

152 FERC ¶ 61,045
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Philip D. Moeller, Cheryl A. LaFleur,
Tony Clark, and Colette D. Honorable.

KC Hydro LLC of New Hampshire

Project No. 14245-001

ORDER DENYING REHEARING

(Issued July 16, 2015)

1. On April 15, 2015, Commission staff issued an order denying KC Hydro LLC of New Hampshire's (KC Hydro) request for a two-year extension of its preliminary permit for the proposed Pittsfield Mill Dam Hydropower Project No. 14245-000 (Pittsfield Project).¹ On April 30, 2015, KC Hydro filed a request for rehearing of the denial. This order denies the request for rehearing.

I. Background

2. On May 23, 2012, Commission staff issued a three-year preliminary permit to KC Hydro for the proposed Pittsfield Project.² The proposed project would be located at the New Hampshire Department of Environmental Service's (New Hampshire DES) Pittsfield Mill dam, located on the Suncook River, in the Town of Pittsfield, Merrimack County, New Hampshire. KC Hydro proposes two possible configurations for its project: one proposal would use the existing powerhouse containing a 415-kilowatt (kW) turbine and appurtenant facilities adjacent to the Pittsfield dam, which are owned by Amenico Green Solutions, LLC (Amenico), and the second option would require construction of new powerhouse facilities with a total installed capacity of 530 kW. Specifically, the project would include: (1) the existing 470-foot-long, 16-foot-high Pittsfield Mill dam;

¹ *KC Hydro LLC of New Hampshire*, 151 FERC ¶ 62,031 (2015).

² *KC Hydro LLC of New Hampshire*, 139 FERC ¶ 62,148 (2012) (Order Issuing Preliminary Permit, Granting Priority to File a License Application, and Denying Competing Application). The order denied Amenico Green Solutions, LLC's (Amenico) competing preliminary permit application for the same site.

(2) an existing 20-acre impoundment; and (3) either Amenico's existing powerhouse or a new powerhouse. The proposed project would have an estimated annual generation of approximately two gigawatt hours.

3. Standard Article 4 of preliminary permits requires a permittee to submit a progress report every six months describing the specific nature of the progress made in preparing an adequate license application during that six-month period.

4. During its preliminary permit term, KC Hydro's progress reports described the following activities: a site visit with New Hampshire DES; an internet database search of the New Hampshire Natural Heritage Bureau database for rare plant and wildlife species in the project area; an April 2014 meeting with the U.S. Fish and Wildlife Service and key state agencies³ to discuss restoring fish passage in certain watersheds;⁴ and a meeting with a turbine manufacturer. KC Hydro stated in several of the reports that the project could be delayed because of KC Hydro's continued inability to reach an agreement with Amenico to use its existing powerhouse and turbine.

5. On March 27, 2015, KC Hydro requested a two-year extension of its preliminary permit, which was due to expire on April 30, 2015. On April 15, 2015, Commission staff denied the requested extension.⁵ The order stated that KC Hydro had not demonstrated that it had carried out activities under the permit with reasonable diligence and that the six-month progress reports required by standard Article 4 of the permit did not contain sufficient evidence of agency consultation, preparation of environmental studies, or other specific information evidencing progress towards the development of a license or exemption application.⁶ The order also explained that holding a site and delaying its assessment in hopes that a third party changes its mind about collaboration on a proposed

³ The names of the other agencies were not identified in the progress reports.

⁴ Five of KC Hydro's progress reports included the activities KC Hydro undertook for the Pittsfield Project and seven to nine other projects for which it held preliminary permits as well. The August 4, 2014 progress report stated that KC Hydro met with the U.S. Fish and Wildlife Service and other state agencies, but it is unclear which of the seven projects listed in that progress report were actually discussed during the meeting.

⁵ 151 FERC ¶ 62,031 (2015).

⁶ *Id.* at P 6.

project constituted site banking.⁷ The order concluded that lack of diligence during the three-year term of the preliminary permit warranted denial of an extension.

6. On April 30, 2015, KC Hydro filed a request for rehearing of the April 15, 2015 order. On the same day, KC Hydro filed an application for an exemption from licensing for the Pittsfield Project. On June 5, 2015, Commission staff rejected the exemption application as patently deficient.⁸

II. Discussion

7. Sections 4(f) and 5 of FPA authorize the Commission to issue preliminary permits to potential license applicants for a period of up to three years.⁹ In 2013, Congress amended section 5 of the FPA to provide that a preliminary permit term may be extended once for not more than two additional years if the Commission finds that the permittee carried out activities under the permit in good faith and with reasonable diligence.¹⁰

8. In general, the Commission has interpreted pursuing the requirements of a permit in good faith and with reasonable diligence to mean that, at a minimum, a permittee timely filed progress reports, consulted with resource agencies, and conducted

⁷ *Id.* at P 8. The essence of the Commission's 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. *Id.* (citing *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at PP 26-27 (2012)).

⁸ See June 5, 2015 letter from Commission staff. Commission staff found KC Hydro's application patently failed to substantially comply with the Commission's regulations and cited numerous deficiencies, including the failure to complete the Commission's three-stage pre-filing consultation process, the lack of documentation that it had the property rights necessary to develop the project, the failure to describe the environmental resources at the project and the project's potential impacts on those resources, the lack of Exhibit F (Project Facilities) Drawings, the lack of descriptions, dimensions, and type of construction materials for new facilities, and the failure to provide adequate Exhibit G (Project Boundary) Drawings.

⁹ 16 U.S.C. §§ 797(f), 798 (2012).

¹⁰ Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, § 5, 127 Stat. 495 (codified as amended at 16 U.S.C. § 798(b) (2012)).

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.¹¹

9. On rehearing, KC Hydro recites the good faith and reasonable diligence standard and states only that “[w]hile it may not have been evident when the motion for two-year extension was timely submitted, an application for exemption from licensing is being submitted before the expiration of this preliminary permit.”¹²

10. KC Hydro's activities under its preliminary permit did not demonstrate good faith and reasonable diligence. KC Hydro performed no studies during the three-year permit term and engaged in only one agency consultation meeting. The filing of a patently deficient exemption application on the last day of the permit term does not remedy the lack of diligence. Indeed, KC Hydro acknowledges that the project proposed in its exemption application is not the one it wishes to pursue and that, if its permit were extended, it would use the time to attempt to reach an agreement with Amenico (owner of the existing powerhouse) that would allow for development of a different, preferred project proposal.¹³ Accordingly, we cannot give weight to the exemption application.

11. Based on the foregoing, we deny KC Hydro's request for rehearing. We note, however, that holding a preliminary permit is not a prerequisite to pursuing a development application, so that KC Hydro remains free to pursue development of the Pittsfield Project site.

The Commission orders:

KC Hydro LLC of New Hampshire's request for rehearing, filed on April 30, 2015, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹¹ See, e.g., *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 26 (2012).

¹² Request for Rehearing at 3.

¹³ *Id.* at 2-3.