

155 FERC ¶ 61,055
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Columbia Basin Hydropower

Project Nos. 14316-002
14318-002
14349-002
14351-002

ORDER DENYING REHEARING

(Issued April 21, 2016)

1. On January 15, 2016, Commission staff issued an order denying Columbia Basin Hydropower's (Columbia Basin) requests for 2-year extensions on the term of its preliminary permits for the following proposed projects: the PEC 1973 Drop Hydroelectric Project No. 14316, the Scootney Inlet Drop Hydroelectric Project No. 14318, the P.E. 16.4 Wasteway Hydroelectric Project No. 14349, and the P.E. 46A Wasteway Hydroelectric Project No. 14351.¹ Each of the proposed projects would be located on a wasteway or irrigation canal within the U.S. Bureau of Reclamation's (Reclamation) Columbia Basin Project in Franklin County, Washington. On February 16, 2016, Columbia Basin filed a timely request for rehearing of the order denying its permit extensions. This order denies Columbia Basin's request for rehearing.

¹ *Columbia Basin Hydropower*, 154 FERC ¶ 62,030 (2016) (January 15 Order).

I. Background

2. On March 26, 2013, Commission staff issued preliminary permits to Columbia Basin² to study the feasibility of the four above-named projects.³ Each project would consist of an intake diversion canal with an intake gate structure, a steel penstock, a powerhouse with a single turbine/generating unit ranging from 1.6 megawatts (MW) to 2.2 MW, and a transmission line.

3. On December 9, 2015, Columbia Basin filed timely requests for 2-year extensions of the four preliminary permits, which were all due to expire on February 29, 2016. On December 28, 2015, Percheron Power, LLC (Percheron) filed an answer and protest in response to Columbia Basin's extension requests for the PEC 1973 Drop Project and the Scootene Inlet Drop Project, stating that Columbia Basin did not pursue development of the projects in good faith or with due diligence. On January 8, 2016, Columbia Basin filed an answer to Percheron's protest, which was rejected as an impermissible answer to a protest.⁴

4. On January 15, 2016, Commission staff denied Columbia Basin's requested extensions because its progress reports did not demonstrate sufficient progress toward the preparation of development applications. The order explained that, during the term of its permits, Columbia Basin did not file notices of intent (NOI) and preliminary application documents (PAD) to initiate pre-filing consultation, had not engaged in any resource agency consultation, or made any effort to identify and develop environmental studies needed to prepare development applications. In addition, the order noted that each of the five progress reports filed by Columbia Basin was very similar, and mainly discussed the

² At the time the permits were issued, Columbia Basin was called the Grand Coulee Project Hydroelectric Authority.

³ *Grand Coulee Project Hydroelectric Authority*, 142 FERC ¶ 62,252 (2013) (PEC 1973 Drop Project No. 14316); 142 FERC ¶ 62,247 (Scootene Inlet Drop Project No. 14318); 142 FERC ¶ 62,250 (P.E. 16.4 Wasteway Project No. 14349); and 142 FERC ¶ 62,249 (P.E. 46A Wasteway Project No. 14351).

⁴ January 15 Order, 154 FERC ¶ 62,030 at n.7. On rehearing, Columbia Basin contends that Commission staff adopted Percheron's arguments in the extension denial order and, by not considering Columbia Basin's response to Percheron's filing, denied Columbia Basin an opportunity to respond to those arguments. Commission staff's denial was based entirely on Columbia Basin's own filings in the record, and not on Percheron's protest. Columbia Basin's answer was an improper answer to a protest, and was properly rejected. *See* 18 C.F.R. § 385.213(a)(2) (2015).

economic feasibility of the projects.⁵ The order concluded that Columbia Basin's lack of diligence under the term of its preliminary permits warranted denying the permit extensions.

5. On February 16, 2016, Columbia Basin filed a request for rehearing of the January 15 Order.

II. Discussion

6. Sections 4(f) and 5 of the Federal Power Act (FPA)⁶ authorize the Commission to issue preliminary permits to potential development applicants for a period up to 3 years. In 2013, Congress amended the FPA to provide that a preliminary permit can be extended once for not more than 2 additional years beyond the 3-year term allowed, if the Commission finds that the permittee has carried out activities under the permit in good faith and with reasonable diligence.⁷

7. In general, pursuing the requirements of a permit in good faith and with reasonable 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 progress reports a pattern of progress toward the preparation of a development application.⁸

⁵ Columbia Basin filed separate progress reports for each of its four projects, for a total of twenty progress reports; however, the content of the progress reports did not differ between the projects.

⁶ 16 U.S.C. §§ 797(f) and 798 (2012).

⁷ Pub. L. No. 113-23, § 5, 127 Stat. 495 (codified as amended at 16 U.S.C. § 798(b)).

⁸ *KC Pittsfield LLC*, 147 FERC ¶ 61,040 (2014); *Cascade Creek, LLC*, 140 FERC ¶ 61,221, at P 26 (2012) (citing to section 4(f) of the FPA, 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

(continued ...)

8. On rehearing, Columbia Basin argues that Commission staff incorrectly applied the standard for granting a permit extension by failing to consider the totality of the record. In particular, Columbia Basin asserts that staff did not appreciate the steps it took during the term of its permits or the “innovative,” “non-traditional” nature of its proposed projects. Columbia Basin also presents, for the first time on rehearing, additional information to show an extension is warranted.⁹

9. After a review of the record, we affirm staff’s finding that Columbia Basin did not pursue its development applications in good faith and with reasonable diligence during the term of its permits so as to warrant extensions of those permits. Columbia Basin’s activities were largely limited to performing market analyses and conducting feasibility studies,¹⁰ both of which are general, initial steps that do not, without more, demonstrate significant progress toward preparing a development application. Columbia Basin’s progress reports and other filings contain virtually no information about preparing a PAD or other development materials. In addition, there is no evidence that Columbia Basin has conducted any environmental studies or consulted with resource agencies, aside from one meeting with Washington State Fish and Wildlife, which was mentioned for the first time in Columbia Basin’s request for rehearing. Moreover, although Columbia Basin terms its projects innovative, they do not appear substantially different from other projects located on conduits or irrigation canals¹¹ so as to merit the Commission treating these preliminary permit proposals differently or under a more lenient standard than other project proposals.

studies the applicant must conduct to obtain that information prior to the filing of a license application. 18 C.F.R. § 4.38 (2015)).

⁹ Columbia Basin states that it has completed an additional feasibility report and notes that on August 26, 2015, it met with representatives from Washington State Fish and Wildlife to discuss potential impacts of its proposed projects.

¹⁰ Columbia Basin has also engaged in site trips to the proposed project site and to similar hydroelectric projects, and held meetings with Franklin Public Utility District regarding its interest in purchasing the power generated from the projects.

¹¹ Although Columbia Basin claims it is still assessing whether it will utilize emerging turbine technologies, the general nature of its project proposal is not unique. For example, see *Idaho Irrigation Dist.*, 135 FERC ¶ 62,023 (2011); *Hydrodynamics, Inc.*, 132 FERC ¶ 62,193 (2010); *Hydrodynamics, Inc.*, 131 FERC ¶ 62,190, for orders issuing preliminary permits for other similarly-designed, low head projects proposed at Reclamation irrigation canals.

10. Columbia Basin also argues that denying its permit extensions is inconsistent with Commission precedent. In particular, Columbia Basin notes that staff granted an extension request for its Pinto Dam Hydroelectric Project No. 14380 upon substantially similar facts.¹²

11. We disagree. There are numerous instances where Commission staff has denied a preliminary permit extension when the applicant failed to demonstrate evidence of agency consultation, environmental studies performed, or progress toward completing and filing an NOI and PAD, similar to the case here.¹³ In addition, Commission staff's grant of an extension for Columbia Basin's Pinto Dam Project was not, as Columbia Basin alleges, based on similar facts. In that case, staff found that an extension was warranted because Columbia Basin needed an additional irrigation season in order to obtain flow history data and forecasts from Reclamation in order to determine a consistent annual operation, and Reclamation was a year behind schedule in providing that information. There is no similar explanation as to why Columbia Basin was unable to make progress in developing the four proposed projects discussed in this order.

12. For the reasons discussed above, we deny rehearing and affirm Commission staff's denial of the permit extensions.

The Commission orders:

Columbia Basin Hydro's request for rehearing, filed on February 16, 2016, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

¹² *Columbia Basin Hydropower*, 152 FERC ¶ 62,044 (2015).

¹³ *See, e.g., North Star Hydro Services CA, LLC*, 153 FERC ¶ 62,071 (2015); *Peak Hour Power, LLC*, 150 FERC ¶ 62,194 (2015); *Arizona Independent Power, Inc.*, 148 FERC ¶ 62,069 (2014).