

147 FERC ¶ 62,226  
 UNITED STATES OF AMERICA  
 FEDERAL ENERGY REGULATORY COMMISSION

Western Minnesota Municipal Power Agency  
 Lock+ Hydro Friends Fund III, LLC

Project No. 14540-000  
 Project No. 14539-000

ORDER ISSUING A PRELIMINARY PERMIT, GRANTING PRIORITY TO FILE  
 LICENSE APPLICATION, AND DENYING COMPETING PRELIMINARY PERMIT

(June 25, 2014)

1. On July 23, 2013, at 8:30 a.m., Lock+ Hydro Friends Fund III, LLC (Lock+) filed a preliminary permit application, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>1</sup> to study the feasibility of the Melvin Price Locks & Dam Hydroelectric Project No. 14539 to be located at the existing Melvin Price Lock and Dam, located on the Mississippi River near the City of Alton, Illinois, in Madison County, Illinois, and the City of West Alton, in St. Charles County, Missouri. At the same time,<sup>2</sup> Western Minnesota Municipal Power Agency (Western Minnesota) filed a competing preliminary permit application for the proposed Melvin Price Hydroelectric Project No. 14540 to be located at the same site. Western Minnesota has claimed entitlement to municipal preference pursuant to section 7(a) of the FPA.<sup>3</sup> For the reasons discussed below, we are issuing a preliminary permit to Western Minnesota and denying Lock+'s application.

**I. Background**

2. The Melvin Price Locks and Dam are owned by the United States government and operated by the United States Army Corps of Engineers (Corps), St. Louis District. The Corps built and operates Melvin Price Locks and Dam, which consists of a dam and two locks, for navigation purposes. The main lock is 1,200 feet long and 110 feet wide while the auxiliary lock is 600 feet long and 110 feet wide. The dam is 1,160 feet long with

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<sup>1</sup> 16 U.S.C. § 797(f) (2012).

<sup>2</sup> The Commission is open each day, except Saturdays, Sundays, and holidays, from 8:30 a.m. to 5:00 p.m. *See* 18 C.F.R. § 375.101(c) (2013). The two applications were filed between 5:00 p.m. on July 22, 2013 and 8:30 a.m. on July 23, 2013. Under the Commission's Rules of Practice and Procedure, any document received after regular business hours is considered filed at 8:30 a.m. on the next regular business day. *See id.* § 385.2001(a)(2).

<sup>3</sup> 16 U.S.C. § 800(a) (2012).

nine tainter gates, each 110 feet wide and 42 feet high, and has a 1,900-foot-long weir. The mean headwater elevation is 418.8 feet mean sea level (msl) and mean tailwater elevation is 404.1 feet msl.

3. Western Minnesota's proposed Melvin Price Hydroelectric Project No. 14540-000 would consist of: (1) six 110-foot-wide, approximately 110-foot-long steel structures placed immediately downstream of the existing tainter gates 4 through 9 (one steel structure per gate) containing arrays of micro-turbines and pinned between new 60-foot-long, 72-foot-high concrete piers extending downstream of the existing piers; (2) a 150-foot by 150-foot substation located next to the dam on the Missouri side of the river that would step-up the project voltage from 13.8 kilovolt (kV) to 138 kV; (3) a 138-kV, 1.07-mile-long transmission line connecting the project substation to an existing substation on the Illinois side of the river; and (4) appurtenant facilities. Western Minnesota has not decided on a micro-turbine supplier but states that the capacity of the project would be based on an established flow and head condition. At a mean water head of 14.7 feet and a flow of 72,600 cubic feet per second (cfs) flowing through the project, each steel structure assembly would produce 15.5 megawatts (MW), resulting in a project rated capacity of 93.0 MW. At a maximum operating head of 20.0 feet, the anticipated flow through the project would be 85,800 cfs producing 24.9 MW per steel structure assembly or 149.4 MW for the project. The estimated average annual generation would be 445.4 gigawatt-hours (gwh). The project would occupy 16 acres of federal lands owned by the Corps and would operate run-of-river.

4. Lock+'s Melvin Price Locks & Dam Hydroelectric Project No. 14539-000 would consist of: (1) a 750-foot-long, 22-foot-wide, 66-foot-high Large Frame Module (LFM) enclosed in a powerhouse and containing 50 turbines each having a diameter of 8 feet and a nameplate capacity of 1.5 MW for a total system capacity of 75 MW; (2) flow control door assemblies installed in front of the LFM that can close off flow in case a suspension of generation is required; (3) a 750-foot-wide, 550-foot-long tailrace; (4) a 69-kV or 115-kV, 4.8-mile-long transmission line connecting the project power to an existing substation; and (5) appurtenant facilities. The estimated average annual generation would be 427,050 gwh. The project would occupy federal lands owned by the Corps and would operate run-of-river.

5. The Commission issued a joint public notice of Western Minnesota's and Lock+'s competing preliminary permit applications on September 11, 2013, establishing a deadline of November 10, 2013, for filing comments, motions to intervene, competing applications, and notices of intent to file a competing application for Project Nos. 14539 and 14540. The U.S. Department of the Interior (Interior) filed a comment in both proceedings.

6. On November 19, 2013, the Commission issued a *Notice Announcing Preliminary Permit Drawing*, to be held on November 25, 2013, for the purpose of determining which of the two applications would be deemed to have been filed first.

7. On November 21, 2013, Western Minnesota filed a motion requesting that the Commission withdraw the notice of the drawing and cancel the drawing, arguing that because it believes that it was a section 3(7) municipality, its application should be given preference and the drawing was therefore unnecessary.

8. The drawing was held on November 25, 2013, and, as set forth in a November 26, 2013 notice, established the following order of priority: (1) Western Minnesota and (2) Lock+.

## II. Discussion

9. Section 4(f) of the 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,<sup>4</sup> which in turn sets forth the material that must accompany an application for a license. The purpose of a preliminary permit is to preserve the right of the permit holder to have priority in applying for a license for the project being studied.<sup>5</sup> Because a permit is issued only to allow the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.<sup>6</sup>

### A. Better Adapted Application

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<sup>4</sup> 16 U.S.C. § 802 (2012).

<sup>5</sup> See, e.g., *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232, at P 4 (2006) (“The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with respect to the filing of development applications for the affected site.”).

<sup>6</sup> Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. A permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. See, e.g., *Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301, at P 6 (2003); see also *Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

10. Staff has reviewed the applications and found no basis for concluding that either applicant's plan is superior to the other. Neither applicant has presented a plan based on detailed studies or the results of agency consultation. Where the plans of the applicants are equally well adapted to develop, conserve, and utilize in the public interest the water resources of the region, the Commission will favor the applicant with the earliest application acceptance date.<sup>7</sup> Because the two applications had the same filing time, the Commission determined priority through the random drawing. Based on the results of the drawing, the preliminary permit is issued to Western Minnesota.<sup>8</sup>

### **B. Consultation and Study Requirements Under the Permit**

11. Interior recommends that the permittee consult with the U.S. Fish and Wildlife Service, the National Park Service, the Illinois Department of Natural Resources, and the Missouri Department of Conservation regarding the proposed project's effect on fish and wildlife and the National Park System. Interior also recommends that the permittee, during the permit term, prepare an economic analysis and a preliminary engineering plan, and a conduct a study of environmental impacts that would include effects to the benthic environment and fisheries habitat, migration pathways, sedimentary patterns, and water circulation patterns. In addition, Interior identifies species that are listed or proposed to be listed in accordance to the Endangered Species Act of 1973, as well as bald eagle habitats near the project site.

12. Potential development applicants are required to consult with appropriate state and federal resource agencies and affected Indian tribes, conduct all reasonable studies requested by the agencies, and solicit comments on the applications before they are filed.<sup>9</sup> In addition, the Commission has not sought to place all relevant study requirements in preliminary permits.<sup>10</sup> Rather, the studies to be undertaken by a permittee are shaped by the Commission's filing requirements for development applications.

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<sup>7</sup> 18 C.F.R. § 4.37(b)(2) (2013).

<sup>8</sup> Western Minnesota's argument in its November 21, 2013 filing that we should not have held a drawing to establish first-in-time priority, given its status as a municipality, is not convincing. A drawing simply establishes a first-in-time priority, to be used as a tiebreaker in the event that one is necessary, that is, if no applicant is granted municipal preference and if no application is deemed superior to another. The fact that we hold a drawing does not mean that we will not ultimately accord one of the applicants municipal preference or find that one application is superior.

<sup>9</sup> See 18 C.F.R. § 4.38 (2013).

<sup>10</sup> See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355, at 62,177 (2000).

### III. Permit Information

13. During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the possible development of a license application. The pre-filing process begins with preparation of a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.<sup>11</sup> The permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Such a request must accompany the NOI and PAD and set forth specific information justifying the request.<sup>12</sup> Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

14. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each six-month period from the effective date of this permit. A progress report must describe the nature and timing of what the permittee has done under the pre-filing requirements of section 4.38 and Part 5 of the Commission's regulations for the specific reporting period. A permit may be canceled if a permittee fails to file a timely progress report or if the report does not demonstrate that progress is being made by the permittee. The late filing of a report or the supplementation of an earlier report in response to a notice of probable cancellation will not necessarily excuse the failure to comply with the requirements of this article.

15. A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of the application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.<sup>13</sup>

The Director orders:

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<sup>11</sup> 18 C.F.R. §§ 5.5 and 5.6 (2013).

<sup>12</sup> *See id.* § 5.3.

<sup>13</sup> *See City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

(A) A preliminary permit is issued for the Melvin Price Locks & Dam Hydroelectric Project No. 14540 to Western Minnesota for a period effective the first day of the month in which this permit is issued and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) The preliminary permit application filed by Lock+ for the Melvin Price Locks & Dam Project No. 14539 is denied.

(C) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(D) The permittee shall coordinate the studies and its plans for access to the site during the term of this permit with the Corps District Engineer to ensure that the feasibility studies will result in a plan of development consistent with the authorized purposes of the federal project.

(E) 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. § 8251 (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2013).

Timothy Konnert, Chief  
Midwest Branch  
Division of Hydropower Licensing

**Form P-1 (Revised April 2011)****FEDERAL ENERGY REGULATORY COMMISSION****TERMS AND CONDITIONS OF  
PRELIMINARY PERMIT**

**Article 1.** The purpose of the permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the permittee undertakes, the permittee shall at all times exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

**Article 2.** The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

**Article 3.** The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

**Article 4.** No later than the last day of each six-month period from the effective date of this permit, the permittee shall file a progress report. Each progress report must describe, for that reporting period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R. §§ 4.38 and 5.1-5.31 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission to access and use the land. Progress reports may be filed electronically via the Internet, and the Commission strongly encourages e-filing. Instructions for e-filing are on the Commission's website at <http://www.ferc.gov/docs-filing/efiling.asp>. To paper-file instead, mail four copies of the progress report to the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

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