

100 FERC ¶ 61, 004  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, Linda Breathitt,  
and Nora Mead Brownell.

Symbiotics, LLC

Project No. 11911-001

ORDER DENYING REHEARING

(Issued July 1, 2002)

1. Symbiotics, LLC has filed a request for rehearing of an April 25, 2002 order<sup>1</sup> denying its application for a preliminary permit to study the proposed 20-megawatt Eagle Rock Project No. 11911. For the reasons discussed below, we deny rehearing.

**BACKGROUND**

2. On March 20, 2001, Symbiotics filed an application for a three-year preliminary permit under Section 4(f) of the Federal Power Act (FPA)<sup>2</sup> to study the proposed 20-megawatt Eagle Rock Hydroelectric Project No. 11911. The project, which would generate about 105 gigawatt hours annually, would be located on the Snake River in Power County, Idaho, partly on federal lands administered by the Bureau of Land Management (BLM). The proposed project would comprise: (1) a proposed earth-fill dam about 30 feet high and 350 feet long; (2) a proposed reservoir with a surface area of 250 acres and a storage capacity of 2,250 acre-feet at a normal water surface elevation of 4,242 feet; (3) a 200-foot-long power canal; (4) a 24-foot-diameter, 400-foot-long steel penstock; (5) a concrete powerhouse with one generating unit with an installed capacity

---

<sup>1</sup>99 FERC ¶ 61,100.

<sup>2</sup>16 U.S.C. § 797(f). Section 4(f) authorizes the Commission to issue preliminary permits "for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 [of the FPA]." Three years is the maximum term for a preliminary permit. See FPA Section 5, 16 U.S.C. § 798.

of 20 megawatts; (6) a 138-kilovolt transmission line about 2.5 miles long; and (7) appurtenant facilities.

3. On April 25, 2002, the Commission issued an order denying the application. The Commission explained that its policy for over two decades has been to grant preliminary permit applications in the absence of a permanent legal barrier precluding licensing the project.<sup>3</sup> Unlike the vast majority of preliminary permit applications, however, the one at issue involved a site that had previously been the subject of a license application. In that proceeding, involving the Eagle Rock Project No. 2789, Commission staff had recommended, in a 1984 final environmental impact statement (EIS), that the license application be denied, based on staff's conclusion that the unmitigable adverse impacts of the project (including elimination of a unique and valuable Class I trout fishery and of whitewater boating activities, reduction in use of the reach in the project area by the endangered bald eagle and by waterfowl, the loss of riparian communities, with concomitant impacts on wildlife, and significant impacts to prehistoric and historic resources) outweighed the benefits of project development. The EIS also noted that the unfavorable economics of the project did not warrant project construction.<sup>4</sup>

4. The Commission concluded that:

[w]here, as here, the Commission staff has previously issued a Final EIS or final environmental assessment in a licensing proceeding, and the document concluded that the unmitigable adverse environmental impacts outweighed the power and other developmental benefits, and in the absence of any indication that those circumstances have changed, it is our judgment that a preliminary permit to study the feasibility of constructing a project at the same site should not issue.<sup>5</sup>

5. On May 21, 2002, Symbiotics filed a request for rehearing of the April 25, 2002 order. Symbiotics argues that the Commission erred: (1) in relying on the 1984 EIS as a basis for denying its application; (2) in deviating without explanation from its long-

---

<sup>3</sup>99 FERC at p. 61,416, citing *City of Summersville, W.Va. v. FERC*, 780 F.2d 1034, 1038-40 (D.C. Cir. 1986), and *Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1526 (D.C. Cir. 1994).

<sup>4</sup>Id. at pp. 61,416-17, citing *Eagle Rock Project*, FERC No. 2789, Final Environmental Impact Statement, Office of Electric Power Regulation, FERC (March 1984), at pp. 5-18 and 5-19.

<sup>5</sup>Id. at p. 61,417.

standing policy of granting preliminary permits in the absence of permanent legal bars thereto; and (3) in improperly creating a new substantive rule without providing an opportunity for public notice and comment.

## DISCUSSION

### A. Reliance on the 1984 EIS

6. Symbiotics asserts that the Commission's reliance on the 1984 EIS as a basis for concluding that it would not issue a preliminary permit to study the Eagle Rock Project No. 11911 is arbitrary and capricious. Symbiotics contends that the 1984 project differed in design, installed capacity, flow requirements, and environmental impacts from proposed Project No. 11911. It adds that the 1984 EIS is 18 years old, and that in the interim, mitigation techniques have improved and environmental management of the Snake River has "modified the environmental picture."<sup>6</sup>

7. As we stated in the April 25, 2002 order, we found the conclusions of the 1984 EIS sufficient to support denial of Symbiotics' application.<sup>7</sup> While Symbiotics makes vague, general statements regarding the ways in which its project may differ from the earlier proposal, and implies that technical improvements and changed environmental management of the Snake may result in different environmental conclusions, it proffers no substantial evidence on these points. Indeed, based on information filed with the Commission in recent proceedings involving projects on the Snake, it appears that environmental concerns have sharply heightened since 1984, and that it is less likely that new hydropower development will be consistent with current management goals for the

---

<sup>6</sup>Symbiotics adds that reliance on the 1984 EIS is inconsistent with the fact, referenced in the April 25, 2002 order, that our decisions at the licensing stage are based on then-current projects economics, as well as an analysis of the project's potential environmental impacts in the light of then-current laws, policies, and site conditions. There is no such inconsistency. At the licensing stage, we require complete, reasonably current information on which to base a decision as to whether, and under what conditions, a project is in the public interest. Because we do not require a prospective permittee to provide this full quantum of information to support a permit application, it is reasonable for us to rely upon the best available information – in this case, the 1984 EIS - in examining the merits of a permit application.

<sup>7</sup>99 FERC at p. 61,417.

river than was previously the case.<sup>8</sup> Given our broad discretion to decide whether or not to issue a preliminary permit,<sup>9</sup> and the complete absence of evidence that circumstances have changed since the 1984 EIS was prepared,<sup>10</sup> our determination that we will not in this class of cases issue a preliminary permit and thereby confer on the permittee priority of license application was reasonable. We also note that our denial of the preliminary permit does not preclude Symbiotics from fully exploring the feasibility of the Eagle Rock Project or from filing a license application for that project. It simply means that Symbiotics is not assured of first-to-file status<sup>11</sup> and will not have tie-breaker permittee preference<sup>12</sup> in the event that it and another entity both file applications for projects at the Eagle Rock site.

## **B. The Policy Modification**

8. Symbiotics makes two arguments with respect to the policy enunciated in the April 25, 2002 order.

---

<sup>8</sup>In fact, portions of the Snake River in the area where the project would be located have been designated as protected areas under the Columbia Fish and Wildlife Program, administered by the Northwest Power Planning Council.

<sup>9</sup>See, e.g., *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988) ("FERC, under the Federal Power Act, is not obliged to issue permits to anyone who seeks them"); *City of Centralia, Washington v. FERC*, 799 F.2d 475, 482 (9th Cir. 1986) ("an applicant has no entitlement to a permit under the FPA").

<sup>10</sup>We recognize that, in a case like this, the prospective permittee will not likely be able to provide a substantial, resource-specific analysis showing that environmental circumstances have changed, since developing such detailed information is the purpose of the studies performed during the preliminary permit stage. However, an applicant could bring to the Commission's attention a significant change (such as the fact that a formerly free-flowing stretch of river now was impounded by a dam or that a reach previously being considered for inclusion in the Wild and Scenic Rivers System had been rejected from such consideration) that would indicate that Commission staff's prior analysis might no longer hold true.

<sup>11</sup>Pursuant to Section 5 of the FPA, during the term of a preliminary permit, a permittee has priority of application for a license. 16 U.S.C. § 798.

<sup>12</sup>See 18 C.F.R. § 4.37(c).

9. First, Symbiotics argues that the Commission failed to explain adequately its deviation from its established policy of issuing preliminary permits unless there is a permanent legal bar to granting a license application. In fact, the April 25, 2002 order, as quoted above, clearly explains our rationale for modifying our policy: where a Commission staff environmental document has concluded that unmitigable adverse environmental impacts outweigh the power and other developmental benefits of permitting hydropower development at a particular site, and there is no showing that circumstances have changed, we will not issue a preliminary permit to study the feasibility of a project at the same site. This does not represent a wholesale change in policy, but rather explains specific circumstances in which the general policy will not apply.

10. Second, Symbiotics states that the April 25, 2002 order constitutes a new substantive rule subject to the notice and comment requirements of the Administrative Procedure Act. On the contrary, it is axiomatic that an agency may, where it deems it appropriate, develop policy in the course of adjudication.<sup>13</sup> The established permit policy at issue here was in fact promulgated in individual cases and has never been the subject of a notice-and-comment rulemaking. Our modification of the policy in these proceedings is proper.

The Commission orders:

The request for rehearing filed by Symbiotics, LLC on May 21, 2002, is denied.

By the Commission.

( S E A L )

Linwood A. Watson, Jr.,  
Deputy Secretary.

---

<sup>13</sup>See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 291-95 (1974) (agency "is not precluded from announcing new principles in an adjudicative proceeding"); *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947) (agency has discretion to choose between proceeding by general rule or by individual, ad hoc litigation).