

156 FERC ¶ 62,003
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Rivertec Partners, LLC

Project No. 14754-000

ORDER DISMISSING PRELIMINARY PERMIT APPLICATION

(Issued July 1, 2016)

1. This order finds that the Commission lacks jurisdiction to issue a permit or a license to Rivertec Partners, LLC (Rivertec) for the Lincoln Hydroelectric Project No. 14754 at the Libby Dam and accordingly, dismisses Rivertec's application for a preliminary permit.

I. BACKGROUND

2. On April 12, 2016,¹ Rivertec filed an application for a preliminary permit to study the feasibility of constructing a hydroelectric project at the U.S. Army Corps of Engineers' (Corps) Libby Dam Project located at Lake Koocanusa on the Kootenai River near Libby in Lincoln County, Montana.

3. The Corps' Libby Dam is a 422-foot-high, 3,055-foot-long concrete gravity dam with an integrated powerhouse. The powerhouse contains eight turbine-generator bays. The Corps currently has generator units in five of the bays, with a total installed capacity of 600 megawatts (MW). Rivertec proposes to install 120-MW generator units in one, two, or all three vacant bays (bays six through eight), and to tie into the existing transmission line. The estimated annual generation of the project would range from 525 to 1,576 gigawatt-hours, depending on how many generator units Rivertec installs.

4. On February 25, 2016, Commission staff sent the Corps a letter asking whether a non-federal project under the jurisdiction of the Commission could be authorized at the site. The Corps responded on April 4, 2016, stating that the Commission does not have jurisdiction to issue a preliminary permit or license for a project at the site based on the authorizing statute for the Libby Dam. The Corps stated that it has the exclusive right to expand the powerhouse's hydropower production to reach its fully authorized capacity. On April 5, 2016, Rivertec responded to the Corps' letter, arguing that the Rivers and Harbors Act of 1950,² the Water Resources Reform and Development Act of 2014,³ and

¹ Rivertec had previously filed a permit application for the project on February 16, 2016, before it had been issued a Certificate of Organization by the State of Wyoming. Rivertec's April 12, 2016 application superseded the one filed on February 16.

² Rivers and Harbors Act of 1950, Pub. L. No. 81-516, 64 Stat. 163.

previous Congressional action regarding funding at the Libby Dam all provide authority for the Commission to authorize non-federal hydropower at the Libby Dam. On June 27, 2016, Rivertec filed an amended response to the Corps' letter, reiterating its claim that the Commission retains jurisdiction over non-federal hydropower development at Libby Dam, and in particular at bays six through eight.

II. DISCUSSION

5. Sections 4(e) and 4(f) of the Federal Power Act⁴ authorize the Commission to issue preliminary permits and licenses for non-federal hydropower projects to be located at federal dams and facilities. This jurisdiction is withdrawn if federal development of hydropower generation at the site is authorized, or if Congress otherwise unambiguously withdraws the Commission's jurisdiction over the development of such generation.⁵

6. Construction of the Libby Dam was authorized by the Rivers and Harbors Act of 1950, as recommended in House Document 81-531 (House Document 531).⁶ House Document 531 recommends the construction of a powerhouse at the Libby Dam that, along with the Corps' proposed Katka Dam, "would develop *all the available head* of the Kootenai main stem in the United States."⁷ House Document 531 also notes that space would be provided in the powerhouse for "future expansion" and additional units.⁸ Upon construction of the powerhouse, four hydroelectric generator units were initially installed in the powerhouse, with "provision for four additional units."⁹ A fifth unit was installed in 1985. Based on the authorizing statute and subsequent Annual Reports, this order concludes that hydropower development at the Libby Dam, including the three vacant bays, is reserved to the federal government.

³ Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193.

⁴ 16 U.S.C. §§ 797 (e), (f) (2012).

⁵ See, e.g., *Richard D. Ely, III*, 87 FERC ¶ 61,176 (1999), citing *City of Gillette, Wyoming*, 25 FERC ¶ 61,366 (1983).

⁶ Rivers and Harbors Act of 1950, Pub. L. No. 81-516, 64 Stat. 163; House Document 531, 81st Congress, 2nd Session.

⁷ House Document 531, at 458 (emphasis added).

⁸ *Id.* at 463.

⁹ 1974 Annual Report of the Chief of Engineers, United States Army, at 38-12.

7. Rivertec argues that Congress effectively de-authorized the installation of units in bays six through eight when it directed the Corps to complete installation of the fifth unit, and to not spend any of appropriations for fiscal year 1982 on units for bays six through eight.¹⁰ However, while Congress temporarily halted spending for units six through eight, there is no indication that the appropriations bill de-authorized the hydropower development. This is further evidenced by the fact that the Water Resources Development Act of 1996 explicitly provided funding for the Corps to complete construction and installation of generating units six through eight.¹¹ The Water Resources and Development Act of 1996 stated that the funds are to “remain available until expended.”¹² In its amended response, Rivertec also cites to the text and records of several other Congressional bills that it argues proposed to de-authorize the development of units in bays six through eight of the Libby Dam; however, Congress did not pass into law any of the bills with the de-authorization language.¹³

8. Rivertec also argues that it should be granted a preliminary permit pursuant to the recently enacted Water Resources Reform and Development Act of 2014. Among other things, the Act declares that the Corps shall make non-federal development at its facilities a priority and shall process such proposals in a timely and consistent manner.¹⁴ However, the Act does not expand the Commission’s (or the Corps’) jurisdiction at Corps facilities

¹⁰ See Senate Report 97-39, 97th Congress, 1st Session, at 409 (“It is the Committee’s intent that any present appropriations be used solely for the completion of the fifth installed unit at the main Libby Dam, and for the immediate termination of work on the sixth, seventh, and eighth installed units.”)

¹¹ Water Resources Development Act of 1996, Pub. L. No. 104-303, § 549, 110 Stat. 3658, 3779.

¹² *Id.*

¹³ Rivertec cites to: (1) a version of the Energy and Water Development Appropriations Act of 2004, Pub. L. No. 108-137, 117 Stat. 1827 (2003) (language regarding de-authorization of Libby Dam units six through eight is not in the final version of the act); (2) the congressional record for the Water Resources Development Act of 2003, H.R. 2557, 108th Cong. (not ultimately enacted); (3) the Water Resources Development Act of 2004, S. 2773, 108th Cong. (not ultimately enacted); and (4) the Water Resources Development Act of 2005, H.R. 2864, 109th Cong. (not ultimately enacted).

¹⁴ Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, § 1008, 128 Stat. 1193, 1215-16.

and, thus, does not change the fact that the Commission lacks authority to issue a permit or license for power development at the vacant bays at the Libby Dam.

9. For the above reasons, this order concludes that the Commission lacks authority to issue a permit to Rivertec for development of hydropower at the vacant bays at the Libby Dam, and accordingly dismisses its preliminary permit application.

The Director orders:

(A) The application for preliminary permit for the Lincoln Hydroelectric Project No. 14754, filed on April 12, 2016, by Rivertec Partners, LLC, is dismissed.

(B) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days of the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l* (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2015).

Vince Yearick
Director
Division of Hydropower Licensing

Document Content(s)

P-14754-000Order.DOC.....1-4