146 FERC ¶ 61,106
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

KC Brighton LLC

Project No. 3633-040
Docket No. CD14-9-001

ORDER DENYING REHEARING

(Issued February 20, 2014)

1. On December 16, 2013, KC Brighton LLC (KC Brighton) filed a request for rehearing of a November 14, 2013 staff letter order rejecting KC Brighton's application requesting that the Commission characterize its licensed Brighton Dam Project No. 3633 as a "qualifying conduit hydropower facility" that would be excluded from the Commission's licensing jurisdiction. The project is located on the Patuxent River, near the Town of Ashton, in Montgomery and Howard Counties, Maryland. For the reasons discussed below, we deny the request for rehearing.

Background

2. In 1984, Commission staff issued a minor license to authorize construction and operation of the Brighton Dam Project, consisting of: (1) the existing 80-feet-high, 995-feet-long Brighton Dam; (2) the existing 800-acre Triadelphia Reservoir with a gross storage capacity of 18,850 acre-feet; (3) an existing intake tower housing two 30-inch-diameter, 40-foot-long penstocks; (4) an existing powerhouse, containing two generating units with an installed capacity of 480 kilowatts; (5) a new and enlarged tailrace; (6) a new 15-kilovolt transmission line; and (7) appurtenant facilities.[1] The licensee operates the Brighton Dam under a lease agreement with the Washington Suburban Sanitary Commission—the owner of the dam.

[1] *Alternative Energy Assoc., Inc.*, 28 FERC ¶ 62,413 (1984). In 2009, the license was transferred to KC Brighton. *See Alternative Energy Assoc. Ltd. P'ship*, 128 FERC ¶ 62,133 (2009).

3. The project operates by feeding water from the intake tower to the project's two 40-foot-long penstocks, from which water is then delivered to each of the project's two generating units. These generating units are located in the project's powerhouse, which is integrated in the Brighton Dam. The generating units operate under an average head of 51 feet created almost entirely by the Brighton Dam, and the dam itself is classified as a high hazard structure because the dam's failure may cause serious property damage and possibly even loss of life.

4. In August 2013, Congress enacted the Hydropower Regulatory Efficiency Act of 2013 (2013 Act).[2] As pertinent here, the 2013 Act amended section 30 of the Federal Power Act (FPA) to create a class of conduit hydropower projects that are excluded from the licensing requirements of Part I of the FPA. A qualifying conduit facility is one that generates electric power, using for such generation only the hydroelectric potential of a non-federally-owned conduit, without the need for any dam or other impoundment to produce power. The 2013 Act defines "conduit" as "any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity."[3] Projects licensed under or exempted from Part I of the FPA as of August 9, 2013 (the enactment date of the law) are not eligible as qualifying conduit facilities.[4]

5. On November 5, 2013, KC Brighton filed a request that the Commission determine that the project meets the criteria of a qualifying conduit facility and thus is excluded from the licensing requirements of Part I of the FPA. Subject to that determination, KC Brighton requested to surrender the project license. KC Brighton stated that "[t]he small conduit hydroelectric facility and its proposed mode of operation would be identical to the licensed P-3633 Brighton Dam Project Facility."[5]

6. On November 14, 2013, Commission staff rejected KC Brighton's request. Commission staff stated the Brighton Dam Project does not meet the qualifying conduit facility criteria because it includes the 80-foot-high, 995-foot-long Brighton Dam and because the project was licensed under Part I of the FPA at the time the 2013 Act was enacted.

7. On December 16, 2013, KC Brighton filed a request for rehearing.

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[2] Pub. L. No. 113-23, § 4(a), 127 Stat. 493 (2013).

[3] *Id.*

[4] *Id.*

[5] KC Brighton's November 5, 2013 Application at 2.

Discussion

8. On rehearing, KC Brighton argues, for the first time, that the Brighton Dam is ancillary to, and not needed for, the Brighton Dam Project. Thus, KC Brighton reasons, its project is a qualifying conduit because, without the dam and reservoir, the project is a new development, i.e., one that was not previously licensed.

9. As an initial matter, the 2013 Act limits the eligibility of qualifying conduit facilities to those projects (and project works) that were not licensed or exempted under Part I of the FPA as of August 9, 2013.[6] The Brighton Dam Project was originally licensed in 1984,[7] and it continues to operate under this license. Hence, the Brighton Dam Project cannot be a qualifying conduit facility.[8]

10. KC Brighton also avers that it would be against the intent of the 2013 Act to reject its conversion request because the law was intended to reduce costly and redundant dam safety oversight on small hydropower developers, such as KC Brighton. However, Congress stated that the passage of the 2013 Act was in furtherance of developing untapped resources, including approximately 60,000 megawatts of new hydropower capacity.[9] Hence, Congress's intent in enacting the 2013 Act was to foster the development of new hydropower resources; and it was not, as KC Brighton argues, intended to remove the Commission's dam safety oversight of licensed projects. For these reasons, Commission staff properly rejected KC Brighton's request.

11. In addition, the 2013 Act specifically limits qualifying conduit facilities to those projects that do not include a dam or other impoundment.[10] Though KC Brighton argues that the Brighton Dam is not needed for the project, the project's powerhouse is integral to the dam, and the dam provides nearly all of the head for the project's electric generation. The Brighton Dam therefore is part of the project's complete unit of

[6] Pub. L. No. 113-23, § 4(a), 127 Stat. 493 (2013).

[7] *Alternative Energy Assoc., Inc.*, 28 FERC ¶ 62,413 (1984).

[8] The statute provides no mechanism for the "conversion" of existing licensed or exempted projects to qualifying conduit facilities, and, indeed, the limitation of eligibility to projects that were not licensed or exempted as of the date of enactment bars such action.

[9] Pub. L. No. 113-23, § 2, 127 Stat. 493 (2013).

[10] *Id.* § 4(a).

development,[11] and therefore, KC Brighton may not simply delete the dam from its project in an attempt to meet the qualifying conduit facility criteria.

The Commission orders:

KC Brighton LLC's request for rehearing filed on December 16, 2013, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[11] Sections 4(e) and 23(b)(1) of the FPA apply to the construction, operation, and maintenance of water power "project works." Section 3(12) of the FPA defines "project works" as "the physical structures of a project." 16 U.S.C. § 796(12) (2012). A "project" is defined in section 3(11) of the FPA as a "complete unit of improvement or development, consisting of . . . all dams and appurtenant works and structures . . . ." 16 U.S.C. § 796(11) (2012). Taken together, these provisions require the Commission to license all the physical structures that comprise a complete unit of development.