

114 FERC ¶61,150
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Marseilles Land and Water Company

Project No. 12552-003

ORDER GRANTING IN PART AND
DENYING IN PART REHEARING

(Issued February 16, 2006)

1. In this order, the Commission grants in part and denies in part rehearing of an order which rejected as untimely a request for rehearing filed by Marseilles Land and Water Company (Land and Water) and provided clarification regarding the resolution of potential conflicts between the rights of Land and Water as a preliminary permit holder in relation to the rights of a licensee for a project located at the same site. We conclude that Land and Water's rehearing request was timely filed, but affirm our decision as to Land and Water's rights as permittee.

Background

2. Land and Water applied for a preliminary permit to study the proposed 6.4-megawatt (MW) Marseilles Lock and Dam Project No. 12552. The proposed project would use, among other facilities, the U.S. Army Corps of Engineers' Marseille Lock and Dam and two existing intake canals. One of these canals, the North Channel, is among the project works included in the 4.7 MW Marseilles Project No. 12020, for which Marseilles Hydro Power LLC (Hydro Power) was issued a license in 2003.¹

3. Hydro Power opposed the permit on the ground that it would require alteration of Hydro Power's licensed project works and operating regime by increasing the headwater elevation and requiring reconstruction of the North Channel headrace walls. The Commission staff noted that: (1) Land and Water has stated that it would develop its

¹ *Marseilles Hydro Power LLC*, 105 FERC ¶ 62,131 (2003), *order on reh'g*, 107 FERC ¶ 61,066 (2004). Construction has not commenced on Project No. 12020.

project so as not to interfere with the licensed project; and (2) project proposals at the permit stage are speculative and fluid. Therefore, consistent with precedent, staff issued the requested permit.²

4. Hydro Power sought rehearing or clarification of the permit order, stating that in order to build its licensed project it would have to rebuild the walls of the North Channel and that it intended, for safety reasons, to seek Commission approval to increase the height of the canal walls, which would increase the head and, potentially, the project's hydraulic generation and capacity. Hydro Power sought clarification that Land and Water's permit would not preclude Hydro Power from receiving approval for such a modification or, if not, rehearing of the permit order to the extent that it included the North Channel as a project work.

5. On July 13, 2005, Commission staff issued a letter stating that Land and Water's preliminary permit does not limit Hydro Power's rights with respect to licensed project works such as the North Channel walls. It added that during the term of the permit Hydro Power may proceed with Commission-approved modifications to the North Channel walls despite inclusion of those walls as potential project works under Land and Water's permit.

6. On September 2, 2005, the Commission's Secretary issued a notice dismissing Hydro Power's request for rehearing as moot on the basis that staff's July 13 Letter Order provided the requested clarification.

7. On October 3, 2005, Land and Water filed a request for rehearing or clarification of the September 2 Notice and the July 13 Letter Order. Land and Water sought rehearing to the extent that the effect or intent of the letter and notice is to hold that the Commission would accept an amendment application or otherwise permit Hydro Power to increase hydraulic and generating capacity at its existing project during the term of the license and thereby develop water resources not authorized by the current license. Alternatively, Land and Water sought clarification that the Commission would not accept an application by Hydro Power to develop the incremental electric generation and hydraulic capacity at the site during the term of the permit and would treat Land and Water as the priority applicant for unutilized hydro capacity at the site should its license application be accepted for filing before the expiration of its permit.

² *Marseilles Land and Water Company*, 111 FERC ¶ 62,037 (2005).

8. On November 2, 2005, the Commission issued an order rejecting as untimely Land and Water's request for rehearing as it pertained to the July 13 Letter Order and responding to its request for clarification.³ In response to Land and Water's request for clarification, the November 2 Order explained that the permit was issued on the basis that the proposed project would not interfere with any of the licensed project's physical structures, including the North Channel, and that issuance of the permit does not prevent the licensee from seeking to modify those physical features during the term of the permit. It added that if the Commission determined that modifications sought by the licensee were necessary or reasonable for project purposes, it would not be constrained by the permit from approving them simply because they might also increase the project's hydraulic capacity and generation. It emphasized that Land and Water's permit bestows priority to develop additional capacity only to the extent set forth in its permit application, and does not prevent the licensee from increasing the hydraulic capacity of its own project facilities. Finally, the November 2 Order stated that the Commission cannot resolve any potential conflicts between Land and Water's permit rights and Hydro Power's rights as a licensee in the absence of an application from either party, and that Land and Water is free to contest any proposal that Hydro Power may make.⁴ Land and Water's request for rehearing followed.

Discussion

A. Procedural Matters

9. Rule 713 of our Rules of Practice and Procedure⁵ provide that rehearing may be sought of a "final Commission decision or other final order." An agency order is final when it "imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process."⁶

10. Land and Water argues that staff's July 13 Letter Order could not have been a final decision or other final order because the staff lacks delegated authority to issue

³ *Marseilles Land and Water Company*, 113 FERC ¶ 61,120 (2005).

⁴ *Id.* at P 11-12.

⁵ 18 C.F.R. § 385.713(2005).

⁶ See *City of Fremont v. FERC*, 336 F.3d 910, 913-14 (9th Cir. 2003); *Cities of Riverside and Colton v. FERC*, 765 F.2d 1434, 1438 (9th Cir. 1985); *Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 239 (D. C. Cir. 1980), *cert. denied*, 449 U.S. 1061 (1980).

orders on rehearing⁷ or to otherwise impose obligations or adjudicate the substantive rights of the parties to a contested preliminary permit proceeding.⁸ Thus, it states, the July 13 Letter Order could only be interlocutory until the Secretary's dismissal notice. It adds that the letter did not identify itself as a final order and was not served on Land and Water.

11. Hydro Power filed a timely request for rehearing of the preliminary permit order. That proceeding, and thus the permit itself, remained open until the September 2 Notice.⁹ At that time, it was appropriate for Land and Water to request rehearing of the intervening clarification.¹⁰

B. Land and Water's Rights under its Permit

12. Section 4.33(b) of our regulations provides that the "Commission will not accept an application for a license or project works that would . . . utilize, in whole or part, the same water resources that would be . . . utilized by a project for which there is an unexpired preliminary permit."¹¹ Section 4.37(c) provides that in the case of competing license applications using the same water resources, a permit holder whose application was accepted for filing prior to expiration of the permit will be selected over a competitor's if both are equally well adapted and the permittee has the right to amend its license application to make it as well adapted as a later-filed competing license application to a comprehensive plan to develop the water resources in the public interest.¹²

⁷ Citing Order No. 530, *Streamlining Commission Procedures for Review of Staff Action*, FERC Stats. & Regs., Regs. Preambles 1986-1990 ¶ 30,906 at 31,861 (1990).

⁸ Citing 18 C.F.R. § 375.308(a)(3) (2005).

⁹ The record of a proceeding is not closed until the Commission takes final action on the pleadings requesting rehearing of an order. *Niagara Mohawk Power Corp.*, 76 FERC ¶ 61,073 (1996).

¹⁰ The arguments made in the November 22, 2005 request for rehearing are essentially the same arguments made in the October 3, 2005 request for rehearing.

¹¹ See 18 C.F.R. § 4.233(b) (2005).

¹² See 18 C.F.R. § 4.37(c) (2005).

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13. Land and Water interprets section 4.33(b) as a blanket prohibition on any license amendment application during the term of its permit that would increase the licensed project's capacity because any such increase would use the same water resources covered by Land and Water's permit. It interprets 4.37(c) to mean that it would be the priority applicant with respect to all currently unlicensed capacity that could be developed at the North Channel if it files an application during the term of its permit and Hydro Power files a competing amendment application covering the same capacity.

14. In essence, Land and Water asks us to rule that under no circumstances will the Commission accept an application for license amendment from Hydro Power that uses the same water resources covered by Land and Water's permit. We will not do so. At the time that Land and Water filed its permit application, it knew that the Commission had issued a license for the Marseilles Project. Land and Water accepted its permit knowing that the North Channel was part of the licensed project. Just as preliminary permit proposals are inchoate and subject to alteration, so unconstructed projects are sometimes revised. Thus, it is not possible here to reach blanket conclusions about the applicability of the cited regulations, as might be the case had Land and Water sited its project in an otherwise unused location. In the absence of specific development proposals by these entities, we are not able to say whether there will be a conflict in fact, as opposed to the hypothetical conflict presented in Land and Water's rehearing request. If Hydro Power files an amendment application that Land and Water claims interferes with its rights as a permittee – just as if Land and Water files a license application that Hydro Power contends adversely affects its rights under the license – we will resolve those issues pursuant to the Federal Power Act and our regulations. We cannot address such an issue until it is presented to us. We will therefore deny rehearing on this issue.

The Commission orders:

The request for rehearing filed on November 22, 2005 by Marseilles Land and Water Company is granted in part and denied in part as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.