

139 FERC ¶ 61,230
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Percheron Power, LLC

Project No. 14208-001

ORDER DENYING REHEARING

(Issued June 21, 2012)

1. On March 14, 2012, Percheron Power, LLC, (Percheron) filed a request for rehearing of a February 14, 2012 Commission staff letter order rejecting Percheron's application for a conduit exemption for the Potholes East Canal at Station 1973 (Potholes East) Project. For the reasons discussed below, we deny the request for rehearing.

Background

2. On May 31, 2011, Percheron filed an application for a preliminary permit to study the feasibility of the proposed Potholes East Project, to be located on the Potholes East Canal at Station 1973, near Othello, Franklin County, Washington. On August 10, 2011, the Commission accepted the application and issued a public notice, setting October 11, 2011, as the deadline for filing comments, motions to intervene, competing preliminary permit and development applications, and notices of intent to file competing preliminary permit and development applications.¹ During this time period, any entity could have filed a permit application to compete with Percheron's permit application and any entity

¹ The Commission's Rules of Practice and Procedure provide that, if a filing deadline falls on a Saturday, Sunday, holiday, or other day when the Commission is not open for business, the filing deadline does not end until the close of business on the next business day. 18 C.F.R. § 385.2007(a)(2) (2011). The filing deadline was 60 days from issuance of the notice (*i.e.*, October 9, 2011), which fell on a Sunday. Because Monday October 10, 2011, was a federal holiday, the filing deadline was the close of business Tuesday, October 11, 2011.

(including Percheron) could have filed either a notice of intent to file, or could have filed, a development application.²

3. On October 7, 2011, Grand Coulee Project Hydroelectric Authority (Authority) filed a timely motion to intervene and a notice of its intent to file a competing preliminary permit application. On November 8, 2011, the Authority filed a timely competing application for a preliminary permit in Project No. 14316, for the Potholes East site. The Authority claims municipal preference pursuant to section 7(a) of the Federal Power Act (FPA).³

4. On November 29, 2011, the Commission accepted the Authority's application and issued a public notice, setting January 30, 2012, as the deadline for filing comments and motions to intervene.⁴ Percheron filed a motion to intervene on January 27, 2012. Percheron contended that the Authority does not have the required authorization to file a competing preliminary permit as a municipality. Percheron also alleged that the Authority does not intend to develop the site and only filed a preliminary permit application to prevent Percheron from development.⁵

5. On January 27, 2012, more than three months after the deadline for competing applications, Percheron submitted an application for a conduit exemption for the Potholes

² In Percheron's case, the filing of a notice of intent or a development application would have protected it against the filing by a state or municipality of a permit application, which under the Federal Power Act is favored over a permit application submitted by a private entity (such as Percheron) all else being equal, *see infra* n.3.

³ 16 U.S.C. § 800(a) (2006). Where, as is the case here, one of the competing applicants is a municipality, and the plans of the municipality are at least as well adapted as its competitor's, to develop, conserve, or utilize in the public interest the water resources of the region, the Commission favors the municipality, as required by FPA section 7(a). *Id.* and section 4.37(b)(3) and (4) of the Commission's regulations, 18 C.F.R. § 4.37(b)(3) and (4) (2011).

⁴ Since the 60-day deadline fell on a weekend, the deadline for interventions in this proceeding was Monday, January 30, 2012. *See* 18 C.F.R. § 385.2007 (2011).

⁵ The Commission has not yet acted on the competing preliminary permit applications. Percheron's allegations regarding the Authority's municipal status and development concerns will be addressed in the order regarding those applications.

East Project. Commission staff's February 14, 2012 order rejected the conduit exemption application because it was untimely.⁶

6. On March 14, 2012, Percheron filed a request for rehearing of the staff's letter order.⁷

Discussion

7. On rehearing, Percheron argues that the Commission should have accepted its conduit exemption application because at the time of its filing, no other entity held a preliminary permit for the site. In support, Percheron cites to section 4.33(d) of the regulations, which provides that the Commission will not accept an exemption application if there is an issued and unexpired permit or license in effect for the project.⁸ Percheron reasons that the reverse must be true, i.e., that if there is no issued permit or license for a site then the Commission must accept all applications.

8. We disagree. As Commission staff explained in the February 14, 2012 order, the appropriate regulation governing the timeliness of Percheron's competing development application is found at section 4.36 of the Commission's regulations.⁹ Under that section, the Commission requires a competing application or a notice of intent to file a competing application to be filed on or before the prescribed intervention deadline for the

⁶ 18 C.F.R. § 4.36(a)(1) (2011).

⁷ Percheron styled its filing as a "Request for Reconsideration, Extension of Time, and/or Stay of Commission Action," rather than a request for rehearing, explaining that it believes staff's order does not constitute final agency action and is not ripe for rehearing. We disagree. The staff order, issued under authority delegated to the Director of the Office of Energy Projects or to the Director's designee pursuant to 18 C.F.R. § 375.308 (2011), rejected Percheron's exemption application and, as such, constitutes final agency action. Though Percheron did not call its filing a request for rehearing, it did file within the 30-day deadline for seeking rehearing established by section 313 of the Federal Power Act, 16 U.S.C. § 825l (2006), and included a statement of issues as required by Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (2011). We therefore treat Percheron's Filing as a request for rehearing.

⁸ 18 C.F.R. § 4.33(d) (2011).

⁹ 18 C.F.R. § 4.36 (2011).

initial application, in this case by October 11, 2011.¹⁰ A single deadline for all applications competing with the initial preliminary permit application introduces earlier certainty on what competing applications would be filed. As the Commission has explained:

[I]n promulgating Section 4.36 of its regulations, the Commission discussed at length the considerations relevant to competition deadlines, and concluded that, on balance, a single deadline for all applications competing with the initial permit application would reduce the submittal of inadequate development applications and would introduce earlier certainty regarding what competing applications would be filed. In formulating this policy the Commission was aware that initial permit applicants who were in a position to meet the 180-day deadline [for filing a competing development application pursuant to a notice of intent] might anticipate the filing of competing development applications by themselves filing a notice of intent to file a development application. For such applicants, the choice of filing a permit application or waiting six months and filing a development application is apparently a tactical decision.¹¹

9. Indeed, Percheron itself acknowledges this policy, citing to Order No. 413, which promulgated the Commission licensing regulations at issue here. During the permit competition process applicants that are prepared to proceed with project development can

¹⁰ 18 C.F.R. § 4.36(a)(1) and (c)(1) (2011). Competing applications filed pursuant to a timely notice of intent must be filed: (1) for competing permit applications, within 30 days of the intervention deadline; and (2) for development (*i.e.*, license or exemption) applications, within 120 days of the intervention deadline. 18 C.F.R. §§ 4.36(a)(2) and (3) (2011). Because Percheron did not file a notice of intent to file a competing development application in accordance with section 4.36(c), the 120 day deadline does not apply. Percheron argues that its general public statements regarding its intent to develop the site should constitute a notice of intent filing, however such general public statements cannot be construed as a formal notice of intent to file a competing development application by a time certain. *See* 18 C.F.R. § 4.36(c) (2011).

¹¹ *Tropicana Limited Partnership*, 65 FERC ¶ 61,094, at 61,551-552 (1993) (*Tropicana*). *See also* Application for License, Permit, or Exemption from Licensing for Water Power Projects, 50 Fed. Reg. 11,658 (March 25, 1985), FERC Stats. and Regs., Regulations Preambles 1982-1985, ¶ 30,632, at 31,266 (March 20, 1985) (Order No. 413) (in promulgating the licensing regulations, the Commission's established filing deadlines ensures that all interested parties know the identity of all actual and prospective competing application within 60 days of the public notice accepting for filing an initial preliminary permit).

file a competing development (i.e., license or exemption) application.¹² Pursuant to our regulations, Percheron had until October 11, 2011, to file either a development application or a notice of intent to do so. If it needed additional time to complete its application it could have filed a timely notice of intent to obtain an additional 120 days.¹³

10. Percheron next argues that the Authority filed on the last day in the 60-day window as a tactic to hide from Percheron the Authority's intent to compete until it was too late for Percheron to timely submit a competing development application. However, there would be nothing wrong in doing so.¹⁴ The Authority complied with all Commission regulations and timely submitted both its notice of intent and a competing preliminary permit application.

11. For the above reasons, we deny rehearing.

The Commission orders:

The request for rehearing filed by Percheron Power, LLC, on March 14, 2012, is denied.

By the Commission. Commissioner Clark voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

¹² See Order No. 413 at 31,266.

¹³ Percheron contends that its conduit exemption application cannot be a competing development application filed in competition with its own preliminary permit application. Percheron appears to believe that the Commission's preliminary permit process is reserved for the development of license applications only. However, an issued preliminary permit gives the permittee filing priority for either a license application or an exemption from licensing application.

¹⁴ In fact, the Authority filed its notice of intent on October, 7, 2011, four days before the deadline, not at the last hour of the last day as Percheron alleges.