

147 FERC ¶ 61,040  
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 Pittsfield LLC

Project No.14493-001

ORDER DENYING REHEARING

(Issued April 17, 2014)

1. On February 12, 2014, Commission staff issued an order denying KC Pittsfield LLC's (KC Pittsfield) application for a successive preliminary permit for the Drum-Spaulding Small Hydro Project No. 14493.<sup>1</sup> The proposed project would be located in Placer County, California, within the boundary of Pacific Gas and Electric Company's (PG&E) Drum-Spaulding Project No. 2310.<sup>2</sup> On February 25, 2014, KC Pittsfield filed a request for rehearing of the order denying its successive permit application. This order denies KC Pittsfield's request for rehearing.

**I. Background**

2. Kelly Sackheim is the real party in interest for KW Sackheim Development (KW Sackheim) and KC Pittsfield.<sup>3</sup>

3. On February 5, 2010, Commission staff issued KW Sackheim a three-year preliminary permit to study the feasibility of the 3.1-megawatt (MW) Drum-Spaulding Small Hydro Project No. 13225.<sup>4</sup> The project would consist of three developments, each

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<sup>1</sup> *KC Pittsfield LLC*, 146 FERC ¶ 62,122 (2014).

<sup>2</sup> PG&E filed a relicense application for the project on April 12, 2011.

<sup>3</sup> *See KC Pittsfield LLC*, 146 FERC ¶ 62,122 at PP 8-9. Kelly Sackheim exercised control over both projects as the agent and manager of KC Pittsfield, and as the principal of KW Sackheim.

<sup>4</sup> *KW Sackheim Dev.*, 130 FERC ¶ 62,130 (2010).

of which would use existing drop structures<sup>5</sup> that are part of PG&E's Drum-Spaulling Project: (1) the North Fork American-Drum Canal Drop; (2) the Bear-Halsey Canal Drop; and (3) the Wise-Rock Canal Drop. The drops currently do not include generating facilities.

4. On January 31, 2013, the permit for Project No. 13225 expired.

5. On February 1, 2013, KC Pittsfield filed its preliminary permit application (which was docketed Project No. 14493) to study the feasibility of developing the 3.1-MW Drum-Spaulling Small Hydro Project. KC Pittsfield's proposed project is in most respects identical to KW Sackheim's Project No. 13225.<sup>6</sup>

6. Commission staff issued public notice of KC Pittsfield's application, and on November 12, 2013, PG&E filed a timely motion to intervene and protest. PG&E contended that KC Pittsfield's application is for a successive preliminary permit and should be denied because KW Sackheim did not pursue development of the project in good faith and with due diligence under the prior permit. PG&E also asserted that the Commission should deny KC Pittsfield's application because: (1) it would develop the same water resource as PG&E's Drum-Spaulling Project; and (2) it would alter a licensed project without the licensee's consent contrary to section 6 of the Federal Power Act (FPA).<sup>7</sup>

7. On February 12, 2014, Commission staff issued an order denying KC Pittsfield's permit application. The order explained that, because Kelly Sackheim is the real party of interest for both KW Sackheim's expired preliminary permit for Project No. 13225 and

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<sup>5</sup> A drop is a structure, located across a stream or canal, designed to pass water to a lower elevation while controlling its velocity.

<sup>6</sup> Of the three developments contained in KW Sackheim's permit, KC Pittsfield's application contains identical proposals for the North Fork American-Drum Canal Drop (now referred to as the Lake Valley Canal Development) and the Bear-Hasley Canal Drop. The Wise-Rock Canal Drop has been replaced by the Alta Powerhouse Development.

<sup>7</sup> 16 U.S.C. § 799 (2012). The initial permit order in Project No. 13325 explained that, although PG&E is in the relicensing process for the multi-dam Drum-Spaulling Project, it is Commission policy to allow preliminary permits for the study of unused capacity at licensed projects during relicensing. *KW Sackheim Dev.*, 130 FERC ¶ 62,130 at P 11 (citing to *Preferences at Relicensing of Units of Development*, 57 FERC ¶ 61,349 (1991)).

KC Pittsfield's preliminary permit application for Project No. 14493, the application for Project No. 14493 would be treated as a successive permit application.<sup>8</sup>

8. The order stated that the six-month progress reports required by standard Article 4 of the permit for Project No. 13225 did not contain evidence of agency consultation, studies performed, or other specific information demonstrating progress toward preparing a development application for the Drum-Spaulding Small Hydro Project.<sup>9</sup> The order concluded that the lack of diligence under the first permit warranted denying KC Pittsfield's successive permit application.<sup>10</sup>

9. On February 25, 2014, KC Pittsfield filed a request for rehearing of the February 12 order. On March 10, 2014, Trinity Star LLC filed a letter supporting KC Pittsfield's request for rehearing and attributing the lack of progress toward developing the project to the pace of progress in PG&E's relicensing proceeding rather than a lack of diligence by KW Sackheim. On March 12, 2014, KC Pittsfield filed a letter authorizing Nino Spagnuolo of Trinity Star LLC to act as an agent for its Project No. 14493.

## II. Discussion

10. Sections 4(f) and 5 of the FPA authorize the Commission to issue preliminary permits to potential development applicants for a period of up to three years.<sup>11</sup> It is Commission policy to grant a successive permit only if an applicant has pursued the

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<sup>8</sup> See *Long Lake Energy Corp.*, 29 FERC ¶ 61,290, at 61,592 (1984) (treating a permit application as a successive application despite it having been submitted by a different legal entity where the prior permittee had a "cloak of control" over the second permit).

<sup>9</sup> *KC Pittsfield LLC*, 146 FERC ¶ 62,122 at P 10.

<sup>10</sup> The order determined that PG&E's arguments concerning whether KC Pittsfield's project would develop the same water resource as PG&E's Drum-Spaulding Project or alter the project without its consent are moot given the denial of KC Pittsfield's permit application. *KC Pittsfield LLC*, 146 FERC ¶ 62,122 at n.6.

<sup>11</sup> 16 U.S.C. §§ 797(f) and 798 (2012). In August 2013, Congress enacted the Hydropower Regulatory Efficiency Act of 2013 (2013 Act) (Pub. L. No. 113-23, § 4(a), 127 Stat. 493), which amended section 5 of the FPA to provide that a preliminary permit term can be extended once for not more than two additional years if the Commission finds that the permittee has carried out activities under the permit in good faith and with reasonable diligence.

requirements of its prior permit in good faith and with due diligence.<sup>12</sup> This policy applies regardless of whether there are competing applications for a site.<sup>13</sup>

11. In general, pursuing the requirements of a permit with due diligence has meant that, at a minimum, a permittee timely filed progress reports, consulted with resource agencies, and conducted environmental studies, such that Commission staff is able to discern from the permittee's actions a pattern of progress toward the preparation of a development application.<sup>14</sup>

12. On rehearing, KC Pittsfield argues that progress under KW Sackheim's Project No. 13225 preliminary permit demonstrates sufficient diligence to warrant a successive permit. KC Pittsfield admits that it has "achieved limited progress" under its prior permit term and attributes that lack of progress to the availability of information that PG&E is developing as part of its relicensing proceeding, and the availability of stakeholder and agency staff time to consult.<sup>15</sup> KC Pittsfield also asserts that its November 14, 2013

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<sup>12</sup> See, e.g., *Greybull Valley Irrigation Dist.*, 143 FERC ¶ 61,131, at P 8 (2013) (citing *City of Redding, California*, 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)); *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 24 (2012).

<sup>13</sup> See, e.g., *Greybull Valley Irrigation Dist.*, 143 FERC ¶ 61,131 at P 8 (citing *City of Redding, California*, 33 FERC ¶ 61,019); *Cascade Creek, LLC*, 140 FERC ¶ 61,221 at P 24.

<sup>14</sup> *Cascade Creek, LLC*, 140 FERC ¶ 61,221 at P 26 (citing to section 4(f) of the FPA, 16 U.S.C. § 797(f) (2012), which states that the purpose of a preliminary permit is to enable applicants for a license to secure the data and to perform the acts required by section 9 of the FPA, 16 U.S.C. § 802 (2012). Section 9 requires license applicants to submit to the Commission such maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project (i.e., an acceptable license application). In order for an applicant to submit an acceptable license application, it must have consulted with relevant resource agencies regarding the information the agencies will need in the environmental document, and therefore what studies the applicant must conduct to obtain that information prior to the filing of a license application. 18 C.F.R. § 4.38 (2013)).

<sup>15</sup> KC Pittsfield suggests that agencies lack resources to consult on its project while PG&E's relicensing proceeding is ongoing, but provides no documentation that it attempted to consult with them.

filing, which stated that assessment of its project's impacts and associated agency consultation will "properly follow progress in the larger [PG&E] relicensing proceeding" demonstrates diligence.<sup>16</sup> We disagree.

13. After a review of the record, we affirm staff's finding that KW Sackheim did not pursue its development application in good faith and with due diligence during the term of its initial permit such that it warrants a successive preliminary permit. KW Sackheim's progress reports indicate that it performed no studies at all during the prior permit term, and engaged in no agency consultation.<sup>17</sup> The purported pre-application

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<sup>16</sup> It is worthy of note that, since February of 2010, Commission staff has devoted considerable time to processing 18 preliminary permit applications submitted by six separate corporations either controlled by Kelly Sackheim or for which Kelly Sackheim was acting as an agent, including an instance where Kelly Sackheim submitted competing permit applications as the agent of two different corporations for the same project. *See Fall River Valley Community Services Dist.*, 143 FERC ¶ 61,047 (2013) (denying rehearing of a permit dismissal where Kelly Sackheim had been listed as the agent for both competing preliminary permit applicants).

<sup>17</sup> *See* progress reports for Project No. 13225, filed May 28 and November 30, 2010, June 4 and December 14, 2011, July 31, 2012, and January 31, 2013. The first progress report stated that KW Sackheim contacted PG&E and Commission staff, and created a website. The second progress report described activities that PG&E was pursuing during the course of its relicensing proceeding and stated that KW Sackheim was exploring financing options. The third progress report described PG&E relicensing activities and stated that PG&E had denied access to the sites KW Sackheim was proposing to develop and stated that KW Sackheim had submitted a Freedom of Information Act request to the National Forest Service, asking for information regarding Forest Service special use permits. The fourth progress report stated that KW Sackheim looked forward to cooperating with PG&E and reported no further progress. The fifth progress report also reported no progress and stated that KW Sackheim would begin reviewing information generated by PG&E during its relicensing proceeding. The sixth and final progress report described no progress.

Concurrent with the final progress report, KW Sackheim filed what it described as a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to Part 5 of the Commission's regulations, 18 C.F.R. pt 5 (2013), purportedly for a conduit exemption for the proposed Drum-Spaulding Small Hydro Project facilities. On January 16, 2014, the Director, Division of Hydropower Licensing, dismissed the NOI and PAD explaining that the documents were dismissed because they are not required with respect to a conduit exemption application. In any case, the NOI and PAD contained little to no information

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document that it filed failed to show any progress made toward preparing a development application.

14. Finally, while KC Pittsfield argues that it is important for it to receive a successive permit so it can work toward project development, we note that holding a permit is not a prerequisite to pursuing a development application. Accordingly, KC Pittsfield is free to pursue development of the Drum Spalding Small Hydro project.

15. For the above reasons, we deny KC Pittsfield's request for rehearing.

The Commission orders

KC Pittsfield's request for rehearing, filed on February 25, 2014, is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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beyond that provided in the initial permit application submitted three years prior and did not indicate that any studies or consultation had been performed.