

147 FERC ¶ 62,186
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Archon Energy 1, Inc.

Project No. 14575-000

ORDER ISSUING PRELIMINARY PERMIT AND GRANTING PRIORITY TO FILE
LICENSE APPLICATION

(June 5, 2014)

1. On January 6, 2014, Archon Energy 1, Inc. (Archon) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed Black Butte Afterbay Hydropower Project No. 14575 (Black Butte Afterbay Project or project) to be located on Stony Creek near the city of Orland in Glenn County, California.

I. Project Proposal

2. The project would be located at the U.S. Army Corps of Engineering's Black Butte dam and would utilize the existing infrastructure and afterbay of the dam. The proposed project would consist of: (1) a bypass intake in the afterbay of Black Butte reservoir; (2) two 2,800-foot-long pressurized, reinforced concrete pipes creating approximately 20 feet of head; (3) a powerhouse, containing two low-head, 2.5-megawatt (MW) Kaplan turbine-generators; and (4) an undefined interconnection point to the grid within several hundred feet of the proposed powerhouse. The estimated annual generation of the Black Butte Afterbay Project would be 22,000 megawatt-hours.

II. Background

3. The Commission issued public notice of Archon's permit application on March 26, 2014. The City of Santa Clara, California (Santa Clara) filed a timely notice of intervention on May 27, 2014.² The U.S. Department of the Interior filed comments on May 22, 2014, stating that it received the application and had no comments.

¹ 16 U.S.C. § 797(f) (2012).

² Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. 18 C.F.R. § 385.214 (2013).

III. Discussion

4. Santa Clara is a licensee of two projects currently using the same water resources as Archon's proposed Black Butte Afterbay Project. Archon's proposed project would be located immediately downstream from Santa Clara's Black Butte Project (Project No. 3190) and upstream of its High Line Canal Project (Project No. 7252).

5. Santa Clara states that it takes no position with respect to Archon's pursuit of the Black Butte Afterbay project at this time. However, it raises two concerns, in order to alert both the Commission and the applicant, so that any future action by the Commission will not jeopardize Santa Clara's existing projects. In its application, Archon states that it intends to operate the proposed Black Butte Afterbay Project as "run of river." However, Santa Clara cautions that any restrictions requiring the retention of water by Archon could affect water levels in the Black Butte afterbay, and consequently may affect the amount of water that it would be able to discharge from its upstream Black Butte Project, thereby affecting the production capabilities and economics of that project.

6. Santa Clara is further concerned that the proposed project may affect downstream water quality and quantity for its High Line Canal Project. As described in Santa Clara's comments, water flows from the existing Black Butte Project into the Black Butte afterbay. The afterbay serves as both the head for the canal leading to the High Line Canal Project and discharges into Stony Creek. The proposed Black Butte Afterbay Project would also utilize the head of the Black Butte afterbay, diverting it through two 2,800-foot pipes parallel to Stony Creek until it reaches the proposed powerhouse and is discharged further downstream into Stony Creek. Santa Clara states that Archon's proposed Black Butte Afterbay Project may impact the amount of water running from the Black Butte afterbay into South Canal, the source of water for its downstream High Line Project.

7. Section 6 of the FPA protects licensees, in part, by ensuring that licenses "may be altered...only upon mutual agreement between the licensee and the Commission."³ Section 6 bars substantial unilateral alterations of a licensed project, but may permit "such encroachments on a license, comparable in their adverse impact to variations in conditions that investors might expect from other causes such as, for example, annual fluctuations in water supply."⁴ Accordingly, the Commission will not issue a permit where it is clear the proposed development would cause impermissible alterations in a licensed project without the licensee's consent.⁵ Where, however, the proposed

³ 16 U.S.C. § 799 (2012)

⁴ *Pacific Gas and Electric Co. v. FERC*, 720 F.2d 78, 90 (D.C. Cir. 1983).

⁵ *See, e.g., Mokelumne River Water and Power Auth.*, 78 FERC ¶ 61,213 (1997)

development could avoid conflict with a licensee's section 6 protections, the Commission will issue a preliminary permit.⁶

8. There is insufficient information in Archon's permit application to ascertain at this time whether the proposed project would impact the amount of water running from the Black Butte afterbay into South Canal, the water source for Santa Clara's downstream High Line Project, or whether any potential licensing restrictions on Archon's proposed project would affect the amount of water that can be discharged from Santa Clara's Black Butte Project. Indeed, one purpose of the permit is to afford the permittee an opportunity to study the potential for operational impacts and to design the project in such a manner as to avoid or mitigate those impacts.⁷

IV. Permit Information

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,⁸ which in turn sets forth the material that must accompany an application for license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license for the project that is being studied.⁹ 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

(permit application dismissed where application proposed to remove features of upstream licensed project); *JDJ Energy Co.*, 41 FERC ¶ 61,254 (1987)

⁶ See, e.g., *McGinnis, Inc.*, 131 FERC ¶ 62,003 (2009); *City of Oswego, New York*, 61 FERC ¶ 61,056 (1992) (permit issued over existing licensee's objections that proposed project would cause operational impacts on licensed project, including raised water levels in tailrace, reduced head, and reduced generation, because such impacts were speculative at the preliminary permit stage).

⁷ See *McGinnis, Inc.*, 129 FERC ¶ 61,229 (2009).

⁸ 16 U.S.C. § 802 (2012).

⁹ 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.").

project and to prepare a license application, it grants no land-disturbing or other property rights.¹⁰

10. 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. 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 his article.

11. 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.¹¹ 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.¹² 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.

12. 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

¹⁰ 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).

¹¹ 18 C.F.R. §§ 5.5 and 5.6 (2013).

¹² *See* 18 C.F.R. § 5.3 (2013).

applicants for license, the joint application will not be eligible for any permit-based priority.¹³

The Director orders:

(A) A preliminary permit is issued for the Black Butte Afterbay Hydropower Project No. 14575 to Archon Energy 1, Inc. 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) 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.

(C) 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.

(D) 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. § 825l (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2013).

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

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