

157 FERC ¶ 61,207
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Rivertec Partners, LLC
Loxbridge Partners, LLC

Project Nos. 14753-001
14777-001

ORDER DENYING REHEARING

(Issued December 15, 2016)

1. On September 2, 2016, Commission staff issued orders dismissing the preliminary permit applications for Rivertec Partners, LLC's (Rivertec) proposed Clearwater Hydroelectric Project No. 14753 (Clearwater Project) and Loxbridge Partners, LLC's (Loxbridge) proposed McNary Second Powerhouse Project No. 14777 (McNary Second Powerhouse Project).¹ Rivertec's proposed Clearwater Project would be located at the U.S. Army Corps of Engineers' (Corps) Dworshak Dam on the North Fork Clearwater River near the City of Orofino in Clearwater County, Idaho. Loxbridge's McNary Second Powerhouse Project would be located at the Corps' McNary Lock and Dam on the Columbia River near the City of Umatilla in Umatilla County, Oregon.
2. On September 27, 2016, Rivertec and Loxbridge filed timely requests for rehearing of the September 2 Orders.² This order denies the requests for rehearing.

¹ *Rivertec Partners LLC*, 156 FERC ¶ 62,161 (2016); *Loxbridge Partners, LLC*, 156 FERC ¶ 62,163 (2016).

² Both requests for rehearing were filed by Mark Steinley, the managing member and authorized agent for both Rivertec and Loxbridge. The requests raise many of the same issues.

I. Background

A. Clearwater Project

3. On April 12, 2016, Rivertec filed an application for a preliminary permit to study the feasibility of the proposed Clearwater Project. The proposed project would utilize one of three vacant bays in the Corps' existing powerhouse at the Dworshak Dam, and would have an installed capacity of 40 to 50 megawatts (MW).

4. On May 31, 2016, Commission staff sent the Corps a letter requesting its opinion on jurisdiction over the proposed non-federal hydropower development³ and on whether Rivertec's proposal would interfere with existing dam operations or plans for the Dworshak Dam facility. On August 2, 2016, the Corps responded, stating that it believes the Commission does not have jurisdiction to issue a preliminary permit for the proposed project, and that the project would substantially interfere with the Corps' operation of Dworshak Dam. The Corps asked that Commission staff deny the permit.⁴

5. On September 2, 2016, Commission staff denied Rivertec's application for a preliminary permit, finding that no purpose would be served in issuing the preliminary permit given that the Corps, whose permission would be needed for the development of any project at the Dworshak Dam, opposed the project.

B. McNary Second Powerhouse Project

6. On April 25, 2016, Loxbridge filed an application for a preliminary permit to study the feasibility of the proposed McNary Second Powerhouse Project. The proposed project would utilize the McNary Dam and consist of a new powerhouse built in place of

³ Commission staff noted its preliminary finding regarding jurisdiction, which was that the Commission has jurisdiction over non-federal development at the vacant bays in the Dworshak powerhouse because Congress has explicitly de-authorized development by the Corps at those bays.

⁴ Rivertec filed a response to the Corps' comments on August 8, 2016, asserting that the Commission has jurisdiction over the proposed project and that the project would not interfere with Corps operations.

the existing McNary Dam south abutment.⁵ The project would have an installed capacity of 700 MW.

7. On May 16, 2016, Commission staff sent the Corps a letter requesting its opinion on whether non-federal hydropower development is authorized at the McNary Dam, and if so, whether Loxbridge's proposal would interfere with existing dam operations or improvement plans. On August 2, 2016, the Corps responded, stating that it believes the Commission does not have jurisdiction to issue a preliminary permit for the proposed project, and that the project would interfere with the Corps' operation of McNary Dam. The Corps asked that Commission staff deny the permit.⁶

8. On September 2, 2016, Commission staff denied Loxbridge's application for a preliminary permit, finding that no purpose would be served in issuing the preliminary permit given that the Corps, whose permission would be needed for the development of any project at the McNary Dam, opposed the project.⁷

C. Requests for Rehearing

9. On September 27, 2016, Rivertec and Loxbridge filed requests for rehearing of the September 2 Orders. Rivertec and Loxbridge argue that the Commission retains authority to issue preliminary permits for their proposals, and that the Commission should issue the permits despite the Corps' stated opposition. Rivertec and Loxbridge contend that the Corps' opposition is unwarranted and an abuse of process, and that the proposed projects would not interfere with the Corps' operation of its facilities. Moreover, Rivertec and Loxbridge argue that any issues with the Corps could be resolved during the preliminary permit term, and that the Corps' interests would be adequately

⁵ Loxbridge states that the proposed configuration would necessitate the relocation of the Corps' juvenile fish facility and bypass system and the southern shore fish ladder, which are all located at McNary Dam's south abutment.

⁶ Loxbridge filed a response to the Corps' comments on August 8, 2016, asserting that the Commission has jurisdiction over the proposed project and that the project would not interfere with Corps operations.

⁷ In the order, Commission staff noted that it need not address the issue of jurisdiction over non-federal hydropower development at McNary Dam.

protected through existing review processes established by law and the Memorandum of Understanding (MOU) recently entered into between the Commission and the Corps.⁸ Rivertec and Loxbridge further argue that the MOU provides authority for the Commission to issue the permits and that the MOU should “overrule” any concerns expressed by the Corps.

10. On November 16, 2016, the Corps filed additional comments on the Clearwater and McNary Second Powerhouse proposals. The Corps notes that it maintains its position that the Commission lacks jurisdiction to issue a preliminary permit for either project. In addition, the Corps states that it considers both proposals to be “infeasible” because neither proposal would be possible without the Corps shutting down its own generation units and negatively impacting its own flow requirements.⁹

11. On November 18, 2016, Rivertec and Loxbridge filed comments in response to the Corps’ November 16 comments. Rivertec and Loxbridge reiterate their previous arguments and disagree with the Corps’ assertion that the proposals would interfere with the Corps’ operations. In addition, Rivertec and Loxbridge claim that the Corps’ November 16 letter indicates that the Corps’ no longer opposes modifications to its facilities and that any concerns could be addressed during the permit term.

II. Discussion

12. Section 4(f) of the Federal Power Act (FPA) 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,¹⁰ which in turn sets forth the material that must accompany an application for a license. The

⁸ *Memorandum of Understanding between the United States Army Corps of Engineers and the Federal Energy Regulatory Commission on Non-Federal Hydropower Projects* (July 21, 2016) (MOU), <https://www.ferc.gov/legal/mou/2016/07-21-16.pdf>.

⁹ In addition, the Corps listed some resolvable concerns it has with the proposals. Although it is possible that these other matters could be resolved during the process of project development, they are irrelevant, given the Corps’ separate conclusion that both projects are infeasible.

¹⁰ 16 U.S.C. § 802 (2012).

Commission is not required to grant a preliminary permit application, so long as it articulates a rational basis for not doing so.¹¹

13. The Commission's policy is to deny a preliminary permit for a project at a federal facility if the agency that operates the facility indicates that it opposes the proposed project. In *Owyhee Hydro, LLC*, the Commission denied a preliminary permit because the U.S. Bureau of Reclamation stated that a non-federal entity's proposed use of its federal facility was unacceptable and would not be permitted.¹² Similarly, in *Advanced Hydropower, Inc.*, the Commission denied a preliminary permit for a project at the McNary Dam because the Corps opposed the project as it would interfere with the Corps' existing plans and operations.¹³

14. We affirm the September 2 Orders and find that staff's dismissals of the Rivertec and Loxbridge preliminary permit applications were consistent with Commission policy. While Rivertec and Loxbridge assert that the proposed projects would not interfere with the Corps' facilities or operations, we defer to the Corps' opinion about its own facilities. The Corps clearly states that the proposals are not possible without the Corps shutting down its own generation units, thus making the projects "infeasible." Moreover, contrary to Rivertec and Loxbridge's assertions, the Corps clarifies that this issue is not one that could be resolved through the feasibility study process of a preliminary permit term.¹⁴

15. In its request for rehearing, Rivertec notes that the Commission previously issued a preliminary permit to Utah Associated Municipal Power Systems (UAMPS) for the proposed development of the vacant bays in the Dworshak powerhouse.¹⁵ Rivertec

¹¹ See *Advanced Hydropower, Inc.*, 155 FERC ¶ 61,007, at P 8 (2016); *Owyhee Hydro, LLC*, 154 FERC ¶ 61,210, at P 23 (2016); *Wyco Power and Water, Inc.*, 139 FERC ¶ 61,124 (2012) (citing *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988)). See also *Symphony Hydro LLC*, 150 FERC ¶ 62,092, at 64,165 (2015) (delegated order denying preliminary permit application to study feasibility of project at Corps' Upper St. Anthony Falls Lock and Dam because "no purpose would be served in issuing a preliminary permit," given Corps' statement that project "would preclude or seriously interfere with its use of the lock for navigation and would therefore be incompatible with the statutorily authorized purpose of the facility.").

¹² *Owyhee Hydro, LLC*, 154 FERC ¶ 61,210, at PP 22-25 (2016).

¹³ 155 FERC ¶ 61,007, at 10 (2016).

¹⁴ See Corps' November 16, 2016 Comments.

¹⁵ *Utah Associated Municipal Power Systems*, 79 FERC ¶ 62,057 (1997).

argues that because the Corps' did not oppose that proposal, the Commission should be skeptical of the Corps' current assessment of the Clearwater Project. We disagree. Our decision here is based on the Corps' unequivocal comments about the Clearwater Project and we are in no position to second-guess the Corps' lack of opposition to the UAMPS Project

16. While the MOU recently entered into between the Corps and the Commission is a valuable tool for the respective agencies and prospective applicants to follow in processing a license application, it does not give the Commission any additional authority to issue preliminary permits and does not eliminate the Corps' ability to determine that a proposal interferes with the statutorily authorized purposes of its' facilities.¹⁶ The primary purpose of the MOU was "to establish a framework for early coordination and participation [between the agencies] to ensure timely review of and action on proposed non-Federal hydropower development applications."¹⁷

17. Here, the Corps, which owns both the McNary Dam facility and the Dworshak Dam facility and whose permission would be needed for the development of any project at either of those facilities, has stated that the proposals are not feasible and would interfere with current operations. Therefore, we find no purpose in issuing preliminary permits for either project and accordingly affirm staff's decision to dismiss the preliminary permits applications.¹⁸

¹⁶ See MOU at 4 ("The Corps can allow the development of hydropower by non-Federal entities at suitable projects, provided that the installation and operation of the hydropower facility is found to be compatible with the purposes for which Congress authorized the project . . ."); see also MOU at 13 ("The policy and procedures contained within this MOU are intended solely as guidance to improve the working relationships of the signatory agencies in connection with expeditious decisions with regard to non-Federal hydropower project authorizations. This MOU does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.").

¹⁷ MOU at 1.

¹⁸ Given that we are denying the permit applications because of the Corps' assessment that projects are not feasible and would interfere with the Corps' operations, the issue of jurisdiction over non-federal hydropower development at the McNary Lock and Dam and Dworshak Dam is moot.

The Commission orders:

Rivertec and Loxbridge's requests for rehearing, filed on September 27, 2016, are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.