to be the direct result of concerted action of the City . . . and the Partnership. Even after it had determined that it would not develop the project itself, the City filed its six-month report thereby avoiding revocation of its permit and extending the protection of its permit to the Partnership. This apparently allowed the Partnership sufficient time to gather the necessary information to prepare an acceptable application, which was filed . . . the day after the City's permit expired. The City's advantageous competitive position may

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<sup>41</sup> *Id.* See also *Consolidated Hydroelectric, Inc.*, 26 FERC ¶ 61,192, at 61,455 (1984) (emphasizing that “[t]he industry has been put on notice . . . that the Commission will strictly enforce its policy with respect to the abuse of municipal preference”).

<sup>42</sup> *Orofino Falls Hydro Limited Partnership*, 26 FERC ¶ 61,245 (1984).

<sup>43</sup> *Id.* at 61,545.

<sup>44</sup> *Id.*

well have dissuaded other potential competitors from filing applications for this site.<sup>45]</sup>

25. The Commission explained that “[t]he motives underlying an arrangement between a municipality and a non-municipality are irrelevant. Competitors for a proposed project are injured by the abuse of municipal preference, whether or not the offending entities proceed in knowing violation of the Commission’s prior decisions or according to what they thought to be ‘good faith.’”<sup>46</sup> Moreover, the Commission reiterated that a municipal permittee is deemed to have employed municipal preference whether or not competing permit applications were actually filed in response to an application for preliminary permit.<sup>47</sup>

26. In denying reconsideration, the Commission explained that to avoid a misuse of municipal preference, “[o]nce a municipal permittee determines that it will not develop the project itself, it cannot continue to maintain its permit for the benefit of any other potential applicant . . . [or] actively cooperate with any other potential applicant in the preparation of its license application . . . . A municipal permittee in this situation should simply surrender its permit . . . .”<sup>48</sup>

27. The Commission reached the same result in *Friends of Keeseville, Inc.*,<sup>49</sup> finding a misuse of municipal preference where a village, after concluding that it could not finance the development of a project, retained its permit and assisted a not-for-profit corporation, which it had organized to promote local revitalization, in filing a license application.

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<sup>45</sup> *Id.* (footnote omitted).

<sup>46</sup> *Id.* at 61,545, n.10.

<sup>47</sup> *Id.* at 61,544 (referencing the factual circumstances of *Wilcox* in which only three of *Wilcox*’s six permits had been subject to competing permit applications); *Paterson Mun. Utilities Authority*, 27 FERC ¶ 61,323, at 61,609 (1984) (“[W]e cannot ignore the likelihood that there were other prospective candidates who were prejudiced in that they were dissuaded from filing by the municipality’s statutory preference.”). *See also City of Vidalia, La.*, 28 FERC ¶ 61,328, at 61,609 (1984).

<sup>48</sup> *Orofino Falls*, 27 FERC ¶ 61,434, at 61,804, n.10 (1984). *See also Energeology, Inc.*, 28 FERC ¶ 61,159 (1984), *order dismissing license application*, 37 FERC ¶ 61,020 (1986).

<sup>49</sup> 28 FERC ¶ 61,158 (1984), *order dismissing exemption application*, 32 FERC ¶ 61,111 (1985).

28. Similarly, in *Liberty County, Montana*, the Commission found a misuse of municipal preference where a municipality was awarded a permit based on municipal preference, surrendered the permit, and then filed a joint application with a non-municipal entity, without claiming municipal preference that became the first-filed license application.<sup>50</sup> As in previous cases, the Commission dismissed the license application, and prohibited the offending entities from filing an application for the site for one year, explaining that these remedies further the equitable goals of punishing and deterring the misuse, and correcting the chilling effect of the misuse on competition.<sup>51</sup> On appeal, the D.C. Circuit affirmed the Commission's remedy, stating that "[i]nherent in FERC's role as supervisor of competition for hydroelectric power licenses is authority to ensure that would-be misusers are deterred and that parties not be permitted to profit from their own, even innocently or benignly conceived, misuse of the licensing process."<sup>52</sup>

29. Since the series of cases in the 1980s, the Commission has not had to deal substantively with the question of misuse of municipal preference at the licensing stage.<sup>53</sup>

### **B. Request for Rehearing**

30. On rehearing, the Quincy entities argue that the February 17 Order erroneously found that Great River's license application resulted from a misuse of the City's municipal preference because Mississippi Hydro and Great River are 100 percent owned and controlled by the City and were created for the express purpose of obtaining American Recovery and Reinvestment Act of 2009 (Recovery Act) funding.<sup>54</sup>

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<sup>50</sup> *Liberty County, Montana, et al.*, 41 FERC ¶ 61,016 (1987).

<sup>51</sup> 50 FERC ¶ 61,099 (1990), *remedy aff'd sub nom., Malta Irrigation Dist.*, 955 F.2d 59 (D.C. Cir. 1992).

<sup>52</sup> *Malta Irrigation Dist.*, 955 F.2d 59, 64 (D.C. Cir. 1992).

<sup>53</sup> There have been a number of instances where such misuse was alleged at the permit stage. In such cases, the Commission has reiterated its policy of not investigating the matter until licensing. *See, e.g., Symbiotics, L.L.C.*, 97 FERC ¶ 61,113 (2001).

<sup>54</sup> The Quincy entities explain that they are vehicles to enable the City to finance the project by taking advantage of Recovery Act tax credits, which are not available to non-taxpayers like municipalities, by accepting grants in lieu of tax credits for specified energy property. March 18, 2011 Request for Rehearing at 9-10. Given that section 1603(g) of the American Reinvestment and Recovery Act, Pub. L. No. 111-5, § 1603(g), 123 Stat. 115 (2009) (codified at 26 U.S.C. § 48), specifically provides that

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31. The Quincy entities do not contend that they are municipalities under the FPA. Rather, they argue that because Great River's only member is Mississippi Hydro, and because Mississippi Hydro's only shareholder is the City, "every action taken by Great River will be taken under the control and direction of Mississippi Hydro and, by extension, the City itself."<sup>55</sup> The Quincy entities assert that Great River is acting entirely on the City's behalf, and not on behalf of an unrelated private party. Given these circumstances, they argue, the advantage enjoyed by Great River against competing permit applicants "inures to the benefit of the City alone and no other entity," and that this contrasts with prior circumstances where the Commission found a misuse of municipal preference, such as *Wilcox*, *Orofino Falls*, and *Liberty*, because in those cases, "the municipality had a business arrangement that clearly benefited a private party."<sup>56</sup> The entities further maintain that *Fayetteville* is not appropriate precedent because it involved competing permit applications, not a license application.

32. We disagree and deny rehearing of the February 17 Order. Section 3(7) of the FPA defines a municipality as "a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power."<sup>57</sup> Thus, a municipality must be a formed by a state, and given its authority to be in the power business by that state.<sup>58</sup> An applicant's eligibility for municipal preference is determined

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the Secretary of the Treasury "shall not make any grant under this section to . . . any Federal, State, or local government (or any political subdivision, agency, or instrumentality thereof)," it is not clear whether the Quincy entities would qualify for funding under this Act.

<sup>55</sup> March 18, 2011 Request for Rehearing at 8.

<sup>56</sup> *Id.* at 8-9.

<sup>57</sup> 16 U.S.C. § 796(7) (2006). The Commission has clarified that electric cooperatives and the governments of Indian reservations are not municipalities. *Mitex, Inc.*, 35 FERC ¶ 61,131 (1986) (government of Indian reservation not a municipality because the reservation is not within the jurisdiction of the State of Montana, and consequently cannot be a political subdivision of that state); *Carolina Power and Light Co.*, 55 F.P.C. 1272 (1976) (electric cooperative is not a municipality because it is a corporation chartered under the laws of the state of North Carolina, and therefore "clearly not a 'political subdivision' of the state").

<sup>58</sup> See, e.g., *Pacific Water & Power, Inc.*, 50 FERC ¶ 61,294 (1990) (finding that a California water district was a municipality under the FPA because it had verified before a notary public that it is a political subdivision of the State of California and provided a

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by the status of the named applicant only, not by the status of any unnamed entity which the applicant may represent.<sup>59</sup> The entities formed by the City – Mississippi Hydro and Great River – are private, for-profit entities, and do not meet the FPA’s definition of a municipality.

33. While the Quincy entities do not contend that they are municipalities under the FPA, they nonetheless ask the Commission to conclude they are sufficiently controlled by a municipality that they will not be found to have misused municipal preference. However, the Commission has not excused what would otherwise be misuse of municipal preference based on the nature of the private entity involved. Had it been inclined to do so, it might well have reached different conclusions in some of the initial cases in this area. For example, the private entity in *Fayetteville* was a not-for-profit association of electric cooperatives, while in *Keeseville*, the private entity was a not-for-profit corporation established by the municipality (i.e., the Village) to enhance economic recovery of the region. In *Keeseville*, the Commission noted that the parties’ description of the non-profit entity was replete with phrases such as “appointed by the Village,” “directed by the Village,” and “on behalf of the Village,” and found that the fact that the non-profit entity acted for the benefit of the Village was not relevant.<sup>60</sup> The Commission nonetheless found competitive advantages given to these entities, which by their nature could not derive private profits, improper. We see no basis for determining that the for-profit corporations established by the City here deserve advantages not granted non-profit entities.

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copy of relevant California Water Code sections under which it is empowered to generate and deliver hydropower); *Aero Construction, Inc.*, 28 FERC ¶ 61,242 (1984) (finding that the Red Ark Development Authority is a municipality under the FPA because it was established as a public trust under the Oklahoma Trust Act for the benefit of the State of Oklahoma, and the Supreme Court of Oklahoma has determined that a public trust is an “agency of the State”).

<sup>59</sup> *Brasfield Development Ltd.*, 20 FERC ¶ 61,358 (1982) (rejecting Appomattox River Water Authority’s assertion that it should be accorded municipal preference because it consisted entirely of “municipalities” within the meaning of the FPA).

<sup>60</sup> 32 FERC ¶ 61,111 at 61,302. The Quincy entities describe Mississippi Hydro as an “instrumentality” of the City. However, to be accorded municipal preference under the FPA, Mississippi Hydro would have had to have been created by the state and given specific authority by the state to be in the business of developing, transmitting, utilizing, or distributing power. See, e.g., *Pacific Water & Power, Inc.*, 50 FERC ¶ 61,294; *Aero Construction, Inc.*, 28 FERC ¶ 61,242.

34. The dispositive question in determining whether a misuse of municipal preference has occurred is whether a non-municipal entity obtains an unfair competitive advantage over other potential applicants. Here, the City was awarded a preliminary permit based on municipal preference. The City submitted progress reports, a notice of intent to file a license application, and a pre-application document indicating that it was in the process of preparing a license application. However, on November 30, 2009, the City's permit expired without the City having submitted a license application. On December 1, 2009, L&D 21, a private entity unaffiliated with the City, filed a permit application for the site. That same day, the City formed the private entity Mississippi Hydro. The next day, on December 2, 2009, Mississippi Hydro filed a permit application in competition with L&D 21. On January 8, 2010, Hydro Friends also filed a competing permit application for the same site. Thus, a new permit competition for the site had begun between three private entities.

35. In response to the public notice of competing permit applications, on March 19, 2010, Great River, a private company formed by the City on March 16, 2010, filed a notice of intent to file a license application in competition with the three competing permit applications. Great River stated that its intent was to "carry on activities" initiated under the City's prior permit, and file a final license application.<sup>61</sup> Because of its access to the City's work product, Great River was the first (and, as was inevitable under the facts here, only) entity to submit a license application, thus gaining priority over all other license applications, as well as all permit applications.<sup>62</sup>

36. Therefore, the City placed Great River in a competitively advantageous position by first holding a permit with respect to which it claimed municipal preference and then putting Great River in the position of having the first-filed license application as a result of finishing, rather than beginning anew, the license application that had been started by the City under its permit. This clearly constitutes coordination between a private entity and a municipality. As the Commission has repeatedly cautioned, such coordination prejudices other parties who, in light of the City's initial appearance as a preferred

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<sup>61</sup> The purpose of the 120-day period is strictly limited to allowing entities to complete applications that they have already been working on, not to create new ones out of whole cloth. *Lock+ Hydro Friends Fund IV, LLC*, 131 FERC ¶ 61,031, at P 17 (2010). It would not have been possible for Great River, or any other entity, to begin and complete a license application within the 120 days afforded by a notice of intent without adopting the work previously done by the City (nor do the Quincy entities contend that Great River prepared its application from scratch).

<sup>62</sup> See 18 C.F.R. § 4.37(a) and (b)(2) (2010).

municipality, coupled with its decision not to develop the project itself, were denied a fair opportunity to compete to develop the project.<sup>63</sup>

37. It is true that the City did not form Mississippi Hydro until the day after the permit expired, so that Mississippi Hydro technically could not have coordinated with the City during the permit term, because Mississippi Hydro did not exist at that time. Similarly, Great River was formed and submitted its license application four months after the City's permit expired, so that it arguably cannot be said that the facts here lead to an invocation of the rebuttable presumption established in *Orofino Falls* that an abuse of municipal preference exists where a private entity files a license application within 90 days of a municipality surrendering a permit (or of the permit expiring).

38. Notwithstanding this relatively novel set of facts, the key consideration in determining whether there has been a misuse of municipal preference is whether coordination between a municipality and a private entity has advantaged the private entity and disadvantaged potential competitors. Misuse of municipal preference does not turn on how many days pass after the expiration of a municipal permit before a private entity files a license application, nor on when the private entity that coordinated with the municipality was formed. Rather, it turns on whether a private entity was competitively advantaged by the municipality's preference. It cannot be denied that Great River, regardless of the date of its creation and the date that it filed its notice of intent, was enabled to quickly file a license application when the other permit applicants could not. Therefore, Commission staff correctly determined that there was a misuse of municipal preference in this proceeding.

39. Moreover, while the City is currently the only shareholder and member of the Quincy entities, there is no assurance that this will remain the case. On rehearing, the Quincy entities argue that the City will ensure that any arrangement between Great River and any private entity concerning the financing, construction, or operation of the project complies with the Commission's ownership requirements for municipal licensees. However, the Quincy entities' letter of intent with Coastal makes clear that the parties' objective is to transfer as much as an 80 percent equity interest in the project to Coastal, an unrelated, private entity. The Quincy entities assert that these objectives are among the non-binding portions of the letter of intent, and that no actual contractual relationship between Coastal and the Quincy entities has been agreed upon. While we recognize that the letter of intent is not a binding contract, it clearly demonstrates a strong interest among the parties to achieve the stated ends. Thus, even if it were the case that Great

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<sup>63</sup> See, e.g., *Paterson*, 27 FERC ¶ 61,323 at 61,609; *Orofino Falls*, 26 FERC ¶ 61,245 at 61,545.

River was deemed to be a municipality, there is evidence in the record that the City's intent is to advantage private parties with respect to the ownership of the project.<sup>64</sup>

40. As to the Quincy entities' assertion that *Fayetteville* is not apposite, we note that *Fayetteville* and its progeny enunciated a general principle – that municipal preference is to be used for the benefit of municipalities alone – that is applicable across a broad range of circumstances. As demonstrated by the plethora of differing fact patterns in which we have found a misuse of municipal preference, the key in determining whether such a misuse has occurred is not whether the specific facts in each case are identical to previous cases, but rather whether a private entity has gained a competitive advantage as a result of coordination with a municipality.

41. Here, the City held its permit, and did not submit a license application during the permit term. Upon expiration of the permit (and its accompanying preference), two unrelated private entities (L&D 21 and Hydro Friends) filed permit applications to compete for the site. The City's private entity, Mississippi Hydro, neither first in time with its permit application, nor an entity entitled to municipal preference, filed a notice of intent to file a license application. Then Great River, another private entity, filed a notice of intent and a license application, admittedly building on the work that the City had performed during its permit term.<sup>65</sup> Under our precedent, we presume that private entities that might have filed competing permit applications when the City filed its permit application could have been dissuaded from doing so when faced with the likelihood that they would not win a competition with the City. Likewise, no entity was likely to commit resources to preparing a license application during the term of the City's permit because it would have been unlikely that such an entity could have overcome the City's

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<sup>64</sup> A resolution passed by the Quincy City Council on February 28, 2011 (reacting to the February 17 order dismissing the Quincy entities' applications), states "[i]n May of 2010, the City through its Mississippi River No. 21 Hydropower Company formed the subsidiary company of Great River Hydropower, LLC, with the sole member being the City's Mississippi River No. 21 Hydropower Company, *for the purpose of attracting a private equity partner . . .*" Official Proceedings of the Quincy, Illinois, City Council (Feb. 28, 2011) (emphasis added), *available at* <http://www.ci.quincy.il.us/CityClerk/Archive/2011/Minutes/2011-02-28.pdf>.

<sup>65</sup> Great River's March 19, 2010 notice of intent stated that "it is the intent of the City of Quincy, the Mississippi River No. 21 Hydropower Company, and Great River Hydropower, LLC to carry on activities initiated with the filing in 2008 [by the City] of the Pre-Application Document . . . . It is the City of Quincy's intent that Great River Hydropower, LLC will finalize the draft application on the Mississippi River No. 21 Hydropower Company's behalf, and file a final application for license."

permittee preference.<sup>66</sup> In consequence, when the City in effect handed off its almost complete application to the private corporations, it provided them with an essentially insurmountable advantage. While the Quincy entities raise on rehearing the issue of whether any entity other than the City was advantaged by the actions at issue here, they do not address the at least equally important question of whether other competitors were disadvantaged. We find here that this indeed occurred.

42. The Quincy entities argue that the City acted in good faith when it relied on the advice of project finance counsel and the U.S. Department of Treasury (Treasury) guidance regarding how it could become eligible for Recovery Act grants. However, as explained in *Orofino Falls*, the motives underlying any such arrangement are not at issue. No inquiry is required as to whether the parties believed that their actions were proper. All that need be established to find misuse of municipal preference is that the actions of the municipal and non-municipal entities were coordinated in a manner that used the municipal preference available to the municipality alone to place the non-municipal applicant in a competitively advantageous position. Therefore, we cannot ignore the City's actions here, regardless of whether they were undertaken in good faith.

43. The Quincy entities further explain that the City has invested over \$3.6 million since 2006 to develop the site, and denying rehearing would unreasonably preclude the City from developing the project. We recognize that our remedy – prohibiting the filing of applications for the site by any of the offending entities for one year – is indeed consequential. However, this remedy is longstanding and has been consistently applied as being appropriate to rectify any undue competitive advantage, such as that the City's private entities have obtained here.<sup>67</sup>

44. Finally, the Quincy entities argue that in a recent delegated order, *City of New Martinsville, W. Va.*,<sup>68</sup> a municipality was allowed to transfer a project to a non-

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<sup>66</sup> Nor would any entity commit resources to preparing a license application to be filed after expiration of the permit since the City had submitted a notice of intent to file a license application and a pre-application document 18 months into its 36-month-long permit.

<sup>67</sup> *Liberty*, 50 FERC ¶ 61,099 at 61,311 (imposing abuse of municipal preference remedy despite parties' assertions that they had spent "large sums of money to maintain property rights necessary to the license application, to answer the Commission staff's data requests, and in state proceedings"); *Orofino Falls*, 27 FERC ¶ 61,434 at 61,803, n.9 (abuse of municipal preference remedy imposed on municipality even though it had expended between \$13,000 and \$30,000 to study the site under its permit).

<sup>68</sup> *City of New Martinsville, West Virginia and American Municipal Power-Ohio*,

municipality without the competitive proceeding that is normally required in such cases.<sup>69</sup> The Quincy entities state that in *New Martinsville* the Commission found that a strict application of the FPA's definition of municipality would be a triumph of form over substance. They assert that the current situation is not materially different from *New Martinsville*, and urge us to overcome those same misuse of municipal preference concerns here. We cannot do so. *New Martinsville* involved the transfer of a license, some 20 years after it was issued, which would appear to undercut any suggestion (of which there was none) that the municipality at issue had coordinated its actions with the transferee at the time the license application was filed, almost 25 years previous. Thus, that case is inapposite here, where the issue involves current questions of undue competitive advantage in an ongoing proceeding. In any event, the order in question was issued by our staff under delegated authority, and is not binding on the Commission. To the extent that case is inconsistent with our precedent regarding misuse of municipal preference, it was wrongly decided.

45. For all of the above reasons, rehearing is denied.

The Commission orders:

The request for rehearing filed by Great River Hydropower, LLC, and Mississippi River No. 21 Hydropower Company is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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126 FERC ¶ 62,122 (2009) (*New Martinsville*).

<sup>69</sup> See *City of Vidalia*, 28 FERC ¶ 61,328 (1984) (when a municipality obtains a license through the use of its municipal preference and subsequently proposes to transfer the license in whole or part to a non-municipal entity, the Commission initiates a competitive transfer proceeding to remedy the potential abuse of municipal preference and to maintain the integrity of its competitive licensing procedures).