

147 FERC ¶ 61,233  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

FFP Qualified Hydro 14, LLC  
Western Minnesota Municipal Power Agency

Project Nos. 13579-003  
14491-001

ORDER GRANTING MOTION TO INTERVENE OUT-OF-TIME  
AND DENYING REHEARING

(Issued June 19, 2014)

1. On January 22, 2014, Western Minnesota Municipal Power Agency (Western Minnesota) filed a request for rehearing of the Commission's December 19, 2013 order issuing a successive preliminary permit to FFP Qualified Hydro 14, LLC (FFP) and denying Western Minnesota's competing preliminary permit application (Order).<sup>1</sup> The Order granted FFP's application for a successive preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>2</sup> to study the feasibility of the Saylorville Dam Water Power Project No. 13579 to be located at the existing Saylorville Dam and Lake on the Des Moines River, in the City of Johnston in Polk County, Iowa. The Order denied Western Minnesota's competing preliminary permit application for the proposed Saylorville Hydroelectric Project No. 14491, to be located at the same site. Western Minnesota challenges the Commission's finding that Western Minnesota is not entitled to municipal preference pursuant to section 7(a) of the FPA.<sup>3</sup> Also on January 22, 2014, the American Public Power Association (APPA) and the Public Power Council (PPC) filed a joint motion to intervene out-of-time and a request for rehearing. For the reasons discussed below, the Commission grants APPA's and PPC's motion to intervene out-of-time and denies Western Minnesota's, APPA's, and PPC's requests for rehearing.

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<sup>1</sup> *FFP Qualified Hydro 14, LLC*, 145 FERC ¶ 61,255 (2013).

<sup>2</sup> 16 U.S.C. § 797(f) (2012).

<sup>3</sup> 16 U.S.C. § 800(a) (2012).

## I. Background

2. Saylorville Dam and Lake are owned by the United States government and operated by the U.S. Army Corps of Engineers (Corps), Rock Island District. The Corps built and operates the dam and lake for flood control, water conservation, fish and wildlife habitat management, recreation, and water supply. The dam is 6,750 feet long, 125 feet high (with a crest at 915.5 feet mean sea level (msl)), 1,125 feet wide at its base, and 44 feet wide at its top. At a normal surface elevation of 836 feet msl, Saylorville Lake has a surface area of 5,520 acres and a gross storage capacity of 74,000 acre-feet.

3. FFP's proposed project would consist of: (1) a new 400-foot-long by 300-foot-wide forebay channel; (2) a new 75-foot-long by 50-foot-wide by 140-foot-high concrete intake; (3) a new 18-foot-diameter by 75-foot-long concrete lined headrace tunnel; (4) a new 18-foot-diameter by 250-foot-long steel penstock; (5) three 10-foot-diameter pipelines that connect the penstock to the proposed turbines; (6) a new 120-foot-long by 70-foot-wide concrete powerhouse, containing three 4.8 megawatt (MW) Kaplan turbine generators, with a combined nameplate capacity of 14.4 MW; (7) a new 275-foot-long by 190-foot-wide tailrace channel; (8) a new 60-foot-long by 50-foot-wide substation; (9) a buried 1,000-foot-long, 4.16-kV transmission line from the powerhouse to the project substation and a new 4,950-foot-long, 69-kilovolt (kV) transmission line from the project substation to an interconnection point; and (10) appurtenant facilities. The project would have an estimated annual generation of 45.3 gigawatt-hours (GWh).

4. On February 24, 2010, the Commission issued FFP a preliminary permit for the site.<sup>4</sup> The permit expired on January 31, 2013. On February 1, 2013, FFP filed an application for a successive permit to continue to study the project.

5. Also on February 1, 2013, Western Minnesota filed a competing preliminary permit application for Project No. 14491. Western Minnesota's proposed project would consist of: (1) a new 80-foot-long by 35-foot-wide by 95-foot-high concrete intake; (2) three new 14-foot-diameter by 740-foot-long conduits; (3) a new 100-foot-long by 50-foot-wide concrete powerhouse with three 5-MW Kaplan vertical turbines, having a combined generating capacity of 15 MW; (4) three new 7.5-MW generator units; (5) a 100-foot-long by 75-foot-wide substation; (6) a new 3.73-mile-long, 69-kV transmission line; and (7) appurtenant facilities. The project would have an estimated annual generation of 66 GWh.

6. The Commission issued a joint public notice of the competing applications on March 15, 2013. Western Minnesota filed a timely motion to intervene, opposing FFP's application and arguing that Western Minnesota should be issued the permit based on municipal preference. On October 10, 2013, the Commission issued a *Notice*

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<sup>4</sup> See *FFP Qualified Hydro 14, LLC*, 130 FERC ¶ 62,158 (2010).

*Announcing Preliminary Permit Drawing*, to be held on October 21, 2013, for the purpose of determining which of the two applications would be deemed to have been filed first. On October 21, 2013, Western Minnesota filed a motion requesting that the Commission withdraw the notice of the drawing, arguing that it was entitled to municipal preference and, therefore, the drawing was unnecessary. The drawing was held on October 21, 2013, and, as set forth in an October 23, 2013 notice, established the following order of priority: (1) FFP; and (2) Western Minnesota.

7. The Order was issued on December 19, 2013. As relevant here, the Commission determined that FFP had pursued the requirements of its prior permit in good faith and with due diligence. Therefore, FFP's current permit application was considered in competition with Western Minnesota's permit application.<sup>5</sup> The Commission further determined that Western Minnesota satisfied the definition of a "municipality" under FPA section 3(7).<sup>6</sup> In addition, the Order found that both entities appeared to be in the early stages of project development and neither applicant claimed that its application was superior.<sup>7</sup> However, the Commission concluded that granting Western Minnesota municipal preference pursuant to FPA section 7(a) would not be in the public interest, given the distance between the project site in Iowa and the registered office location of Western Minnesota in Ortonville, Minnesota (almost 400 miles) and the lack of connection, beyond a business development interest, between the proposed project and Western Minnesota.<sup>8</sup> Because the Commission determined that Western Minnesota was not entitled to municipal preference and because there was no claim that either applicant's plan was better adapted than the other, the Commission issued a successive preliminary permit to FFP, based on the results of the first-in-time tiebreaker.<sup>9</sup>

8. Western Minnesota filed a request for rehearing on January 22, 2014. Western Minnesota argues that the plain language of FPA section 7(a) entitles all municipalities, as defined in FPA section 3(7), to the statutory preference and that the legislative history of the FPA supports the statutory language. In addition,

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<sup>5</sup> Order, 145 FERC ¶ 61,255 at P 14.

<sup>6</sup> 16 U.S.C. § 796(7) (2012).

<sup>7</sup> Order, 145 FERC ¶ 61,255 at P 16.

<sup>8</sup> *Id.* at P 19.

<sup>9</sup> *Id.* at P 20. Where preliminary permit applications are filed at the same time and none is better adapted than the other(s), the Commission uses a lottery to determine which applicant will be awarded the permit. *See Petersburg Mun. Power & Light v. FERC*, No. 10-1096 (D.C. Cir. 2011) (unpublished opinion) (upholding use of a lottery tie-breaker as reasonable).

Western Minnesota asserts that the Commission's interpretation is inconsistent with statutory and regulatory action subsequent to the enactment of FPA section 7(a), as well as Commission precedent. Finally, Western Minnesota claims that the Commission's policy justification for its interpretation is unsupported and that the new standard for determining which municipalities are entitled to the preference is impermissibly vague.

9. Also on January 22, 2014, APPA and PPC filed a joint motion to intervene out-of-time and request for rehearing. APPA and PPC argue that there is good cause for their late interventions because there was no indication prior to issuance of the Order that the Commission would announce a new, generally applicable interpretation of FPA section 7(a), and no party will be unduly prejudiced by APPA's or PPC's late intervention. In their request for rehearing, APPA and PPC raise issues similar to those of Western Minnesota.

## II. Discussion

### A. Motion to Intervene Out-of-Time

10. The Commission ordinarily denies motions to intervene at the rehearing stage, even when the petitioner claims that the decision establishes a broad policy of general application.<sup>10</sup> In ruling on a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d),<sup>11</sup> and consider, among other things, whether the movant had good cause for failing to file the motion within the time prescribed, whether the movant's interest is not adequately represented by other parties to the proceeding, whether any disruption to the proceeding might result from permitting the intervention, and whether any prejudice to or additional burdens upon the existing parties might result from permitting the intervention.

11. APPA and PPC claim that good cause exists for their failure to file a timely motion to intervene because there was no indication prior to the Order that these proceedings would impact their members as a group and these circumstances are "unusual." In addition, APPA and PPC assert that they are willing to accept the record as it stands and that no party will be unduly prejudiced by their late intervention. We find that, although the arguments on rehearing made by APPA and PPC are similar to those made by Western Minnesota, APPA's and PPC's interests as national organizations are somewhat different from Western Minnesota's interest as an applicant in this proceeding. Moreover, since the arguments raised by APPA and PPC focus on the reasonableness of the Commission's statutory interpretation, which has not been briefed before, permitting

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<sup>10</sup> See, e.g., *Cameron LNG, LLC*, 112 FERC ¶ 61,146, at P 6 (2005).

<sup>11</sup> 18 C.F.R. § 385.214(d) (2013).

their late intervention will not disrupt the proceeding or prejudice any party. For these reasons, APPA's and PPC's request for late intervention is granted.

## **B. Rehearing Requests**

12. The sole issue on rehearing is whether the December 2013 Order reasonably interpreted the scope of municipal preference in FPA section 7(a) to be limited to the development of water resources that are located in the vicinity of the municipality.<sup>12</sup> As discussed below, we find that the Order was based on reasonable construction of the statute.

13. Section 4(f) of the FPA<sup>13</sup> authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts required by section 9 of the FPA,<sup>14</sup> which in turn sets forth the material that must accompany an application for a license. The purpose of a preliminary permit is to preserve the right of the permit holder to have priority in applying for a license for the project being studied.<sup>15</sup> Because a permit is issued only to allow the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.<sup>16</sup>

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<sup>12</sup> Municipal preference is one of a limited set of preferences that give an advantage to certain applicants in what is otherwise a strictly competitive licensing scheme. Other preferences include permittee preference for an original license application and incumbent licensee preference for a relicense application. *See Great River Hydropower LLC*, 135 FERC ¶ 61,151, at P 14 (2011).

<sup>13</sup> 16 U.S.C. § 797(f) (2012).

<sup>14</sup> 16 U.S.C. § 802 (2012).

<sup>15</sup> 16 U.S.C. § 798 (2012); *see also, 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.").

<sup>16</sup> Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. A permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. *See, e.g., Three Mile Falls Hydro, LLC*, 102 FERC

14. Section 4(f) of the FPA further requires the Commission to give notice of an application for a preliminary permit filed by any person, association, or corporation in writing to any state or municipality “likely to be interested in or affected by such application.” In addition, section 4(f) requires the Commission to publish notice of the application once each week for four weeks in a daily or weekly newspaper published in “the county or counties in which the project or any part thereof or the lands affected thereby are situated.”<sup>17</sup>

15. Section 7(a) of the FPA provides that:

In issuing preliminary permits hereunder or original licenses where no preliminary permit has been issued, the Commission shall give preference to applications therefor by States and municipalities, provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region; and as between other applicants, the Commission may give preference to the applicant the plans of which it finds and determines are best adapted to develop, conserve, and utilize in the public interest the water resources of the region, if it be satisfied as to the ability of the applicant to carry out such plans.<sup>18</sup>

16. Section 3(7) of the FPA defines “municipality” as “a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.”<sup>19</sup>

17. On rehearing, Western Minnesota, APPA, and PPC argue that the Commission erred in holding that the municipal preference in FPA section 7(a) is ambiguous and that the notice requirement in FPA section 4(f) shows Congressional intent to limit municipal preference to municipalities located near a

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¶ 61,301 at P 6 (2003); *see also Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

<sup>17</sup> 16 U.S.C. § 797(f) (2012). Section 4.32 of the Commission’s regulations, 18 C.F.R. § 4.32 (2013), implements the notice requirements in FPA section 4(f).

<sup>18</sup> 16 U.S.C. § 800(a) (2012). Section 4.37 of the Commission’s regulations, 18 C.F.R. § 4.37 (2013), implements the rules of preference among competing applications.

<sup>19</sup> 16 U.S.C. § 796(7).

potential hydropower development site. Western Minnesota, APPA, and PPC argue that FPA section 7(a) unambiguously provides that all municipalities, as defined in FPA section 3(7), without exception, are entitled to preference and that the legislative history of the FPA is consistent with the plain language of section 7(a). In addition, Western Minnesota asserts that FPA section 4(f) can only be interpreted as a notice requirement and has nothing to do with entitlement to municipal preference. APPA and PPC similarly argue that the Commission erred in relying on FPA section 4(f) to support its interpretation.

18. As discussed below, we affirm our finding that the statute is ambiguous as to the geographic scope of municipal preference and that our construction of the statute is reasonable. Our determination is supported by the text of the statute, the legislative history, and sound public policy in limiting municipal preference to municipalities which have an interest in developing local water resources for municipal use. By comparison the interpretation of the statute advanced by Western Minnesota, APPA, and PPC – namely, that there is no geographic limit on the preference available to states or municipalities – is unsupported by the text or the history of the statute, and would not be in the public interest, given that it would authorize any municipality to claim priority on the basis of municipal preference over any new hydropower development site, regardless of the proximity of the municipality to the potential development site.

19. FPA section 7(a) is ambiguous as to the scope of municipal preference, and we reasonably concluded that the best reading of the statute is that municipalities should be accorded preference only with respect to the development of water resources that are located in their vicinity.<sup>20</sup> The Commission explained that it is appropriate that a municipality be granted preference in developing nearby hydropower sites for the benefit of its citizens. However, the Commission stated, it is difficult to discern what public interest is served by giving a municipality a preference with respect to a project that is far from the site of the municipality. As the Commission explained, to do so would effectively make municipalities super-competitors with respect to all new hydropower developments, regardless of their location.<sup>21</sup>

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<sup>20</sup> Order, 145 FERC ¶ 61,255 at P 17.

<sup>21</sup> *Id.*

20. An agency may look beyond the statutory text if a literal interpretation would lead to absurd<sup>22</sup> or mischievous<sup>23</sup> consequences or thwart the statute's manifest purpose.<sup>24</sup> Here, the Commission provided hypothetical examples of the undesirable consequences that could occur if the geographic scope of municipal preference were unlimited, as Western Minnesota argues. The first example is the case of a municipal entity located on the east coast claiming preference over a private entity seeking to develop a project in Hawaii. The second example is the case of a distant municipality competing for the same water resource as a municipal applicant located at the project site; if both entities could legitimately claim preference and filed applications at the same time, the distant municipality might win a tiebreaker drawing, thus depriving the nearby municipality of the right to utilize a local water resource.<sup>25</sup> We maintain that these types of consequences were not likely intended, or anticipated, by Congress in enacting FPA section 7(a).

21. In addition, a basic principle of statutory construction is that separate parts of a statute should be interpreted in a harmonious way.<sup>26</sup> For example, the Supreme Court found that its duty is to “construe statutes, not isolated provisions.”<sup>27</sup> Courts have also found that, when interpreting a statute, they “are

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<sup>22</sup> See *United States v. Katz*, 271 U.S. 354, 357 (1926).

<sup>23</sup> See *Caminetti v. United States*, 242 U.S. 470, 502 (1917) (McKenna, J., dissenting).

<sup>24</sup> See *Platt v. Union Pacific Railroad Co.*, 99 U.S. 48, 60-64 (1878).

<sup>25</sup> Order, 145 FERC ¶ 61,255 at P 17. In addition, the statutory text of FPA section 7(a) on its face limits municipal preference. Section 7(a) provides that the Commission shall give preference to applications by States and municipalities, “provided the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve and utilize in the public interest the water resources of the region.” (emphasis added). Thus, municipal preference applies only if the Commission determines that the plans of the applicant who is a State or municipality are at least as well adapted as those of a competing applicant. See 18 C.F.R. §§ 4.37(3) and (4) (2013). This language contradicts Western Minnesota’s claim that entitlement to municipal preference is absolute and unqualified. Western Minnesota rehearing request at 9.

<sup>26</sup> See, e.g., *Gustafson v. Alloyd Co.*, 513 U.S. 561, 568 (1995).

<sup>27</sup> *Id.* See also, *Energy Transfer Partners, L.P.*, 121 FERC ¶ 61,282, at P 56 (2007).

charged with the duty to consider the provisions of the whole law, its object, and its policy.”<sup>28</sup> In this circumstance, the structure of the FPA demonstrates the ambiguity regarding the scope of municipal preference. Both FPA sections 4(f) and 7(a) concern the issuance of preliminary permits for the purpose of enabling prospective hydropower license applicants to secure the data necessary to accompany a license application. Section 4(f) authorizes the Commission to issue preliminary permits and to notify states and municipalities “likely to be interested in or affected by” an application for a preliminary permit by a private developer. Section 7(a) requires the Commission to give preference to applications for preliminary permits by states and their municipalities, provided their plans are equally well adapted to conserve and utilize in the public interest the water resources of the region. The Order appropriately construed the municipal preference provision in FPA section 7(a) together with related FPA section 4(f). The existence of the qualifying language for municipalities in FPA section 4(f) creates an ambiguity as to which municipalities are entitled to preference in FPA section 7(a). In requiring written notice only to states and municipalities “likely to be interested in or affected by” a preliminary permit application, as opposed to all municipalities, it is reasonable to infer that Congress did not intend to extend municipal preference to all municipalities without exception. Otherwise, the qualifying language in FPA section 4(f) would be superfluous.<sup>29</sup>

22. In addition, there is judicial support for the Commission’s finding that FPA sections 7(a) and 4(f) should be construed together. Based on the legislative history of the statute, the court in *N. Colo. Water Conservancy Dist. v. FERC*<sup>30</sup> determined that the purpose of the written notice requirement in FPA section 4(f) was “primarily intended to allow states and municipalities to assert and thus protect their statutory preferences,” in FPA section 7(a).<sup>31</sup> We find a joint reading of these sections to be consistent with, and to support, our conclusion that the statute, read as a whole, properly grants municipal preference to municipalities seeking to develop local water resources, and not to all such entities without regard to their proximity to the water resource.

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<sup>28</sup> *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 516 (3d Cir. 1998) (citations omitted).

<sup>29</sup> *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is ‘a cardinal principle of statutory construction’ that ‘a statute ought, upon the whole, be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.’”) (citations omitted).

<sup>30</sup> 730 F.2d 1509 (D.C. Cir. 1984) (*N. Colo.*).

<sup>31</sup> *Id.* at 1513, citing 56 Cong. Rec. 9762 (Aug. 30, 1918) (comments of Rep. Sinnott).

23. Because the scope of the municipal preference in FPA section 7(a) is ambiguous, the only remaining question is whether the Order's interpretation that municipalities should be accorded preference only with respect to development of water resources that are located in their vicinity was based on a reasonable construction of the statute.<sup>32</sup> We believe that it was.

24. As a threshold matter, we note that section 7(a) was originally enacted in the Federal Water Power Act of 1920, when the nation's electric grid was relatively undeveloped and access to hydroelectric power was at a particular premium for municipalities seeking to provide electric power to their communities. Therefore, it seems reasonable to conclude that Congress intended only to give a preference to states and municipalities with respect to water resources in proximity to those public entities, to facilitate the development of those resources for the benefit of local consumers; conversely, it seems reasonable also to conclude that Congress did not intend to give states or their municipalities preference with respect to the development of remotely-located resources to the exclusion of other developers. Indeed, while the legislative history of municipal preference in the FPA is limited, much of the debate focused on public versus private development of water power resources, and the legislative history reflects a preference for the development of local water resources for local use. For example, during the Senate debate on S. 1419 as amended by the House, which included the municipal preference provision, the following exchanges occurred:

Mr. Shields. I desire to get the Senator's position in regard to ownership, as to the source of it. Is he advocating the control or ownership of all water power developed by the Federal Government or by the States in which the waters are to be found through their several agencies?

Mr. Borah. By the States in which the waters are to be found, except in an instance where, as I said a moment ago, by reason of the fact that they are serving across state lines, it might be necessary for the National Government to take control.

Mr. Shields. Where the interstate clause intervenes.

Mr. Borah. Yes; but as to intrastate business by all means by the development of local organizations, municipalities, and State subdivisions.

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<sup>32</sup> See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (stating that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

Mr. Shields. The Senator and I do not disagree about that; . . .

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Mr. Walsh. If a private party and a municipality both are asking for a permit, the permit must be given to the municipality under the provisions of the bill.

Mr. Borah. Is that mandatory?

Mr. Walsh. It is mandatory, as I understand from a reading of the bill. But if it is not I will agree with the Senator that it shall be made so.

Mr. Borah. That is precisely what I want. . . . When the people of a community decide they want public ownership I wish that to be final.

Mr. Walsh. The Senator and I are one on that point.<sup>33</sup>

This exchange demonstrates that Congress desired each state to be accorded preference in the control and ownership of water resources located in that state over private entities and to exercise that control and ownership through its political subdivisions, including local municipalities. It does not support Western Minnesota's, APPA's, and PPC's argument that all municipalities, regardless of their location, are equally and independently entitled to preference in applying for preliminary permits.<sup>34</sup>

25. In addition, as the Order states, it would be administratively impossible for the Commission to determine under FPA section 4(f) which municipalities were likely to be interested in a preliminary permit application filed by a private developer other than on the basis of proximity. This interpretation is consistent

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<sup>33</sup> 56 Cong. Rec. 10,482, 10,484 (1918). In its rehearing request, Western Minnesota selectively quotes from the second exchange, but omits the last two sentences concerning local communities. Western Minnesota rehearing request at 17. Western Minnesota also claims that the second exchange demonstrates that Congress intended municipalities to use their statutory entitlement to develop hydroelectric projects "wherever it made sense for them to do so." *Id.* at 19. However, the debate text does not support this claim.

<sup>34</sup> *See also* Statement of Sen. Nugent (ID): "I am very strongly of the opinion that the States and the counties, municipalities, and other political subdivisions of the States in which these water-power sites are situated should have the right to develop them for the use of the people of those States, counties, or municipalities, as the case may be." 59 Cong. Rec. 1571 (Jan. 15, 1920) (emphasis added).

with the Commission's longstanding policy, as implemented in section 4.32(a)(2) of the Commission's regulations,<sup>35</sup> that a town's or city's population and 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.<sup>36</sup>

26. We are not persuaded by Western Minnesota's, APPA's, and PPC's arguments in support of their interpretation that Congress did not intend that there be any geographical limitation on municipal preference. Western Minnesota, APPA, and PPC rely primarily on the isolated statutory text of FPA section 7(a), which states that in issuing preliminary permits, preference shall be given to "states and municipalities" without any qualifying language. However, this argument ignores the other related provisions of the statute, particularly FPA section 4(f), which, as explained above, when read together with FPA section 7(a) indicates that municipal preference is not unqualified.<sup>37</sup> Moreover, the legislative

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<sup>35</sup> 18 C.F.R. § 4.32(a)(2). The regulations provide that a permit application must identify and provide addresses for: (1) every county, city, town (or similar local political subdivision), or irrigation district in which any part of the project is located; (2) every city, town, or similar 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. *See also Valley Affordable Housing Corp.*, 141 FERC ¶ 61,038 (2012) (water pollution abatement district located 34 miles upstream of the proposed project was sufficiently far away to not be considered "in the general area" of the project; district's stated interest in the potential effect on water quality was determined not to be a sufficient interest to warrant written notice of the permit application).

<sup>36</sup> *See City of Idaho Falls*, 20 FERC ¶ 61,066, at 61,140 (1982).

<sup>37</sup> Western Minnesota mischaracterizes the Order in stating that it "equates" the phrase in FPA section 4(f) "likely to be interested in or affected by" a proposed property with "shall give preference to" in FPA section 7(a). Western Minnesota rehearing request at 12. APPA and PPC similarly misconstrue the Order. APPA/PPC rehearing request at 17-19. The Order states that its interpretation of the geographical limits inherent in municipal preference is buttressed by section 4(f), which qualifies which states and municipalities are entitled to written notice of a permit application; the Order does not state that the phrases are identical in meaning. Western Minnesota also argues that municipalities may be "interested in or affected by" another entity's proposed project for a host of reasons that have nothing to do with whether or not the municipality wishes to develop the project. *See also APPA/PPC rehearing request* (continued...)

history cited by Western Minnesota, APPA, and PPC does not support their theory of unlimited geographic entitlement to municipal preference, but only affirms the general principle that the Commission must give preference to states where specific water resources are located and their political subdivisions, including municipalities, over private developers. Western Minnesota, APPA, and PPC ignore the legislative history that demonstrates that municipal preference was intended to promote the development by states, through their political subdivisions, of local water resources.

27. For example, APPA and PPC argue that Congress “deliberately” chose not to adopt geographic limitations on the scope of municipal preference.<sup>38</sup> This argument is misplaced. The legislative history demonstrates that the proposed amendment referenced by APPA and PPC was not adopted (or even offered as a formal amendment), not because it included the term “local municipality” (as well as development of sites “which may be reasonably adjacent to or available for the community in which the site is located”), but because it would have limited the amount of time a local municipality would be able to apply for a license. A careful reading of the debate shows much discussion of municipal preference in the context of local municipalities.<sup>39</sup> APPA and PPC assert that the House Water Power Committee rejected language that would have limited municipal preference to “municipal purposes.”<sup>40</sup> Again, a careful reading of the debate shows that committee members were concerned that if preference were limited to “immediate” municipal purposes, it could prevent municipalities from developing local water resources that may be needed in the future, in the event the municipality’s population and corresponding water power needs grew.<sup>41</sup> The debate demonstrates that Congress was primarily interested in local municipalities using local water resources for municipal purposes, whether for immediate or future water power needs.

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at 18. However, these other reasons are not relevant to the primary purpose of FPA section 4(f), which is to enable municipalities to prepare competitive applications. *See N. Colo.*, 730 F.2d at 1526, n.2 (MacKinnon, concurring) (“The purpose of the municipal preference . . . is not to provide notice to municipalities which may generally be interested in keeping informed, but to alert municipalities which may wish to compete for the permit in question.”).

<sup>38</sup> APPA/PPC rehearing request at 14-15.

<sup>39</sup> *See* Hearings before the House Water Power Committee, 65th Cong. 798-806 (1918).

<sup>40</sup> APPA/PPC rehearing request at 14, citing 58 Cong. Rec. 2039 (1919).

<sup>41</sup> *See* 58 Cong. Rec. 2039-2040 (1919).

28. Western Minnesota, APPA, and PPC make several arguments in attempting to show that FPA section 4(f) does not support the Order's interpretation of municipal preference, but none is convincing. For example, Western Minnesota argues that when Congress enacted the Electric Consumers Protection Act of 1986,<sup>42</sup> it amended FPA section 9 to require applicants for an original license to notify by certified mail any Federal, State, municipal or other local agency "likely to be interested in or affected by such application." Western Minnesota argues that the inclusion of this language in FPA section 9, which applies to non-applicants for which municipal preference is irrelevant, must mean that the same language in FPA section 4(f) also has nothing to do with municipal preference.<sup>43</sup> However, this argument ignores the legislative history and court precedent directly tying section 4(f) to section 7(a).

29. Western Minnesota further claims that the only logical reading of the notice provision in FPA section 4(f) affirms that Congress did not intend to limit the preference to municipalities near a project, because the notice requirement only applies if a non-municipality files a permit application. Western Minnesota reasons that if Congress intended the notice requirement to apply to local municipalities, it obviously would have required notice to be given to local municipalities in every case, including where a non-local municipality files a permit application.<sup>44</sup> However, a more logical reading is that Congress never intended or even anticipated that a municipality would propose to develop a project at a distant location in another state (or that such municipality would claim municipal preference). As discussed above, section 7(a) was originally enacted in the Federal Water Power Act of 1920, when the nation's electric grid was relatively undeveloped. Given this state of the grid, it is unlikely that Congress envisioned that municipalities might seek to develop distant projects when they would be unable to make use of the power that would result from such projects. Thus, there was no reason for Congress to include a notice requirement for such an unlikely situation.<sup>45</sup>

30. In another attempt to bolster its theory of unlimited municipal preference, Western Minnesota cites several examples of municipal development where the municipality is located in the same region as the project, but not "in the vicinity

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<sup>42</sup> Pub. L. No. 99-495, 100 Stat. 1243 (Oct. 16, 1986).

<sup>43</sup> Western Minnesota rehearing request at 13.

<sup>44</sup> *Id.* at 12. *See also* APPA/PPC rehearing request at 18.

<sup>45</sup> Although section 4(f) does not require notice in writing to interested municipalities of the applications of other municipalities, the Commission, as a matter of policy, provides such notice as a courtesy. *See, e.g., City of Idaho Falls*, 20 FERC at 61,140.

of’ or “nearby” the proposed project.<sup>46</sup> Western Minnesota argues that regional municipalities may have the same power development interest as local municipalities and are thus “likely to be interested;” therefore, Western Minnesota argues, the Commission’s interpretation of and reliance on section 4(f) to limit the municipal preference is incorrect. Western Minnesota misconstrues the Order. The Order does not state that the “likely to be interested” language in FPA section 4(f), as implemented in the notice regulations, dictates which municipalities are entitled to preference under FPA section 7(a). Instead, the Order states that, as a matter of statutory construction, the existence of language qualifying municipalities in FPA section 4(f) buttresses the Order’s interpretation that FPA section 7(a) is ambiguous with respect to the scope of municipal preference.<sup>47</sup>

31. Western Minnesota also asserts that the Order’s interpretation is inconsistent with statutory action subsequent to enactment of the municipal preference in FPA section 7(a) and Commission precedent, since neither body has ever suggested that the entitlement applies to anything other than all municipalities.<sup>48</sup> However, the fact is that neither Congress nor the Commission has ever faced the precise question of whether preference should be given to a municipality with respect to a project that is far from the site of the municipality. Thus, contrary to Western Minnesota’s claim, its theory that all municipalities are entitled to the preference regardless of location is not and has never been a “universally accepted” interpretation.<sup>49</sup> In addition, Western Minnesota, APPA, and PPC argue that the Commission’s interpretation is at odds with its precedent rejecting physical proximity to a project site as an appropriate basis for favoring

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<sup>46</sup> Western Minnesota rehearing request at 14-18.

<sup>47</sup> The Commission has stated on several occasions that the fact that a town or city receives written notice of an application does not constitute a determination that the town or city qualifies as a municipality under FPA section 3(7). *See, e.g., City of Idaho Falls*, 20 FERC at 61,140 n.3. The Commission also has acknowledged that its notice regulations in some cases would be overly expansive, while in other cases certain interested municipalities may not be included in an applicant’s list, but, as a general matter, they would reflect a reasonable interpretation of who should be notified under FPA section 4(f). *See Allegheny Elec. Coop., Inc.*, 29 FERC ¶ 61,208, at 61,422 (1984) (“[M]any towns and cities have expressed an interest in developing projects located within their borders.”).

<sup>48</sup> Western Minnesota rehearing request at 22-25, 29.

<sup>49</sup> *Id.* at 22.

one applicant over another.<sup>50</sup> As explained below, we disagree that there is any inconsistency.

32. The cases cited by Western Minnesota all concern factors that should be considered in determining whether, under FPA section 7(a), a permit or license applicant's plans are better adapted to develop, conserve, and utilize in the public interest the water resources of the region. The statute provides that the Commission must give preference to applications by states or municipalities over private developers, provided that their plans are at least as well adapted or can be made equally well adapted within a reasonable time. This "better-adapted" determination also applies where competing applications are submitted by non-public applicants. Similarly, the majority of the cases cited by APPA and PPC involve factors that should be considered in determining, under the *proviso* in FPA section 7(a), whether an applicant's plans are superior to its competitor's plans. None of these decisions establishes precedent concerning the issue of whether geographical proximity is relevant to the scope of municipal preference. The factors used to determine if an applicant's plans are better adapted have never been used by the Commission to define the scope of municipal preference under FPA section 7(a), and the issue of proximity in the context of municipal preference has not been directly addressed by the Commission before now.

33. Western Minnesota further asserts that the examples of undesirable consequences provided in the Order, if all municipalities regardless of location were entitled to preference over non-municipalities, do not make sense.<sup>51</sup> Western Minnesota disagrees with the first example, in which a mainland municipality could claim the preference to study or develop a project in Hawaii, on the basis that it is not "realistic."<sup>52</sup> Western Minnesota asserts that a mainland municipality would not apply for such a permit, because it "could not make use of the power that would result from the project." Western Minnesota further argues that no municipality has attempted, or will ever attempt, to use the preference to study or develop water resources outside of the region in which the municipality is located and which will not benefit the municipality's electric utility customers. Western Minnesota's assertions are unsupported; given the evolving electric market and regulatory environment, it is not unlikely that municipalities may claim entitlement to preference in a variety of circumstances beyond the uses intended

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<sup>50</sup> Western Minnesota rehearing request at 29 and n.94; APPA/PPC request for rehearing at 19-20, 24-25.

<sup>51</sup> Western Minnesota rehearing request at 25-31.

<sup>52</sup> *Id.* at 26.

by Congress, if no geographical limits exist.<sup>53</sup> Moreover, if Western Minnesota's theory were to be adopted, a municipality could seek preference at distant projects in order to reap the purely financial benefits, a scenario we see no reason to believe Congress intended to create.

34. Western Minnesota makes a different argument with respect to the second example, in which a distant municipality could file an application for a permit or license at the same time as a local municipality and win a tiebreaker drawing, thus depriving the nearby municipality of the right to utilize a local water resource. Western Minnesota does not claim that such a scenario could never happen; it simply asserts that the FPA does not provide that local municipalities have any preferential right to use local water resources and that the Commission's interpretation is inconsistent with the "regional development context" of FPA section 7(a).<sup>54</sup> This claim is merely a variation of Western Minnesota's basic argument that Congress did not favor municipalities located near a project site and has already been addressed in this order.

35. By contrast, APPA and PPC argue that the hypothetical examples would not produce results that are absurd or even inconsistent with the public interest, given that private entities located some distance from a project regularly own and operate

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<sup>53</sup> To the extent Western Minnesota's argument can be read as suggesting that municipal preference should be accorded only to municipalities located in the region where the project is located for the benefit of the municipality's electric utility customers, as opposed to a speculative business venture, its disagreement appears to be with the Commission's interpretation of the extent of the geographical limit on municipal preference, not that there is a geographical limit. Although Western Minnesota also asserts that the Commission's interpretation is inconsistent with its open transmission access policy, that is not the Commission's intent nor does the Commission believe that its interpretation will have any adverse effects on open transmission access.

<sup>54</sup> Western Minnesota rehearing request at 27-28. Western Minnesota also claims that no harm will result from a non-local municipality developing a project in the vicinity of a competing local municipality, since municipalities have many options to satisfy their power supply needs beyond local hydropower development. Obviously, a local municipality would benefit economically from its own development and use of nearby water resources for the benefit of its citizens. Congress could not have intended that municipal preference would work to the disadvantage of local municipalities. On the other hand, Western Minnesota has failed to demonstrate that any harm will result from the inability of a non-local municipality to claim municipal preference. Those municipalities also have many options to satisfy their power supply needs, and they, like any applicant, can still compete for distant projects on the merits of their plans.

Commission-licensed hydroelectric projects.<sup>55</sup> APPA and PPC miss the point. The Commission does not interpret the FPA to prohibit municipalities from owning or operating distant projects; we simply believe that Congress did not intend for municipalities to be entitled to municipal preference for distant projects.

36. Finally, Western Minnesota, APPA, and PPC argue that the standards in the Order for determining which municipalities are entitled to the preference are impermissibly vague.<sup>56</sup> We disagree. The Order interpreted FPA section 7(a) to accord preference to municipalities only with respect to the development of water resources that are located “in their vicinity.” The Order also held that it is appropriate that a municipality be granted preference in developing “nearby” hydropower sites for the benefit of its citizens. Western Minnesota, APPA, and PPC claim that the language “in the vicinity” and “nearby” provides potential applicants no useful guidance. We find no reason to further define these terms here. The municipalities defined in section 4.32(a)(2)(ii) of the Commission’s regulations would obviously be “nearby” or “in the vicinity” of the site of a project; however, other municipalities located nearby, but outside the limits of section 4.32(a)(2)(ii), might also be entitled to municipal preference. Any more precise definition would eliminate the flexibility which may be necessary in any particular situation. In any event, it is not necessary to define these terms more precisely here. The proposed site in this case is clearly not “in the vicinity” or “nearby” Western Minnesota’s registered office located in a different state almost 400 miles away or any of its members, all of which are located in Minnesota.

37. Western Minnesota also mischaracterizes the Order as establishing a standard that, in addition to the municipal power supply and economic development benefits, a municipality must demonstrate an unspecified “connection” to the project in order to be entitled to municipal preference.<sup>57</sup> In fact, the Order states that it would not be in the public interest to grant municipal preference to Western Minnesota, given its distance from the project and the lack of evidence of any connection, beyond a business development interest, between Western Minnesota and the proposed project.<sup>58</sup> This conclusion merely applies the Order’s earlier finding - that municipalities should be accorded preference only with respect to the development of water resources that are located in their vicinity for the benefit of its citizens - to Western Minnesota’s circumstances. In its permit application and other pleadings, Western Minnesota did not

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<sup>55</sup> APPA/PPC rehearing request at 19.

<sup>56</sup> Western Minnesota rehearing request at 31-32; APPA/PPC rehearing request at 23.

<sup>57</sup> Western Minnesota rehearing request at 32.

<sup>58</sup> Order, 145 FERC ¶ 61,255 at P 19.

present any facts that would indicate that it wished to develop the proposed site for the benefit of its citizens. The record only indicated that Western Minnesota and its members were located in another state far from the proposed project; nothing in the record indicates that the power generated from the project would be transmitted to Minnesota.<sup>59</sup> Thus, the Order reasonably concluded that it would not be in the public interest to grant municipal preference to Western Minnesota.<sup>60</sup>

38. Based on the foregoing, we deny Western Minnesota's, APPA's, and PPC's requests for rehearing.

The Commission orders:

(A) The motion to intervene out-of-time filed by APPA and PPC on January 22, 2014, is granted.

(B) The requests for rehearing filed by Western Minnesota, APPA, and PPC on January 22, 2014, are denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>59</sup> See March 8, 2013 letter from Missouri River Energy Services (MRES) to FERC, Exhibits 3-2 and 3-3.

<sup>60</sup> In its rehearing request, Western Minnesota attempts to establish a local connection to the project by stating that it has a long-term capacity contract with and is a member of MRES, a multi-state joint-action agency which serves 61 municipalities with electric utilities in a four-state upper Midwest region, including municipalities in Iowa, where the proposed project will be located. Western Minnesota rehearing request at 8. This description suggests that Western Minnesota does not intend to develop the water resources associated with the Saylorville Dam for the use of its members, all of which are located in Minnesota.