

147 FERC ¶ 62,116

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Utah Board of Water Resources

Project No. 12966-003

ORDER GRANTING EXTENSION OF TERM FOR PRELIMINARY PERMIT

(May 14, 2014)

1. On March 31, 2014, the Utah Board of Water Resources (Utah Board) filed a timely application for a two-year extension of its successive preliminary permit for the proposed Lake Powell Pipeline Project (Lake Powell Project).¹ The proposed project would be located on federal, state, and private lands in Kane, Washington, and Iron counties, Utah, and in Coconino and Mohave counties, Arizona.

Background

2. The proposed project would consist of: (1) building and operating 139 miles of 69-inch-diameter pipeline and penstock, 35 miles of 48- to 30-inch-diameter pipeline, and 6 miles of 24-inch-diameter pipeline; (2) a combined conventional peaking and pumped storage hydro station; (3) five conventional in-pipeline hydro stations; and (4) transmission lines. A water intake would convey water from the Bureau of Reclamation's Lake Powell up to a high point within the Grand Staircase-Escalante National Monument. From the high point, the water would flow through the pipeline and series of hydroelectric turbines, ending at Sand Hollow reservoir, near St. George, Utah. If the pipeline serves Iron County, the Utah Board proposes another pipeline, the Cedar Valley Pipeline System, from the Hurricane Cliffs afterbay reservoir to Cedar Valley in Iron County, Utah.

3. The Utah Board first held a preliminary permit for hydroelectric development on the pipeline under project No. 12966-000, which was issued on October 12, 2007 and expired on September 30, 2010. The Commission issued the current successive preliminary permit to Utah Board on May 20, 2011, which expired on April 30, 2014. Upon the filing of a timely request to extend the term of a permit, the permit term will be

¹ See 135 FERC ¶ 62,156 (2011).

automatically extended (not to exceed a total term allowed by law, in this case an extra two years) until the Commission acts on the application for an extension.²

4. Under the existing permit, the applicant is studying the generating capacity and energy storage options on its proposed system and how these will need to be optimized to best suit the physical site and electrical system conditions.

Permit Extension Request

5. Section 4(f) of the FPA authorizes the Commission to issue preliminary permits to potential license applicants for a period of up to three years.³ The FPA does not address the issue of how many preliminary permits an applicant may receive for the same site. However, 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.⁴ In the rare instance when a permittee applies for a second successive permit (i.e., a third permit), the Commission has granted one only when the permittee has demonstrated that there is some extraordinary circumstance or factor outside of the permittee's control that prevented it from filing a final license application.⁵

6. Section 5(b) of the Federal Power Act, as amended by the Hydropower Regulatory Efficiency Act of 2013, states that a preliminary permit term can be extended once for not more than two additional years if the Commission finds that the permittee has carried out activities under the permit in good faith and with reasonable diligence.⁶ Because Utah Board has held two preliminary permits for this site and now seeks an extension of its

² See 18 C.F.R. § 4.82(c) (2013).

³ 16 U.S.C. § 797(f) (2012).

⁴ *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).

⁵ See *Greybull Valley Irrigation District*, 143 FERC ¶ 61,131, at PP 14-15 (2013); *Mokelumne River Water and Power Authority*, 89 FERC ¶ 61,001 (1999) (issuing a third permit because the applicant had demonstrated that its delay in performing water flow studies necessary to prepare a license application was dependent on resolution of a pending licensing proceeding at the Commission and pending water rights litigation that could impact available flows).

⁶ Pub. L. No. 113-23, § 5, 127 Stat. 495 (codified as amended at 16 U.S.C. 798(b)).

second preliminary permit, the heightened standard of review used for applications for third permits applies here. Utah Board must demonstrate that there is an extraordinary circumstance or factor outside of its control preventing it from filing a final license application.

7. The Commission has found that in most cases, three years is enough time to consult with resource agencies and conduct the studies necessary to prepare a development application. Allowing a site to be reserved for more than six years, absent some showing of extraordinary circumstances, would be to allow site banking.⁷ However, developing a license application for the proposed Lake Powell Pipeline Project differs from most cases because of the project's large size and location in two states, the complexity of the environmental issues, and the number of cooperating and authorizing federal agencies and Native American tribes involved.

8. Utah Board filed its Notice of Intent and Pre-Application Document (PAD) for the hydroelectric system of the Lake Powell Project on March 4, 2008 and is using the Commission's Integrated Licensing Process (ILP) to prepare a license application. In January 2009, the Commission required the Board to complete the 23 resource studies needed to understand the environmental and economic effects of building the project.

9. The Utah Board made timely progress in implementing many of the approved study plans. However, it decided to revise several studies using an updated 2012 population prediction from the Utah Governor's office. Currently, the Utah Board has completed all draft studies and is now working to finalize the draft studies before it files its Preliminary License Proposal.

10. Upon review of the application for extension, the five progress reports submitted under the preliminary permit, and the Utah Board's 23 draft study plans, the Board has demonstrated that it carried out activities under the permit in good faith and with reasonable diligence. In addition, the proposed project's unique size and complexity, the number of agencies and tribes involved, and the Board's completion of the 23 studies required by the Commission, constitute extraordinary circumstances warranting an extension of its successive preliminary permit. Granting the Utah Board an additional

⁷ The essence of our policy against site banking is that an entity that is unwilling or unable to develop a site should not be permitted to maintain the exclusive right to develop it. See *Public Utility District No. 1 of Pend Oreille County, Wash.*, 124 FERC ¶ 61,064, at P 31 (2008). See also *Idaho Power Co. v. FERC*, 767 F.2d 1359, 1363 (9th Cir. 1985) (finding that the Commission's conclusion that site banking is inconsistent with the FPA is "not only clearly reasonable" but also supported by the terms of the FPA); *Mt. Hope Water Power Project LLP*, 116 FERC ¶ 61,232, at PP 8-13 (affirming application of policy against site banking in permit cases).

two years to reserve priority to develop the proposed pipeline's hydroelectric potential is reasonable given the unique circumstances described above and the Board's substantial progress and investment during its last permit term. Therefore, the request for extension of the preliminary permit term is granted.

11. It is expected that during the remaining term of the permit, as extended, agency consultation will continue, draft studies will be completed, a preliminary license proposal will be filed for comment, and a development application will be prepared and filed.

The Director Orders:

(A) Ordering paragraph (A) of the preliminary permit for the Lake Powell Pipeline Project No. 12966 is amended to read as follows:

(A) A preliminary permit is issued to Utah Board of Water Resources, for Project No. 12966-002, for a period effective the first day of the month in which this permit is issued and ending either 60 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 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 FPA, 16 U.S.C. § 8251 (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2013). The filing of a request for rehearing does not operate as a stay of any date specified in this order.

Timothy J. Welch, Chief
West Branch
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