

141 FERC ¶ 61,038
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.

Valley Affordable Housing Corporation

Project No. 13944-002

ORDER DENYING REHEARING

(Issued October 18, 2012)

1. On August 17, 2012, Upper Blackstone Water Pollution Abatement District (District) filed a request for rehearing of a July 18, 2012 Commission notice dismissing the District's late motion to intervene and request to reopen the preliminary permit proceeding involving Valley Affordable Housing Corporation (Valley) preliminary permit application for its proposed Manville Hydroelectric Project No. 13944. For the reasons discussed below, we deny the request for rehearing.

Background

2. On December 10, 2011, Valley filed an application for a preliminary permit to study the feasibility of the proposed 1.026-megawatt Manville Hydroelectric Project, to be located on Manville Dam, on the Blackstone River, in Providence County, Rhode Island. On January 21, 2011, the Commission accepted the application and issued a public notice, setting March 21, 2011, as the deadline for filing comments, motions to intervene, competing preliminary permit or development applications, and notices of intent to file competing preliminary permit or development applications.¹ No entity filed a motion to intervene. On April 1, 2011, Valley was issued a preliminary permit for the proposed project.² No one sought rehearing of the April 1 order.

¹ 76 Fed. Reg. 5584 (February 1, 2011).

² *Valley Affordable Housing Corp.*, 135 FERC ¶ 62,002 (2011). The term of the permit is 36 months, and it will expire on March 31, 2014, or on the date the Valley files an acceptable license application, whichever occurs first.

3. On June 11, 2012, 14 months after the preliminary permit was issued, the District filed a late motion to intervene and a request to reopen the preliminary permit proceeding for comment and study requests. On July 18, 2012, the Secretary of the Commission issued a notice dismissing the District's late intervention and request to reopen the proceeding. The notice explained that, because Valley's permit was issued and became final and unreviewable 14 months ago, there was no proceeding open for intervention and comment.

Discussion

4. On rehearing, the District argues that the Secretary erred in dismissing its late intervention and request to reopen the preliminary permit application proceeding. In support, the District cites to section 385.214(d) of the regulations,³ which allows the Commission the discretion to grant late intervention in a proceeding based on a showing of good cause, among other things. The District contends that there is good cause for late intervention in this case because it did not receive actual notice of the preliminary permit application proceeding, as required by section 4(f) of the Federal Power Act (FPA)⁴ and section 4.32(a)(2) of the Commission's regulations.⁵ The District asks that it be granted late intervention and the permit proceeding be reopened, i.e., the permit be rescinded and the application returned to pending status, so that the District may submit comments on the proposed project and make study requests pertaining to water quality standards on the Blackstone River.

5. We do not agree that the District was entitled to actual notice of the permit application.⁶ Section 4(f) of the FPA specifically requires the Commission to give notice, in writing, "to any state or municipality that is likely to be interested in or affected by such application." Section 4.32(a)(2) of the regulations implements this statutory provision by requiring a permit application to identify, and provide addresses for:

³ 18 C.F.R. § 385.214 (2012).

⁴ 16 U.S.C. § 797(f) (2006).

⁵ 18 C.F.R. § 4.32(a)(2) (2012).

⁶ There is no question that the District received constructive notice of the permit application. The Commission issued public notice of the application on January 21, 2011, which was published in the Federal Register on February 1, 2011. 76 Fed. Reg. 5584. Notice was also published in the Providence Journal (a newspaper in the county where the project dam is located) on January 27, 2011, and February 3, 10, and 17, 2011.

(1) every county, city, town (or similar local political subdivision), or irrigation district in which any part of the project would be located; (2) every city, town, or similar local political subdivision that has a population of 5,000 or more and is located within 15 miles of the project dam; (3) any irrigation district that owns, operates, maintains, or uses any of the project's facilities; and (4) "every other political subdivision *in the general area* of the project that there is reason to believe would be likely to be interested in, or affected by the application." (Emphasis added.) Commission staff uses this list to provide written notice of acceptance of a preliminary permit application.

6. All entities entitled to notice under the FPA and our regulations were given written notice of Valley's application. Pursuant to section 4.32(a)(2) of the Commission's regulations, Valley's permit application identified 44 counties, towns, and cities, in which the project would be located or that had populations of at least 5,000 and are within 15 miles of the project dam, and Commission staff provided written notice to these entities. Valley's application stated that there were no other political subdivisions in the general area of the project that it believed would be interested in, or affected by, the application.⁷

7. The District states that it is a political subdivision in the general area of the project and the Valley should have been aware of its interest in the project. We disagree. The District operates a publicly-owned treatment works (POTW) facility that treats wastewater from, among other sources, the City of Worcester, Massachusetts.⁸ The District's POTW facility, which discharges into the Upper Blackstone River,⁹ is located approximately 34 river miles upstream of Valley's proposed project, sufficiently far away to not be considered "in the general area" of the project.¹⁰ Moreover, its stated interest in

⁷ In promulgating these regulations, the Commission recognized that most, if not all, of the political entities that an applicant believes are likely to be interested in, or affected by, an application will have already been identified by the applicants under the other provisions of the section. *See Application for License, Permit, and Exemption from Licensing for Water Power Projects*, Order No. 413, 50 Fed. Reg. 11,658 (March 25, 1985), FERC Stats. & Regs. ¶ 30,632, at 31,285-86 (1985).

⁸ District's June 11, 2012 motion for late intervention at 3.

⁹ The Blackstone River flows approximately 48 miles south into Rhode Island. The Blackstone River Watershed comprises a total of approximately 540 square miles.

¹⁰ In addition, the seven Massachusetts municipal entities that comprise the District are from 25 to 45 miles from the proposed project. *See City of Idaho Falls, Idaho*, 20 FERC ¶ 61,066 (1982) ("We believe that a town's or city's population and

(continued...)

the project (i.e., that the project could affect the water quality of the Blackstone River, which in turn could result in changes to the POTW's discharge requirements 34 miles upstream) is not a sufficient interest to warrant actual written notice of the permit application.¹¹ For these reasons, we deny rehearing on this issue.

8. The District next argues that the July 18 notice erred in concluding that, because Valley's permit was issued and became final and unreviewable 14 months ago, there is no proceeding open for intervention and comment. The District points to section 385.716 of the Commission's regulations, which provides that "any participant [i.e., party to a proceeding] may file a motion to reopen the record."¹² The District contends that not allowing intervention because a proceeding is closed would render these rules meaningless, and "the entire point of these rules is to potentially allow intervention after a proceeding has closed, for good cause shown."¹³

9. The District is mistaken. First, given that no entities intervened in the permit proceeding before the permit was issued, there were no participants (other than the applicant) that could have invoked section 385.716 of the regulations. Moreover, the Commission's rules provide an avenue for reopening the evidentiary record of a *proceeding*. However, a proceeding terminates with the issuance of a final order, if as is the case here, no party files a timely request for rehearing of the order.¹⁴ Valley was issued a preliminary permit on April 1, 2011. Since no one filed a timely rehearing petition, Valley's preliminary permit proceeding ended, and the preliminary permit became final and unreviewable. To reopen the proceeding now would necessitate rescinding the permit and returning the permit application to pending status. However, as the Commission has explained, when an order issuing a preliminary permit is final, it

distance from the project site offer the best indication of whether it will be likely to be interested in or affected by a proposed project.").

¹¹ See District's June 11, 2012 motion for late intervention.

¹² 18 C.F.R. § 385.716(a) (2012).

¹³ Request for Rehearing at 4.

¹⁴ See, e.g., *California Department of Water Resources and the City of Los Angeles*, 140 FERC ¶ 61,208, at P 28 (2012); *Kings River Conservation District*, 36 FERC ¶ 61,365 at 61,881 (1986).

cannot be revoked except pursuant to reserved authority and after notice and an opportunity for a hearing.¹⁵ We therefore deny rehearing on this issue.

10. Finally, the District contends that the Commission's refusal to grant intervention now and reopen the permit application proceeding "discounts the District's right to participate in the current stage of the Integrated Licensing Process (ILP)" and making it wait to intervene until the Valley files a license application "is incorrect as a matter of law."¹⁶

11. The District misunderstands the Commission's preliminary permit and licensing processes. The purpose of a preliminary permit is to preserve the right of the permittee to have the first priority in applying for a license for the proposed project.¹⁷ The permit does not specify the studies that the permittee must complete as part of its license application. Rather, the studies to be undertaken by a permittee are shaped by the

¹⁵ See *Symbiotics, LLC, and Ochoco Irrigation District*, 98 FERC ¶ 61,083, at 61,251 (2002) (Commission is without authorization to revoke final preliminary permit, even where wrongly issued). See also *International Paper Company v. FERC*, 737 F.2d 1159, 1160 (D.C. Cir. 1984) (if rehearing is not timely sought, an exemption becomes final and non-reviewable and cannot be revoked); *Mary Jane Hirschey v. FERC*, 701 F.2d 215, 217 (D.C. Cir. 1983) (if a petition for rehearing is not filed within 30 days, the exemption grant becomes nonreviewable).

The District cites to three cases in support of its contention that the permit application proceeding can be reopened at this late date. However, the cases can be distinguished. In *Nat'l Wildlife Federation v. FERC*, 801 F.2d 1505 (9th Cir. 1986), an entity had timely sought rehearing, so the permits at issue were not yet final. In *Pioneer Irrigation District v. N.Y. Irrigation District*, 47 FERC ¶ 61,261 (1989), which also dealt with a non-final permit, the Commission addressed allegations of deficient notice involving a pending permit proceeding, but in dicta made a questionable statement that faulty notice could undo a final preliminary permit. In *Northern Colorado Water Conservancy District v. FERC*, 730 F.2d 1509 (D.C. Cir. 1984), the court, in dicta, stated that a final preliminary permit could be revoked, which is a questionable proposition and inconsistent with *International Paper Company* and *Hirschey*.

¹⁶ Request for Rehearing at 6.

¹⁷ See, e.g., *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232, at P 4 (2006) ("The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.").

Commission's pre-filing processes, including the ILP. The District notes, correctly, that the ILP is pre-filing process in which a prospective applicant and interested agencies, entities, and individuals engage in extensive pre-filing consultation, designed to identify potential issues and develop as full a record as possible on environmental and other relevant matters before an application is filed. The pre-filing process is not a "Commission proceeding," so there is not yet an opportunity for intervention. Rather, all interested entities, including the District, may participate. It is not until a license application is actually filed with the Commission that a "proceeding" is initiated and intervention is permitted.¹⁸ In any event, we note that Valley's most recent progress report, filed as required by its permit, states that, in response to the District's filings, Valley has made a preliminary review of the District's concerns, made initial contact with the District, and will provide to the District copies of its future progress reports that it files with the Commission.¹⁹

The Commission orders:

The request for rehearing filed by Upper Blackstone Water Pollution Abatement District, on July 18, 2012, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹⁸ The District appears to believe that a preliminary permit is part of the ILP. This is incorrect. The preliminary permit process is separate from the licensing process. A preliminary permit gives a potential applicant first-to-file priority when filing a license application. But a preliminary permit is not a pre-requisite to filing a license application nor is there any guarantee that a permittee will end up filing a license application for its proposed project. As required by sections 5.5 and 5.6 of the Commission's regulations, Valley has not yet filed a notification of its intent (NOI) to file a license application and a preliminary application document (PAD) for the proposed project, which would propose to use the ILP or another pre-filing process to prepare its license application. 18 C.F.R. § 5.5 and § 5.6 (2012).

¹⁹ See Valley's filing of September 28, 2012.