

156 FERC ¶ 61,044
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

BOST1 Hydroelectric LLC

Project No. 13458-003

ORDER DENYING REHEARING

(Issued July 21, 2016)

1. BOST1 Hydroelectric LLC (BOST1) has filed a request for rehearing of a January 20, 2016 Commission staff order denying BOST1's application for a successive preliminary permit to study the proposed Coon Rapids Dam Hydroelectric Project No. 13458 (Coon Rapids Project),¹ to be located at the Three Rivers Park District's (Park District) Coon Rapids Dam on the Mississippi River in Hennepin and Anoka Counties, Minnesota. This order denies the request for rehearing.

I. Background

2. On October 7, 2010, Commission staff issued a 3-year preliminary permit to BOST1 for the proposed Coon Rapids Project.² The proposed project would include construction of a new powerhouse at the dam with 16 turbine generating units having a total installed capacity of 9.45 megawatts. The Park District owns the Coon Rapids Dam and reservoir and all the land that the Coon Rapids Project would occupy. The lands are part of the Coon Rapids Dam Regional Park, which was established in 1978.³ The permit was set to expire September 30, 2013.

¹ *BOST1 Hydroelectric LLC*, 154 FERC ¶ 62,034 (2016) (January 20 Order).

² *BOST1 Hydroelectric LLC*, 133 FERC ¶ 62,027 (2010).

³ The project also would use the Park District's flowage rights in lands adjacent to the reservoir.

3. On March 21, 2012, BOST1 filed a Pre-Application Document and a Notice of Intent to file a license application using the Commission's traditional licensing process.⁴ On August 30, 2013, the company filed a timely request for a 2-year extension of its preliminary permit.⁵ On September 6, 2013, Commission staff granted the request, thereby extending the permit term until September 30, 2015.⁶ On September 28, 2015, BOST1 filed a Draft License Application.

4. On October 1, 2015, BOST1 filed an application for a successive preliminary permit. The application stated⁷ that BOST1 would be able to file a final license application after it secured a financial partner for the project, negotiated an agreement with the Park District to allow development of the project,⁸ performed hydraulic modeling of flow patterns downstream of the proposed powerhouse, and prepared a Supporting Design Report.⁹

⁴ The Commission's regulations for hydropower development applications establish three license application processes: the integrated licensing process, the alternative licensing process, and the traditional licensing process. *See generally*, 18 C.F.R. Part 4, Subpart D (traditional process), 18 C.F.R. § 4.34(i) (alternative process), and 18 C.F.R. Part 5 (integrated process) (2015).

⁵ 18 C.F.R. § 4.82(c) (2015).

⁶ *BOST1 Hydroelectric LLC*, 144 FERC ¶ 62,215 (2013) (finding that BOST1 had pursued development of the project with due diligence during its permit term).

⁷ BOST1's October 1, 2015 application for successive permit at 20.

⁸ Because the Coon Rapids Dam is within a public park created before 1992 and owned by a political subdivision of the State of Minnesota, section 21 of the FPA, 16 U.S.C. § 814 (2012), precludes BOST1 from using eminent domain to acquire the rights necessary to develop a hydropower project at the site. *See BOST1 Hydroelectric LLC*, 133 FERC ¶ 62,027 at P 8.

⁹ A license application's Exhibit F must include a supporting design report to demonstrate the safety and adequacy of the project's existing and proposed structures. 18 C.F.R. § 4.41(g)(3) (2015).

5. On January 20, 2016, Commission staff denied the application, explaining that the Commission only grants such an application when the permittee demonstrates that extraordinary circumstances or factors outside of its control prevented it from filing a license application, and that BOST1 had not made the requisite showing.¹⁰

6. On February 19, 2016, BOST1 filed a request for rehearing of the January 20 Order, asserting that it should be granted a successive permit because extraordinary circumstances existed had prevented it from performing the hydraulic modeling and from completing negotiations with the Park District to obtain sufficient property rights to develop the project.

II. Discussion

7. Section 4(f) of the Federal Power Act (FPA) authorizes the Commission to issue preliminary permits to potential license applicants.¹¹ Section 5(b) of the FPA, as amended by the Hydropower Regulatory Efficiency Act of 2013, gives the Commission the option to extend a preliminary permit term 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.¹²

8. After the Commission has extended the term of an initial permit or issued a second permit (in other words, after a permittee has obtained an initial preliminary permit and an extension of that permit, or has obtained an initial permit and a second, successive permit), it will grant a request for an additional permit (or an extension of the term of a successive permit) only when the permittee has demonstrated that extraordinary circumstances or factors outside of its control prevented it from filing a license application.¹³

9. On rehearing, BOST1 argues that the January 20 Order failed to recognize that there have been a number of delays in the development process over the course of its preliminary permit, and that these delays constitute extraordinary circumstances. BOST1 contends that it was unable to pursue certain development activities, such as determining

¹⁰ 154 FERC ¶ 62,034 at PP 6-7.

¹¹ 16 U.S.C. § 797(f) (2012).

¹² The Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, § 5, 127 Stat. 493, 495 (2013) (to be codified at 16 U.S.C. § 798(b)).

¹³ See, e.g., *Kenai Hydro, LLC*, 151 FERC ¶ 61,243, at P 11 (2015); *Pine Creek Mine, LLC*, 148 FERC ¶ 61,027, at P 14 (2014).

the powerhouse location, during the first 2 years of its permit term because the State of Minnesota had not released its final plan to rehabilitate the Coon Rapids Dam, which was released to the public in December 2012.¹⁴ Next, BOST1 states that it sent its preliminary project design to the Minnesota Department of Natural Resources (Minnesota DNR) in August 2013 for that agency's review and approval, and the agency took 5 months (until January 2014) to respond with comments and requests for additional studies, including hydraulic modeling. BOST1 also states that it experienced additional delays when, in 2013, the Park District required reimbursement for any costs it will incur relating to BOST1's license application and a bond to ensure BOST1 would have adequate funds, before it would grant BOST1 the right to develop its project within its park. BOST1 states it needs more time to negotiate with the Park District for these rights. BOST1 cites to *Twin Lakes Canal Co.* as analogous to its situation.¹⁵

10. The delays to which BOST1 cites do not constitute extraordinary circumstances. To the contrary, the purpose of a preliminary permit is to maintain priority of a license application while the permittee investigates the feasibility of a proposed project. Difficulties often arise during a permit term, and not all difficulties rise to the level of an extraordinary circumstance. It is normal for permittees to adjust plans to account for the realities of developing a project at a specific location.¹⁶

11. BOST1 has held a preliminary permit for this proposed project for more than 5 years and was well aware of, and should have been able to adequately prepare for, issues associated with rehabilitation of the Coon Rapids Dam and the need to negotiate with the Park District to obtain the property rights necessary to develop its project. Before BOST1 was issued its preliminary permit, the Park District, which at the time was competing with BOST1 for a preliminary permit at the project site, challenged BOST1's permit application and reminded BOST1 that it would not be able to use eminent domain to acquire the necessary rights to develop the project.¹⁷ In issuing the permit to BOST1, Commission staff warned the company that it bore the risk of losing its investment of effort and capital if it was ultimately unable to acquire through negotiation the rights to the park land needed to develop the project.¹⁸ The Park District notified BOST1 in

¹⁴ See Rehearing Request at 5.

¹⁵ *Twin Lakes Canal Co.*, 141 FERC ¶ 62,224 (2012) (*Twin Lakes*).

¹⁶ See, e.g., *Sutton Hydroelectric Co.*, 147 FERC ¶ 61,039 (2014) (rejecting as an extraordinary circumstance the changing price of electricity required the permittee to adjust its proposal).

¹⁷ See note 11, *supra*.

¹⁸ *BOST1 Hydroelectric LLC*, 133 FERC ¶ 62,027 at n.7.

June 2013 that it required a bond or surety fund, and it reiterated the surety requirement in a September 5, 2013 letter¹⁹ and a March 25, 2014 email²⁰ to BOST1. The Park District states that BOST1 did not acknowledge the surety requirement in its responses to the letter and email.²¹ The record appears to substantiate the Park District's claim that "BOST1 made no meaningful effort to consult or work closely with the [Park] District to develop a proposal."²²

12. BOST1's reliance on *Twin Lakes* is unavailing. In that case, Commission staff instructed the permittee to revise a water quality model developed in its Water Quality Study Plan a year before its permit expired, and the permittee worked diligently to complete the necessary revisions, working with Commission staff and resource agencies on a weekly basis. The permittee filed its revised model 4 days before the permit expired, but Commission staff found that the model needed further revisions, so Commission staff gave Twin Lakes a 1-year permit to allow it to finish the model and file its license application. In contrast, Minnesota DNR requested hydraulic modeling in December 2013, 22 months before BOST1's permit was to expire, but BOST1 made no attempt to gather the requested information.²³ Further, BOST1's recent progress reports contradict its claim. In these reports, BOST1 stated that Minnesota DNR's request would not "represent a barrier to the development of the project."²⁴ The first mention of a potential delay was in BOST1's application for a successive preliminary permit on October 1, 2015.

¹⁹ See September 28, 2015 Draft License Application, Appendix AC-14 at 1.

²⁰ See *id.*, Appendix AC-15 at 1-2.

²¹ See *id.*, Appendix AC-14 at 3-4 and AC-15 at 1.

²² Park District's February 9, 2015 Comment on the draft license application at 3. The Park District also disputes BOST1's representation that it has regularly consulted with the Park District. *Id.* at 4.

²³ See BOST1 Filing of Jan. 16, 2014.

²⁴ *E.g.*, BOST1's September 21, 2015 Progress Report at 8; BOST1's March 18, 2015 Progress Report at 5; BOST1's September 25, 2014 Progress Report at 5; BOST1's March 18, 2014 Progress Report at 5.

13. None of the circumstances cited by BOST1 constitute extraordinary circumstances that would justify authorizing the company to hold a preferential right to develop the project for eight years, as would be the case were we to issue the requested permit. Accordingly, we deny rehearing and affirm Commission staff's denial of BOST1's application for a successive preliminary permit.²⁵

The Commission orders:

BOST1's request for rehearing, filed on February 19, 2016, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁵ Additionally, BOST1 asked for clarification as to whether we would require a demonstration of extraordinary circumstances if BOST1 were to apply for another permit for the Coon Rapids Project in the future. On March 7, 2016, BOST1 did in fact apply for another permit for the project. On May 4, 2016, the application was denied due to a lack of extraordinary circumstances that would justify an additional permit. BOST1 did not seek rehearing of that denial. Its request for clarification is therefore moot.