150 FERC ¶ 61,030
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New Summit Hydro, LLC Project No. 14612-001

ORDER DENYING REHEARING

(Issued January 22, 2015)

1. Summit Metro Parks (Metro Parks) has filed a request for rehearing of the October 16, 2014 Commission order[1] issuing a preliminary permit to New Summit Hydro, LLC (New Summit), pursuant to section 4(f) of the Federal Power Act (FPA),[2] to study the feasibility of the New Summit Pumped Storage Project No. 14612 (New Summit Project), a 1,500-megawatt (MW) project proposed to be located near the City of Norton in Medina and Summit Counties, Ohio. This order denies Metro Parks' request for rehearing.

Background

2. On April 14, 2011, Commission staff issued South Run Pumped Storage, LLC (South Run) a preliminary permit to study the feasibility of the South Run Pumped Storage Project No. 13876 at a site nearly identical to New Summit's.[3] In South Run's application, several representatives of Free Flow Power Corporation (Free Flow), including Kevin Young, were identified as South Run's agents.[4] Ramya Swaminathan,

[1] *New Summit Hydro, LLC*, 149 FERC ¶ 61,033 (2014) (October 16 order).

[2] 16 U.S.C. § 797(f) (2012).

[3] *South Run Pumped Storage, LLC*, 135 FERC ¶ 62,039 (2011).

[4] *See* South Run's October 26, 2010 Application at 4-5; *see also* 18 C.F.R. § 4.81(a)(1) (2014) (requiring preliminary permit applications to identify persons authorized to act as agent for the applicant).

who identified herself as the Chief Operating Officer of Free Flow and the managing member of South Run, filed South Run's permit application.[5]

3. During South Run's three-year permit term, South Run timely filed the required six-month progress reports.[6] On behalf of South Run, Ms. Swaminathan of Free Flow filed the first three progress reports, and Mr. Young filed the last three progress reports. Mr. Young was identified as the President of Young Energy Services, LLC in the progress reports.[7] South Run did not file a development application before the permit expired March 31, 2014.

4. On April 1, 2014, New Summit filed a preliminary permit application to study the feasibility of its project, which is very similar to South Run's. The application identified Mr. Young as the managing member of, and agent for, New Summit.[8] The application also identified over forty municipal entities in the vicinity of the proposed project, as required by section 4.32(a)(2) of our regulations.[9] Metro Parks was not identified in the application. The Commission accepted the application and issued public notice of New Summit's permit application on April 23, 2014.[10]

5. Metro Parks filed a timely motion to intervene and protest, arguing that we should treat New Summit's application as an application for a successive (i.e., second) permit because New Summit and South Run are essentially the same entity, and deny a successive permit because New Summit was not diligent under its previous permit. In addition, it argued New Summit's application was deficient and should be rejected because, among other things, it failed to identify Metro Parks as a political subdivision in the general area of the project that should have been entitled to written notice of the application.

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[5] *See* South Run's October 26, 2010 Application at 3.

[6] *See South Run*, 135 FERC ¶ 61,033 (Article 4 requires the permittee to file progress reports, which describe the activities performed under the pre-filing requirements of 18 C.F.R. §§ 3.48 and 5.1-4.31).

[7] *See, e.g.*, South Run's March 28, 2013 Progress Report at 1.

[8] *See* New Summit's April 1, 2014 Application at 2 and 4.

[9] 18 C.F.R. § 4.32(a)(2) (2014).

[10] *See* 79 Fed. Reg. 24,416 (April 30, 2014).

6. The October 16 order explained that we would not treat South Run and New Summit as the same entity because there was no evidence to indicate that Mr. Young controlled South Run or that either Free Flow or South Run controlled New Summit. [11] Therefore, we found that New Summit's application was not an application for a successive permit.

7. The October 16 order also explained that the purpose of the requirement to identify and notify municipal entities in the area of the proposed project is to provide an opportunity for those entities to file a competing application. The order concluded that, based on Metro Parks' description of its function and the Ohio statute that created it, Metro Parks is a resource agency, not a municipal entity that could file a competing application, and thus was not entitled to written notification of New Summit's application.[12]

8. On November 14, 2014, Metro Parks filed a request for rehearing of the October 16 order, reiterating its earlier arguments and asking for a trial-type evidentiary hearing.

Discussion

A. New Summit is Not a Subsidiary of Free Flow or South Run

9. Sections 4(f) and 5(a) of the FPA authorize the Commission to issue preliminary permits to potential license applicants for a period of up to three years.[13] It is Commission policy to grant a successive permit only if it concludes that the applicant has pursued the requirements of its prior permit in good faith and with due diligence.[14] In instances when the Commission has evidence that the prior permittee and the new applicant are essentially the same entity, whereby the prior permittee has a "cloak of

[11] *See New Summit*, 149 FERC ¶ 61,033 at P 7.

[12] *See id.* at P 13.

[13] 16 U.S.C.A. §§ 797(f) and 798(a) (2014). The Commission may extend the period of a preliminary permit once for not more than two additional years beyond the three years permitted by the initial preliminary permit. *See id.* § 798(b).

[14] *City of Redding, Cal.*, 33 FERC ¶ 61,019 (1985) (permittee must take certain steps, including consulting with the appropriate resource agencies early in the permit term, and timely filing six-month progress reports).

control" over the second permit, the Commission will treat the new application as a successive application.[15]

10. On rehearing, Metro Parks argues that the October 16 order incorrectly concludes that Mr. Young was a mere agent of Free Flow and that neither South Run nor Free Flow exercised any control over New Summit. Metro Parks argues that the activities that Mr. Young conducted during South Run's permit term (e.g., investigating equipment requirements for the project and possible integration opportunities with intermittent renewable energy sources, contacting potential project investors, and preparing a pre-application document) demonstrate that Mr. Young acted as more than an agent for South Run.[16] Because Mr. Young was allegedly a controlling member of Free Flow, Metro Parks argues that Mr. Young also controlled South Run.

11. We disagree. It is not unusual for a preliminary permit holder to hire a consultant that is experienced with hydropower development and Commission practice to perform the activities that Metro Parks identifies.[17] In these situations, the consultant acts as an agent on behalf of and within the scope of authority granted by the controlling principal. The mere performance of these activities does not make the agent a principal. We therefore deny rehearing on this issue.[18]

B. Metro Parks is Not Entitled to Written Notice Under the FPA

12. Section 4(f) of the FPA requires the Commission to give written notice to "any State or municipality likely to be interested in or affected by" a preliminary permit

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[15] *See, e.g., KC Pittsfield LLC,* 147 FERC ¶ 61,040, at P 7 and n.8 (2014) (*citing Long Lake Energy Corp.*, 29 FERC ¶ 61,290, at 61,592 (1984)).

[16] *See* Metro Parks' Request for Rehearing at 10-11.

[17] The website for Young Energy Services describes that entity as providing a variety of consulting services to the owners of various hydropower projects, but does not indicate that it has ownership or control of any of those projects. *See* http://youngenergyservices.com/projects (last visited Jan. 8, 2015).

[18] Metro Parks also refers to a filing in a different proceeding in which Free Flow identified Mr. Young as a vice president of project development as evidence of Mr. Young's control over the South Run. *See* Metro Parks' Request for Rehearing at 8-9 (citing a Free Flow filing on April 29, 2011, in Project No. 12861-003). We disagree. That Mr. Young was included in a list of Free Flow's management does not establish that Mr. Young controlled either Free Flow or South Run.

application filed by a non-municipal entity.[19] 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."[20]

13. Section 4.32(a)(2) of our regulations implement section 4(f) by requiring a permit application to identify (by name and mailing address): (1) every county in which any part of a project would be located; (2) every city, town, or similar local political subdivision (a) in which any part of the project would be located, or (b) that has a population of 5,000 or more people and is located within 15 miles of the project dam; (3) every irrigation district, drainage district, or similar special purpose political subdivision (a) in which any part of the project would be located, or (b) that owns, operates, maintains, or uses any facilities that would be used by the project; and (4) every other political subdivision in the general area of the project that there is reason to believe would likely be interested in, or affected by, the application.[21] Commission staff then mails written notices to the identified entities.

14. New Summit's permit application listed two counties in which the project would be located; forty-two cities and townships in which the project would be located or that have a population of 5,000 or more people and are located within 15 miles of the project; and two irrigation districts.[22] Commission staff sent notices to these entities.

15. As explained above, New Summit's application did not identify Metro Parks as a political subdivision entitled to written notice under the FPA, and our October 16 order determined that Metro Parks was a resource agency, not a political subdivision that was entitled to such notice. On rehearing, Metro Parks argues that the October 16 order erred in its determination and that Metro Parks is in fact a political subdivision of the State of Ohio interested in and affected by the permit application, and it thus should have been identified as such in the permit application and received written notice of the application.[23] In support, it references a previous Commission order recognizing Metro

[19] 16 U.S.C. § 797(f) (2012).

[20] 16 U.S.C. § 796(7) (2012).

[21] 18 C.F.R. § 4.32(a)(2) (2014). That section also requires the applicant to identify all Indian tribes that may be affected by the project.

[22] New Summit's Application at 3-4.

[23] *See* Metro Parks' Request for Rehearing at 3.

Parks as a political subdivision[24] and cites to state statutes and cases that recognize Metro Parks as a political subdivision of the state.[25]

16. We disagree. Although Metro Parks may be a political subdivision of the State of Ohio under state law, it is not a municipal entity that is entitled to written notice under section 4(f) the FPA. As we explained in our October 16 order, the purpose of section 4.32(a)(2) of our regulations is to identify municipal entities in the area of the proposed project that might wish to file a competing application using the municipal preference conferred by section 7(a) of the FPA.[26] To qualify as a municipality under the FPA, a political subdivision such as Metro Parks must be "competent under the laws [of the state] to carry on the business of developing, transmitting, utilizing, or distributing power."[27] Metro Parks has submitted no evidence to show that the State of Ohio has

[24] *See id.* at 12 (*citing Metro Hydroelectric Company, LLC*, 121 FERC ¶ 61,049, at n.1 (2007).

[25] *See id.* at 12-15.

[26] 16 U.S.C. § 800(a) (2012). That section requires the Commission to give preference to municipal applicants for preliminary permits or licenses (where no preliminary permit has been issued) provided the plans of the municipal applicant are at least as well adapted to develop the waterway as those of non-municipal competing applicants, or can be made so within a reasonable time. *See* 18 C.F.R. §§ 4.37(3) and (4) (2014).

[27] *See* section 3(7) of the FPA, 16 U.S.C. § 796(7) (2012). For this reason, entities filing permit applications and claiming municipal preference must include in their applications copies of the state or local law or other appropriate legal authority demonstrating that it is competent to engage in the business of development, transmitting, utilizing, or distributing power. 18 C.F.R. § 4.81(a)(4) (2014). *See, e.g., Ohio Power Co.*, 38 F.P.C. 881, 883 (1967); *see also Northern Colorado Water Conservancy District v. FERC*, 730 F.2d 1509, 1515-16 (D.C. Cir. 1984) (determining that the Northern Colorado Water Conservancy District was a municipality that was entitled to notice under section 4(f) of the FPA because its enabling Colorado statute granted it authority to generate, distribute, and sell electricity and that it was likely to be interested in or affected by the permit application because it was empowered to distribute water from the project's water resource). The definition of a municipality is the same for the purposes of both section 4(f) noticing and section 7(a) municipal preference. 730 F.2d 1509, n.7.

authorized it to engage in any of these business functions.[28] Thus, we do not consider it to be a municipality under FPA section 3(7) that was required to receive written notification of the application.[29]

17. Even assuming that Metro Parks qualified as a municipal entity entitled to receive written notice under the FPA, the lack of such notice in this case is harmless error and does not require rescission of New Summit's permit. Here, Metro Parks received actual notice of the application and timely filed a motion to intervene and protest.[30] It also had the opportunity to file a competing permit application or notice of intent to file a competing application but there is no indication that Metro Parks was interested in developing a hydropower project at the same location.

C. The Commission is Not Required to Issue a Separate Decision on Waiver

18. Under Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, answers to a protest are not permitted unless otherwise allowed by the decisional authority.[31] In the permit proceeding, New Summit filed a Motion for Leave to File

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[28] Metro Parks states that it is authorized under state law to enter into contracts, sue before a court, acquire land, or levy taxes and cites to various Ohio statutes that give Metro Parks authority to acquire lands for forest reserves and create parks. However, such authorities do not qualify it as a municipality under the FPA.

[29] Metro Parks argues that we have misread the definition of a municipality under FPA section 3(7). It maintains that the clause "competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power" only modifies "agency of a State" and not "political subdivision." *See* Metro Parks' Request for Rehearing at 3. Metro Parks is mistaken. We have consistently interpreted section 3(7) of the FPA to be a two-part test: (1) the municipality must be a city, county, irrigation district, drainage district, or other political subdivision or agency of a State and (2) it must be competent under state law to carry on at least one of the businesses: developing, transmitting, utilizing, or distributing power. *See, e.g.*, *Symbiotics, LLC*, 105 FERC ¶ 61,044 (2003) (finding a county to be a municipality after examining state laws that established its competence under section 3(7) of the FPA); *Long Lake Energy Corp.*, 23 FERC ¶ 61,040, at 61,097-98 (1983) (finding a school district not to be a municipality because it was not competent).

[30] *See Northern Colorado*, 730 F.2d at 1521 ("Having established FERC's statutory obligation to [the municipality], we still need to determine the consequences of FERC's breach of that obligation").

[31] 18 C.F.R. § 385.213(a)(2) (2014).

Answer and Answer in response to Metro Parks' protest.[32] The October 16 order found good cause to accept the answer.[33]

19. On rehearing, Metro Parks argues that by not making known our decision to accept New Summit's answer prior to the October 16 order, we deprived Metro Parks and others of the opportunity to respond to New Summit's answer.

20. We disagree. As a party to the proceeding, Metro Parks received New Summit's motion. That the Commission had not yet decided whether to allow the motion did not prevent Metro Parks from filing a response to the motion.

D. No Material Facts in Dispute to Necessitate a Trial-Type Hearing

21. On rehearing, Metro Parks requests a trial-type hearing pursuant to sections 4.34 and 385.402 of our regulations.[34] The Commission generally uses notice and comment procedures to conduct hearings in hydroelectric proceedings.[35] We have substantial discretion in deciding whether to hold a trial-type, evidentiary hearing and require such hearings only where there are material issues of fact that cannot be resolved on the basis of the written record.[36] Metro Parks has raised no issues of material fact that cannot be resolved on the basis of the written record in this proceeding. We find that it has had a full opportunity to present its views through multiple written submissions.

22. For the reasons discussed above, we deny Metro Parks' request for rehearing.

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[32] *See* New Summit's filing of June 27, 2014.

[33] *See New Summit,* 149 FERC ¶ 61,033 at n.4.

[34] 18 C.F.R. §§ 4.34 and 385.402 (2014).

[35] *See* 18 C.F.R. § 4.34(b) (2014).

[36] *See Duke Energy Carolinas, LLC,* 137 FERC ¶ 62,090, at P 80 (2011) (citing *Citizens for Allegan County v. F.P.C.*, 414 F.2d 1125 (D.C. Cir. 1969)).

The Commission orders:

Summit Metro Parks' request for rehearing, filed on November 14, 2014, in Project No. 14612-001 is denied.

By the Commission. Commissioner Honorable is voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

Document Content(s)