

156 FERC ¶ 62,161  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Rivertec Partners LLC

Project No. 14753-000

ORDER DENYING PRELIMINARY PERMIT APPLICATION

(Issued September 2, 2016)

1. On April 12, 2016,<sup>1</sup> Rivertec Partners LLC (Rivertec) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>2</sup> to study the feasibility of the proposed Clearwater Hydroelectric Project No. 14753. The project would be located at the U.S. Army Corps of Engineers' (Corps) Dworshak Dam Project on the North Fork Clearwater River near the City of Orofino in Clearwater County, Idaho.

**I. Project Proposal**

2. The proposed project would utilize one of three vacant bays in the Corps' powerhouse at the Dworshak Dam and would consist of the following new facilities: (1) a 125-foot-long, 6-foot-diameter penstock extending from the Corps' existing penstock to a new powerhouse; (2) a powerhouse with a 40 to 50-megawatt (MW) Francis-type turbine-generator; and (3) appurtenant facilities. The estimated annual generation of the Clearwater Project would be 350-420 gigawatt-hours. The proposed project would be located entirely on federal land under the jurisdiction of the Corps.

**II. Background**

3. Under sections 4(e) and 4(f) of the FPA,<sup>3</sup> the Commission has the authority to issue preliminary permits and licenses for hydropower projects located at federal dams and facilities.<sup>4</sup> This jurisdiction is withdrawn if federal development of hydropower

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<sup>1</sup> 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 Rivertec's April 12, 2016 application superseded the one filed on February 16.

<sup>2</sup> 16 U.S.C. § 797(f) (2012).

<sup>3</sup> 16 U.S.C. §§ 797(e), (f) (2012).

<sup>4</sup> Commission licenses for projects at federal facilities cannot include the federal facilities as licensed project works. Rather, the Commission licenses only the non-federal facilities of a hydroelectric project.

generation at the site is authorized, or if Congress otherwise unambiguously withdraws the Commission's jurisdiction over the development of such generation.<sup>5</sup>

4. On February 25, 2016, Commission staff sent the Corps a letter requesting its opinion on whether non-federal development is authorized at Dworshak Dam.<sup>6</sup> The Corps responded on April 8, 2016, stating that it believes the Commission does not have jurisdiction to issue a preliminary permit or license for a project at the site.<sup>7</sup> Upon review of the record, on May 31, 2016, Commission staff sent the Corps a letter, disagreeing with the Corps' jurisdictional assessment and finding that the Commission retains jurisdiction over non-federal hydropower development at the three vacant bays in the Corps' powerhouse.<sup>8</sup> In the May 31 letter, staff provided the Corps an opportunity to respond to staff's jurisdictional findings and asked whether Rivertec's proposal would interfere with the Corps' existing dam operations or improvement plans.

5. On August 2, 2016, the Corps responded stating that it disagrees with staff's jurisdictional determination and that it opposes Rivertec's proposed project on the ground that it would interfere with the Corps' operation of the Dworshak Dam Project. The Corps asks that staff deny the permit application.

6. On August 8, 2016, Rivertec filed a response to the Corps' letter, arguing that the Commission has jurisdiction over development at the vacant bays, that its proposed project would not interfere with the Corps' operation of Dworshak Dam, and that the

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

<sup>6</sup> The Dworshak Dam Project was authorized by the Flood Control Act of 1962. Flood Control Act of 1962, Pub. L. No. 87-875, 76 Stat. 1193. The Corps owns and operates a 400-MW hydroelectric project at this site, using three of the six turbine bays in powerhouse at the dam.

<sup>7</sup> On April 11, 2016, the Nez Perce Tribe filed comments supporting the Corps' position on jurisdiction. On April 12, 2016, Rivertec filed comments arguing that the Commission does have jurisdiction over non-federal hydropower development at the site.

<sup>8</sup> Commission staff noted that Congress explicitly de-authorized development by the Corps at the three vacant bays. 61 Fed. Reg. 66,654 (1996); 55 Fed. Reg. 40,906 (1990). Further, staff concluded that the Corps could not pursue development at those bays under Section 2406 of the Energy Policy Act of 1992 alone. 16 U.S.C. § 839d-1 (2012).

Corps' arguments regarding incompatible operation are premature, as they would be addressed as part of the licensing process.

### III. Discussion

7. 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>9</sup> which in turn sets forth the material that must accompany an application for a license. The Commission is not required to grant a preliminary permit application, so long as it articulates a rational basis for not doing so.<sup>10</sup>

8. In recent decisions, the Commission has denied preliminary permits for projects at federal facilities after the federal entities indicated that no purpose would be served in issuing a permit because the federal entity would not approve modifications to its federal facilities. In *Owyhee Hydro, LLC*,<sup>11</sup> the Commission denied a preliminary permit because the U.S. Bureau of Reclamation stated that a non-federal entity's proposed use of its federal facility was unacceptable and would not be permitted.<sup>12</sup> Similarly, in *Advanced Hydropower, Inc.*,<sup>13</sup> the Commission denied a preliminary permit for a project at McNary Dam because the Corps opposed the project.<sup>14</sup>

9. Here, because the Corps, which owns the Dworshak Dam facility and whose permission would be needed for the development of any project at that facility, has stated that it opposes the project, there is no purpose in issuing a preliminary permit.<sup>15</sup> Therefore, Rivertec's preliminary permit application is denied.

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<sup>9</sup> 16 U.S.C. § 802 (2012).

<sup>10</sup> See *Advanced Hydropower, Inc.*, 155 FERC ¶ 61,007, at P 8 (2016); *Owyhee Hydro, LLC*, 154 FERC ¶ 61,210, at P 23 (2016); *Wyco Power and Water, Inc.*, 139 FERC ¶ 61,124 (2012) (citing *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988)).

<sup>11</sup> 154 FERC ¶ 61,210 (2016).

<sup>12</sup> *Id.* at PP 22-25.

<sup>13</sup> 155 FERC ¶ 61,007 (2016).

<sup>14</sup> *Id.* at 10.

<sup>15</sup> However, we note that Commission staff maintains its position that the  
(continued ...)

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The Director orders:

(A) The preliminary permit application filed by Rivertec Partners LLC on April 12, 2016, for the Clearwater Hydroelectric Project No. 14753 is denied.

(B) This order is issued under authority delegated to the Director and constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from 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 (2016).

Vince Yearick  
Director  
Division of Hydropower Licensing

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Commission has jurisdiction over non-federal hydropower development at the three vacant bays in the powerhouse.

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