

139 FERC ¶ 61,124
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Wyco Power and Water, Inc.

Project No. 14263-001

ORDER DENYING REQUEST FOR REHEARING AND CLARIFICATION

(Issued May 17, 2012)

1. On February 23, 2012, Commission staff dismissed a preliminary permit application filed by Wyco Power and Water, Inc. (Wyco) to study the feasibility of the Regional Watershed Supply Project No. 14263 to be located in Wyoming and Colorado.¹ On March 23, 2012, Wyco requested rehearing and clarification of the February 23 Order. This order denies Wyco's request.

I. Background

2. On September 1, 2011, Wyco filed a preliminary permit application to study the Regional Watershed Supply Project. This project would involve an interbasin transfer of water from the Green River Basin in Wyoming, through a proposed 501-mile-long, 72- to 120-inch-diameter buried water conveyance pipeline, to a proposed reservoir near Pueblo, Colorado, for municipal and agricultural uses. The project also would include seven hydropower projects along the length of the water conveyance pipeline, including two pumped storage projects and five in-pipeline turbines.

3. On October 5, 2011, Commission staff requested that Wyco correct deficiencies in its permit application and submit additional information. As presented in its application, Wyco's proposed project boundary included the entire 501-mile-long pipeline from the Green River in Wyoming to Pueblo, Colorado, as well as the seven proposed hydropower projects. Commission staff's October 5 letter directed Wyco to revise its process schedule for the pre-filing integrated licensing process because Wyco's proposed

¹ *Wyco Power and Water, Inc.*, 138 FERC ¶ 62,150 (2012) (February 23 Order).

schedule provided only six months to consult with participants and to conduct technical studies after submission of the pre-application document, which was not realistic for hydropower developments that would rely on a water conveyance pipeline that had not yet been constructed. Commission staff clarified to Wyco that because the Commission would only license the proposed hydropower developments, which are discrete components of the 501-mile-long water conveyance pipeline, construction of substantial portions of the overall project may require authorization from other federal agencies. In addition, Commission staff asked Wyco to identify the federal lands impacted by the Regional Watershed Supply Project and to prepare a separate map identifying the locations of the proposed hydropower facilities.

4. In response, on October 13, 2011, Wyco submitted a revised licensing process schedule, and updated its maps to include the locations of its proposed hydropower developments and the federal lands impacted by the Regional Watershed Supply Project.²

5. On October 18, 2011, Commission staff accepted Wyco's permit application and issued public notice of the application. In response to the public notice, over 200 comments expressly opposing the proposed project were submitted by the Governor of Wyoming, state agencies, counties, municipalities, water conservation districts, utilities, environmental or resource advocacy groups, and individuals.

6. On February 23, 2012, Commission staff dismissed Wyco's permit application. The February 23 Order found that Wyco's application proposed to study seven hydropower projects that are exclusively dependent on water from a proposed water conveyance pipeline that does not currently exist, and Wyco had failed to present information about its progress in obtaining the necessary authorizations for construction of the pipeline. Given the complexity of seeking a multitude of authorizations for a pipeline that would cross federal, state, county, and private lands, and the additional time required to actually construct such a substantial project, the February 23 Order dismissed Wyco's permit application as premature. The February 23 Order explained that until the water conveyance system is actually built, authorizations have been obtained for a specific route, or the process to identify a specific route has been substantially completed, Wyco would likely be unable to prepare license applications for the seven proposed hydropower projects during the term of a three-year permit.

² Wyco states that its proposed project would occupy lands managed by the U.S. Department of the Interior's (Interior) Bureau of Reclamation (Reclamation) and Bureau of Land Management, and the U.S. Department of Agriculture's Forest Service. A review of the maps submitted by Wyco indicates that the proposed pipeline also crosses lands managed by Interior's Fish and Wildlife Service.

7. On March 23, 2012, Wyco requested rehearing and clarification of the February 23 Order, arguing that Commission staff erred in dismissing the permit application. Colorado Springs Utilities; Colorado Environmental Coalition, National Parks Conservation Association, and Western Resource Advocates, filing jointly; and Sierra Club, Center for Biological Diversity, Rocky Mountain Wild, Save the Poudre: Poudre Waterkeeper, Biodiversity Conservation Alliance, Wyoming Outdoor Council, Citizens for Dixie's Future, Glen Canyon Institute, Living Rivers: Colorado Riverkeeper, and Utah Rivers Council, filing jointly, submitted answers to Wyco's request for rehearing. The answers oppose the request for rehearing and Wyco's proposed project. We will not permit the answers because the Commission's Rules of Practice and Procedure do not allow answers to a request for rehearing,³ and the answers repeat comments in opposition to the project submitted by the same entities in the permit proceeding.

II. Discussion

8. The Commission is not required to grant a permit application, so long as it articulates a rational basis for not issuing the permit.⁴ The Commission could issue a preliminary permit for the discrete hydropower projects along the water conveyance pipeline that Wyco has proposed. However, under the facts of this case, we do not believe it would be good policy to do so.

9. We agree with staff's conclusion that it is premature to issue Wyco a preliminary permit for its seven proposed hydropower developments, at least until more concrete information regarding the authorization of the water conveyance pipeline is available. Sections 4(f) and 5 of the Federal Power Act (FPA) authorize the Commission to issue preliminary permits for the sole purpose of maintaining priority of license application for up to three years to allow a permittee to prepare the maps, plans, and specifications required by section 9 of the FPA to be included in a license application.⁵

³ 18 C.F.R. § 385.213(a)(2) (2012).

⁴ See, e.g., *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988) (The Commission "is not obliged to issue permits to anyone who seeks them.").

⁵ Section 4(f) of the FPA, 16 U.S.C. § 797(f) (2006), authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts required by section 9 of the FPA. Section 9 requires license applicants to submit "[s]uch maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project," together with satisfactory evidence of compliance with pertinent state laws, and

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10. Wyco has presented no information in its permit application or its request for rehearing to indicate that the planning, routing, or authorizations for the water conveyance pipeline are in progress or reasonably foreseeable. Until Wyco is able to do so, there is no point in issuing a preliminary permit for the hydropower developments because Wyco would be unable to study the feasibility of, and prepare a license application for, a project whose location has not been sufficiently narrowed. Indeed, the degree of controversy surrounding the water pipeline, as evidenced by the substantial issues relating to the interbasin transfer of water and the construction of the pipeline, indicates that Wyco's pursuit of authorization for its water conveyance pipeline could be difficult and lengthy. Given Wyco's failure to provide any substantial information regarding the proposed pipeline, which is the water source for the proposed hydropower projects, we affirm staff's dismissal of Wyco's permit application because it is premature to issue a permit at this time.⁶

11. Furthermore, as discussed below, none of the issues raised by Wyco on rehearing warrants a different result. Wyco argues on rehearing that its proposal is indistinguishable from the Lake Powell Pipeline Project in which the Commission issued a preliminary permit to the Utah Board of Water Resources (Utah Board) for hydropower

“such additional information as the Commission may require.” 16 U.S.C. § 802 (2006). Section 5 allows the Commission to issue permits for the sole purpose of maintaining priority of application for a license for up to three years “for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.” 16 U.S.C. § 798 (2006).

⁶ Moreover, we note that Wyco's permit application is overly broad because it presumes the Commission would issue a license for a 501-mile-long water supply pipeline. While the Commission regularly licenses discrete hydropower developments within substantial water conveyance systems, it has long been the Commission's practice not to license the entire water conveyance system itself. *See, e.g., Metropolitan Water District of Southern Calif.*, 4 FERC ¶ 61,064 (1978) (asserting jurisdiction over hydropower developments along the 242-mile-long Colorado River Aqueduct, a water conveyance system that carries water from the Colorado River to Southern California, but not licensing the entire water conveyance system); *Calif. Dept. of Water Resources*, 51 F.P.C. 529, 533-35 (1974) (finding the Commission would only license those facilities that were “actually constructed for power purposes” within the California Aqueduct, a 475-mile-long water conveyance system that carries water from near San Francisco to the Los Angeles area).

development along the Lake Powell Pipeline.⁷ We disagree. In 2006, the State of Utah passed the Lake Powell Pipeline Development Act, which authorized the Utah Board to build the Lake Powell Pipeline, a water supply project that would intake water from the Bureau of Reclamation's Lake Powell, and deliver it to water conservation districts in three Utah counties – Washington, Kane, and Iron.⁸ In addition, the Lake Powell Pipeline Development Act allowed the Utah Board to construct and own hydropower developments, with Commission approval, along the pipeline. It is for these developments alone, and not for the Lake Powell Pipeline, which is a state water supply project authorized under state law, that a preliminary permit was issued to the Utah Board.⁹ Any eventual license issued by the Commission would be limited to the discrete hydropower developments along the Lake Powell Pipeline, and would not encompass the entire pipeline.¹⁰

12. Wyco also argues that the Commission has issued permits for proposed hydrokinetic projects in which the precise location of turbines in the river was unknown at the time of application, and other proposed closed-loop pumped storage projects where the initial fill or replacement water has yet to be authorized.¹¹ Neither of these

⁷ In February 2008, Commission staff issued a preliminary permit to the Utah Board to study the feasibility of three potential hydropower developments along the Lake Powell Pipeline. 122 FERC ¶ 62,131 (2008). In March 2008, the Utah Board submitted a Notice of Intent and Pre-Application Document to initiate the pre-filing integrated licensing process (ILP). Pre-filing activities and studies under the ILP schedule continued through the remainder of the permit term. In 2011, staff issued a successive permit to the Utah Board for the hydropower developments. 135 FERC ¶ 62,156 (2011).

⁸ Utah Code Ann. § 73-28-101 through 405 (LexisNexis 2012).

⁹ At the request of the State of Utah, its state agencies, and the federal agencies from which authorizations are required, Commission staff agreed to become the lead agency for purposes of the Lake Powell Pipeline Project environmental review under the National Environmental Policy Act. Unlike the Lake Powell Pipeline proceeding, no such coalition has asked the Commission to lead a multi-agency environmental effort for Wyco's proposed project.

¹⁰ See, e.g., *Metropolitan Water District of Southern Calif.*, 4 FERC ¶ 61,064 (1978); *Calif. Department of Water Resources*, 51 F.P.C. 529, 533-35 (1974).

¹¹ Pumped storage projects move water between two reservoirs located at different elevations to store energy and generate electricity. A closed-loop pumped storage project is a project that is not continuously connected to a naturally-flowing water feature.

circumstances support issuing Wyco a preliminary permit for the Regional Watershed Supply Project. In the case of the hydrokinetic permits, the Commission has issued preliminary permits for proposals to study a narrowly-defined stretch of river without knowing the precise locations of the turbines.¹² However, in these cases, the defined project boundary area, within which a permittee receives priority of license application, is generally a few miles at most for marine and riverine hydrokinetic projects.¹³ These proportions are in stark contrast to the 501-mile-long pipeline proposed in Wyco's permit application, the precise location of which has yet to be determined. We are not persuaded by Wyco's argument that the proposed locations of its hydropower projects along a hypothetical water conveyance pipeline is analogous to hydrokinetic preliminary permits where the precise location of the turbines is unknown within a defined project boundary.

13. In the case of closed-loop pumped storage projects, the Commission has also issued preliminary permits to study projects that would involve the use of unidentified initial fill and replacement water.¹⁴ These cases also do not support issuance of a permit to Wyco for its 501-mile-long water conveyance pipeline. None of these permit applicants proposed developing such a significant water conveyance system. Each of the permits was issued for a discrete proposed pumped storage project. In fact, in *Eagle Mountain Energy Company*, the Commission issued a permit to study a closed-loop pumped storage project that planned to use unallocated water in the Colorado River Aqueduct as the initial fill and replacement water,¹⁵ which was a similar proposal to

¹² See, e.g., *Verdant Power, LLC*, 100 FERC ¶ 62,162 (2002).

¹³ See, e.g., *Reedsport OPT Wave Park, LLC*, 134 FERC ¶ 62,244 (2011) (permit issued to study the feasibility of a hydrokinetic wave energy project with a project boundary area of approximately one mile wide by five miles long); *Verdant Power, LLC*, 100 FERC ¶ 62,162 (2002) (permit issued to study the feasibility of a hydrokinetic project in the East River with a project boundary that included a 1.8-mile-long stretch of the river). Project boundaries for hydrokinetic permits must be commensurate with the type of technology being proposed.

¹⁴ See, e.g., *Black Longview Energy Exchange LLC*, 139 FERC ¶ 62,072 (2012) (proposed pumped storage project that anticipates obtaining water from local groundwater sources); *Swan Lake North Hydro, LLC*, 127 FERC ¶ 62,077 (2009) (proposed pumped storage project that anticipates obtaining water from local wells). In the case of closed-loop pumped storage projects, the permit priority is usually for the location of the reservoir, rather than the water resource. See *Russell Canyon Corp.*, 58 FERC ¶ 61,288 (1992).

¹⁵ See, e.g., *Eagle Mountain Energy Co.*, 62 FERC ¶ 61,066 (1993) (confirming Commission jurisdiction of proposed closed-loop pumped storage project based on

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Wyco's proposed pumped storage projects. Consistent with the Commission's longstanding practice, the Commission did not issue a permit for the entire Colorado River Aqueduct simply because the closed-loop pumped storage project would be diverting water from the aqueduct.

14. Wyco further argues that the intent of its permit is to receive permit priority under the FPA for the available unused portions of water in the Green River from the States of Colorado and Wyoming, and requests clarification as to how it can reserve this unused water if the Commission will not issue a permit. As discussed previously, it is the Commission's longstanding practice to license only discrete hydropower developments within large water conveyance systems, and not to license the entire water conveyance system itself. Therefore, the permit priority for hydropower developments that use water from a water conveyance pipeline like Wyco has proposed here would be for the water resource in the pipeline, not for the Green River. Once Wyco's water conveyance pipeline is actually built, or authorizations have been obtained for a specific route, or the process to identify a specific route has been substantially completed, Wyco could then seek permit priority for the discrete hydropower developments along, or diverting from, the water conveyance pipeline. Wyco would have to independently obtain the water rights to divert flows from the Green River.

15. Wyco contends that it complied with the Commission's regulations for submitting an adequate permit application and its proposal is not barred by any of the enumerated limitations to accepting permit applications in the Commission's regulations. Wyco is correct that it substantially complied with the letter of the Commission's regulations regarding the adequacy of a permit application for acceptance.¹⁶ Wyco also is correct that its permit application is not barred by any of the enumerated limitations in the Commission's regulations.¹⁷ However, whether an application is sufficiently adequate to be *accepted* has no bearing on whether the Commission will issue the applicant a

reservoir location on federal lands, and disclaiming need to assert jurisdiction on the 242-mile-long Colorado River Aqueduct water conveyance system, which would be the source of the water for the project).

¹⁶ See 18 C.F.R. § 4.32 and 4.81 (2012).

¹⁷ See 18 C.F.R. § 4.33(a) (2012). The Commission will not accept a preliminary permit application for project works that would use the same water resource as an unexpired preliminary permit, would interfere with a licensed project in a manner precluded by section 6 of the FPA, or would develop the same water resource as a project for which an initial development application has been filed. *Id.*

preliminary permit.¹⁸ Here, as discussed above, Wyco's permit application is both premature, because the pipeline that will supply water for the proposed hydropower projects currently does not exist and its route has yet to be determined or authorized, and overly broad, because Wyco's permit application presumes that the Commission would issue a license for a 501-mile-long water supply pipeline.

16. Wyco asserts that Commission staff erred in dismissing Wyco's permit application if the dismissal was the result of the hundreds of comments submitted in the permit proceeding opposing Wyco's proposed Regional Watershed Supply Project. The FPA requires that notice of permit applications be provided to the public.¹⁹ However, while the hundreds of comments in opposition to Wyco's project proposal indicate that obtaining the necessary authorizations for the siting and construction of its water pipeline may be difficult and lengthy, the adverse comments were not the reason Commission staff dismissed Wyco's permit application. We affirm the February 23 Order's dismissal of Wyco's permit application because it includes a proposed, unmapped 501-mile-long water conveyance pipeline that is a prerequisite for Wyco's development of hydropower as part of its proposal, and there is no indication that authorizations are forthcoming within the timeframes necessary to prepare a license application during a permit's three-year term.

17. Finally, Wyco states that a permit is necessary to seek financing for its proposed project. The fact that Wyco believes it needs a permit to seek financing for its project does not convince us to grant rehearing of the February 23 dismissal order, especially since that financing presumably is also for the water conveyance pipeline. When policy suggests that we decline to issue a permit, a developer's desire to obtain financing is not by itself a substantial countervailing consideration. In addition, Wyco emphasizes in its request for rehearing that it is not seeking a conduit exemption. The February 23 Order does not mention a conduit exemption, and it is unclear from the request for rehearing why Wyco mentions this topic. Nevertheless, we note that once a water conveyance system exists, depending on the ownership interests of the system, a conduit exemption may be a feasible hydropower development option.

18. In conclusion, we are not persuaded by any of Wyco's unsupported arguments that it should be issued a preliminary permit for its proposed Regional Watershed Supply

¹⁸ See *Browns Valley Assoc.*, 35 FERC ¶ 61,184 (1986) (applicants do not have vested rights in the acceptance of their applications, and either staff or the Commission may reject accepted applications).

¹⁹ See 16 U.S.C § 797(f) (2006).

Project. Therefore, we affirm the February 23 Order and deny Wyco's request for rehearing.

The Commission orders:

The request for rehearing and clarification, filed by Wyco Power and Water, Inc., on March 23, 2012, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.