147 FERC ¶ 61,039
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Sutton Hydroelectric Company LLC Project No.12693-004

ORDER DENYING REHEARING

(Issued April 17, 2014)

1. Sutton Hydroelectric Company LLC (Sutton) has filed a request for rehearing of a January 24, 2014 Commission staff order[1] denying Sutton's application for a third preliminary permit to study the Sutton Hydroelectric Project No. 12693, a 9.2-megawatt (MW) project proposed to be located at the U.S. Army Corps of Engineers' (Corps) Sutton Dam on the Elk River, about a mile east of the Town of Sutton, in Braxton County, West Virginia. This order denies Sutton's request for rehearing.

<u>Background</u>

2. The Corps owns and operates Sutton Dam and the associated impoundment, Sutton Lake, which extends approximately 14 miles upstream from the dam. Sutton Dam is a concrete gravity dam that is 1,178 feet long, 210 feet high, and 195 feet wide at its base. It was authorized to control flooding along the Elk, Kanawha, and Ohio Rivers, as well as to supply water, provide recreation, conserve fish and wildlife resources, and abate pollution.[2] Five sliding sluice gates control the dam's discharge through five adjacent sluiceways. The fifth sluiceway (Gate 3)[3] has an intake structure with two ports: the upper port invert[4] elevation is 910 feet mean sea level (msl) and the lower port invert

[1] *Sutton Hydroelectric Co. LLC*, 146 FERC ¶ 62,058 (2014).

[2] *See* Flood Control Act of 1938, Pub. L. No. 95-761, 52 Stat. 1215 (1938).

[3] *See* Sutton's February 6, 2008 Pre-Application Document at 15.

[4] An invert is the bottom, or lower, elevation of the intake structure.

elevation is 878.84 feet msl.[5] The intake structure serves as the primary means of drawing water from the reservoir and passing it downstream. During the summer, water is drawn through the upper level intake port and during the winter from the lower intake port.[6] The seasonal intake elevations are maintained to enhance water quality in the river downstream from the dam.

3. The Corps maintains a summer pool elevation of the Sutton Lake between 922 and 925 feet msl and a winter pool elevation of 895 feet msl.[7] Daily lake level fluctuations are minimal, except during storm runoff events, which can lead to flood storage operations.

4. On June 16, 2006, Sutton filed a preliminary permit application, proposing to construct a new multi-port intake structure and penstock through the dam, several feet away from the dam's Gate 3 intake structure. The new intake structure would be capable of drawing water from multiple elevations. The water would pass through the dam via a new 335-foot-long steel penstock to two new 4-MW turbine generator units and one 1.2-MW minimum flow unit. The penstock would be installed through the dam at a downward angle, dropping from 868 feet msl at the upstream face of the dam to elevation 830 msl on the downstream face of the dam.[8]

5. Sutton would operate the intake during the summer at an elevation of 895 feet msl and during the winter at an elevation of 859 feet msl, elevations that were about 15 feet below the Corps winter and summer intakes.[9]

6. On October 26, 2006, Commission staff issued Sutton its first three-year preliminary permit for the proposed Sutton Hydroelectric Project.[10]

7. During the term of its first permit, Sutton pursued development of the project with reasonable diligence, including holding various study meetings with agencies and filing several meeting summaries and plans. In February 2008, Sutton filed a Notice of Intent

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[5] *See* Corps' February 15, 2011 comments at 11.

[6] *Id.*

[7] *Id.* at 16.

[8] *See* Sutton's February 6, 2008 Pre-Application Document at 23.

[9] *See id.*

[10] *Sutton Hydroelectric Co. LLC*, 117 FERC ¶ 62,072 (2006).

(NOI) and Pre-Application Document (PAD) pursuant to the Commission's Integrated Licensing Process (ILP) for preparing a license application.[11]

8. Sutton's first permit expired on September 30, 2009, and, on October 1, 2009, Sutton filed an application for a successive preliminary permit. The application did not change the project proposal. Finding that Sutton had been reasonably diligent under its first permit, Commission staff issued Sutton its second three-year permit on March 4, 2010.[12] The order explained that, during the permit term, the Commission expected Sutton to conduct agency consultation and obtain necessary authorizations to conduct studies in order to prepare a license application.[13]

9. During the term of its second permit, Sutton continued to pursue the ILP, consulting with agencies and conducting studies.[14]

10. In June 2011, Sutton proposed to modify and re-run several of the studies that it had completed in order to change the proposed intake elevations to match the Corps' intake elevations and to increase the project's maximum hydraulic capacity from 1,150 cubic feet per second (cfs) to 1,700 cfs.[15] Commission staff approved the modified study plan in November 2011.

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[11] 18 C.F.R. pt. 5 (2013) establishes the requirements of, and schedule for, the ILP.

[12] *Sutton Hydroelectric Co. LLC,* 130 FERC ¶ 62,189 (2010).

[13] *See id.* P 6-7.

[14] In January 2011, the Corps commented on Sutton's studies, noting that they had not addressed the Corps' concerns about the proposed intake elevations. *See* Corps January 11, 2011 Updated Study Report Comments at 2, 5, and 13. The Corps stressed that "it [was] imperative that the new hydropower intake tower have intakes at the same elevations as the old intake tower" in order to meet downstream temperature requirements. Study Plan Comment Matrix at 3 (filed as Table 1 of Sutton's August 10, 2011 Study Plan Modification Meeting Summary).

[15] *See* Sutton's June 24, 2011 Request for Modification of Study Plan at 1.

11. On August 30, 2012, Sutton filed its fifth progress report to describe what it had accomplished the previous six months. Sutton had not conducted any of the modified studies. Instead, the progress report consisted of the following:

> Sutton LLC has continued to seek out a satisfactory and optimum generation solution for this project along with lower capital cost ideas. As such this project remains challenging in this environment of low wholesale electricity prices so Sutton is also seeking more strategic alternatives along with reasonable priced power purchase arrangements that will allow the project to proceed.[[16]]

12. On November 9, 2012, Commission staff requested a status update on the outstanding studies and reminded Sutton that its preliminary permit would expire February 28, 2013. Sutton responded on December 10, 2012, stating that the economic environment had caused Sutton to conclude that increasing the hydraulic capacity of the project would not be feasible. Sutton stated that it would move forward with the development of a Preliminary Licensing Proposal (PLP)[17] using the same hydraulic capacity detailed in the PAD and the revised intake elevations.[18] Sutton said that it would file its PLP by February 18, 2013, receive comments on the PLP and any additional information requests by May 19, 2013, and file its final license application by July 18, 2013.

13. Sutton filed its PLP on February 28, 2013, the last day of its preliminary permit term. The PLP noted that, on February 28, 2013, the Corps had informed Sutton that it had changed winter operations in an attempt to address downstream sediment depletion. The new operating regime (November through March) passes all water from the low level sluiceways (at 825 feet msl), which are more than 60 feet below Sutton's lowest proposed intake elevation of 878.8 feet msl.[19] Sutton stated that such a change could have significant potential impacts on its project, but at the time of filing its PLP Sutton did not have sufficient information to effectively analyze this new regime. Sutton

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[16] August 30, 2012 Progress Report at 2.

[17] *See* 18 C.F.R. § 5.16 (2013).

[18] Sutton also explained why the change in elevations of the intakes to match the Corps' would not require any new studies.

[19] *See* February 28, 2013 PLP at 2-3 and 2-6 n.2. The PLP stated that the low-level sluiceways were at 845 feet msl, but the Corps subsequently clarified that they are at elevation 825 feet msl. *See* Corps' May 23, 2013 Comment at 1.

stated however that the Corps' operational change "will likely cause either the addition of a third intake at the lowest level or a relocation of Sutton's lower gate from 878.84 to 845 feet msl."[20]

14. On March 1, 2013, Sutton filed an application for a third preliminary permit for the proposed project. The permit application explained that Sutton expected to file a final license application for the project soon after the comment period for the PLP ended on May 29, 2013.[21] Sutton contended that the significant work it had done towards a license application and the amount of money it had spent constituted good cause such that it should receive a third preliminary permit.

15. On May 23, 28, and 29, 2013, the Corps, Commission staff, and West Virginia Department of Natural Resources (West Virginia DNR), respectively, filed comments on the PLP. The Corps questioned how Sutton intended to modify its project to address the Corps' revised winter operations and noted that additional studies and modeling would be required if Sutton added a third intake or lowered the elevation of its proposed intakes. Commission staff had similar concerns in its comments and also addressed other aspects of the PLP, noting additional information that would be needed for a license application, including an updated record of consultation.[22] West Virginia DNR's comments were similar to the Corps'.

16. Sutton has not responded to any of the comments on its PLP or proposed modifications to its project to address the Corps revised winter operations. In addition, although it stated that it would file its license application soon after the May 29, 2013 deadline to file comments on the PLP, it has not done so.

17. On January 24, 2014, Commission staff denied Sutton a third preliminary permit for the Sutton Hydroelectric Project, explaining that the Commission rarely issues a third consecutive permit to the same applicant, for the same site, unless some extraordinary circumstance or factor outside the control of the permittee is present.[23] Commission staff

[20] *See* February 28, 2013 PLP at 2-3.

[21] Interested entities had 90 days to file comments on the PLP. 18 C.F.R. § 5.16(e) (2013).

[22] Commission staff also noted that Sutton's proposed relocation of an intake invert or an addition of a third intake at an elevation of 845 feet msl would prevent construction of a penstock through the dam at this level as well as cause significant damage to the project's turbine runners.

[23] *Sutton Hydroelectric Co. LLC*, 146 FERC ¶ 62,058 at P 6.

determined that the facts in the proceeding did not satisfy the requisite extraordinary circumstance standard because Sutton had failed to file a license application although seven months had passed since the date it said it would do so and because Sutton had not taken any steps since early 2013 to remedy the Corps' concern that the bottom of the proposed project's intake structure would be located above the Corps' sluicegate and to address the potential for flooding to occur to the proposed intake control platform. Accordingly, Commission staff determined that, after seven years from obtaining its first preliminary permit, Sutton was not any closer to filing a license application.[24]

18. On February 20, 2014, Sutton filed a request for rehearing of the denial.

Discussion

19. Section 4(f) of the FPA authorizes the Commission to issue preliminary permits to potential license applicants for a period of up to three years.[25] The FPA does not address the issue of how many preliminary permits an applicant may receive for the same site. However, it is Commission policy to grant a successive permit only if it concludes that the applicant has pursued the requirements of its prior permit in good faith and with due diligence.[26] In the rare instance when a permittee applies for a second successive permit (i.e., a third permit), the Commission has granted one only when the permittee has demonstrated that it has suffered some extraordinary circumstance or factor outside of its control that prevented it from filing a final license application.[27]

[24] *See id.* P 7.

[25] 16 U.S.C. § 797(f) (2012). On August 3, 2013, Congress passed the Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, 127 Stat. 495, which authorizes the Commission, at its discretion, to extend a preliminary permit once for not more than two additional years beyond the three-year term.

[26] *City of Redding, Cal.*, 33 FERC ¶ 61,019 (1985) (permittee must take certain steps, including consulting with the appropriate resource agencies early in the permit term, and timely filing six-month progress reports).

[27] *See Greybull Valley Irrigation District*, 143 FERC ¶ 61,131, at PP 14-15 (2013); *Mokelumne River Water and Power Authority*, 89 FERC ¶ 61,001 (1999) (issuing a third permit because the applicant had demonstrated that its delay in performing water flow studies necessary to prepare a license application was dependent on resolution of a pending licensing proceeding at the Commission and pending water rights litigation that could impact available flows).

20. The Commission has held that, in most cases, three years should be enough time to consult with resource agencies and conduct the studies necessary to prepare a license application, and six years should certainly be more than enough time.[28] Allowing a site to be reserved for nine years (i.e., three permit terms), absent some showing of extraordinary circumstances, would be to allow site banking.[29]

21. On rehearing Sutton describes five "significant challenges" that in the aggregate, it claims, amount to extraordinary circumstances that prevented it from filing a final license application: fluctuating electricity prices, a change of ownership of Sutton, a change in the regulatory environment, a change in the Corps' summer operations, and a change in the Corps' winter operations.[30]

22. After a review of Sutton's record, we affirm Commission staff's determination that Sutton failed to demonstrate that extraordinary circumstances or factors outside of its control have prevented it from diligently pursuing project development. None of the matters Sutton raises, whether viewed independently or aggregately, amounts to an extraordinary circumstance.

23. First, Sutton argues, it had to adjust its proposal to account for the changing price of electricity. However, changes in the economy as a whole do not rise to the level of an extraordinary circumstance. To the contrary, these are issues that developers encounter in the normal course of a project's development. The sole purpose of a preliminary permit, after all, is to maintain priority of a license application while the permittee investigates the feasibility of a proposed project. It would be contrary to our policy against site banking to issue a series of permits while an applicant waits for optimal economic circumstances.

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[28] *See, e.g., Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 27 (2012).

[29] The essence of our policy against site banking is that an entity that is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it. *See Public Utility District No. 1 of Pend Oreille County, Wash.*, 124 FERC ¶ 61,064, at P 31 (2008). *See also Idaho Power Co. v. FERC*, 767 F.2d 1359, 1363 (9th Cir. 1985) (finding that the Commission's conclusion that site banking is inconsistent with the FPA is "not only clearly reasonable" but also supported by the terms of the FPA); *Mt. Hope Water Power Project LLP*, 116 FERC ¶ 61,232, at PP 8-13 (affirming application of policy against site banking in permit cases).

[30] Request for Rehearing at 4.

24. Second, Sutton argues that the ownership of the company changed twice during its two permit terms. Thus, Sutton argues, new ownership resulted in different company goals, resources, and strategies. We find this argument unconvincing. Although Sutton was sold twice (Advanced Hydro Solutions sold it to Brookfield in November 2007 and then bought it back in March 2011), the purchase or sale of a company that holds a preliminary permit is not unusual and would not by itself prevent a permittee from developing a project. We have seen many instances where a developer has sold the company that owns a permit but was able to successfully file a license application within a permit term.[31] In any case, changes in an applicant's corporate philosophy or priorities are within an applicant's control and do not constitute extraordinary circumstances.

25. Third, Sutton argues that the Corps has changed its processes for obtaining a permit under section 408 of the Clean Water Act (CWA)[32] and conducting an Independent External Peer Review (external review).[33] However, a CWA section 408 permit and an external review are not required for a license application and are not prerequisites for obtaining a FERC license. Moreover, there is nothing in the record indicating that Sutton has even begun these processes. Thus, these matters are neither extraordinary circumstances nor a bar to project development.

26. Fourth, Sutton argues that the Corps changed its summer operations in 2011 and that it did not receive from the Corps data relating to the new summer operations until 2012. Sutton states that the change in operation "represents a significant operational change," and its completed studies do not reflect the change. However, Sutton's December 10, 2012 response to staff's request for a status update contradicts this claim. There, Sutton stated that the summer operational change would not necessitate the modification of any studies and that it expected to file its final license application by July 18, 2013.[34]

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[31] For example, Advanced Hydro Solutions bought Tygart LLC from Nelson Energy LLC in Project No. 12613 and yet Tygart was able to timely file a final license application before its preliminary permit expired.

[32] 33 U.S.C. § 408 (2012). Among other things, section 408 prohibits the alteration of a Corps dam without the Corps' finding that the proposal would not harm the public interest.

[33] *Id.* § 2343.

[34] *See* Sutton's December 10, 2012 Status Update at 2.

27. Last, Sutton argues that the Corps changed its winter operations in late 2012, which will affect the project's final design. This change in operation, indeed, will necessitate some modification to Sutton's project design. As explained above, the Corps has modified its winter operations to release water from the dam through a structure at elevation 825 feet msl, while Sutton's proposal is for an intake structure that has a minimum elevation of 878.8 feet msl. However, in its February 28, 2013 PLP and third permit application, Sutton stated it would take into account the new winter operating regime and file a final license application shortly after the May 29, 2013 deadline for entities to file comments on the PLP, thus showing that the change is not a debilitating extraordinary circumstance. It has now been about 14 months since Sutton filed its PLP and 9 months past the anticipated filing date, yet Sutton has not filed a final license application. Nor is there any indication that Sutton has taken any steps forward to make any necessary modifications to its proposal.[35]

28. In addition to its extraordinary circumstance arguments, Sutton also argues that it is unrealistic for the Commission to expect permittees to prepare a development application within six years, especially for projects to be located at a Corps dam. We find this argument unavailing. As discussed in *Cascade Creek, LLC*, we recognize that an ILP timeframe is demanding for developers, especially in situations where there is a lack of existing project-specific information and studies at the site of an unconstructed project.[36] However, because of the ILP timeframe, we expect permittees to use the permit term wisely and begin work as early as possible.[37]

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[35] Sutton states that it has spent $2.5 million in developing its project, but that it has not pursued changing the intake design, claiming that it would be too risky to do so without a preliminary permit. Sutton also states that the record shows that Sutton has not provided information in response to the Corps' intake elevation concerns, but maintains that Sutton would have supplied such evidence if Commission staff had requested it. In addition, Sutton states that it would be willing to change the proposed project's intake elevation now and could file a final license application in six months, if only it had a preliminary permit. Request for rehearing at 6. We find these arguments unconvincing. The absence of a permit for the last 13 months has in no way barred Sutton from filing a license application.

[36] *See Cascade Creek*, 140 FERC ¶ 61,221 at P 31. Moreover, cases such as this, where a developer seeks an original licensee for a project at an existing dam should, all else being equal, take less time to complete than ones where a new dam and impoundment must be constructed.

[37] *Id.*

29. In sum, none of the circumstances to which Sutton refers, either alone or together, constitute an extraordinary circumstance that prevented Sutton from studying its proposed project and filing a final license application. However, while Sutton's second permit has expired, it can certainly continue its ILP, which has not been suspended or terminated. Consistent with Sutton's rehearing request, it should be able to take the necessary steps to a final license application fairly quickly, if indeed it intends to pursue project development.

30. For the reasons discussed above, we deny Sutton's request for rehearing.

The Commission orders

Sutton Hydroelectric Company LLC's request for rehearing, filed on February 20, 2014, in Project No. 12693-004 is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.