

UNITED STATES OF AMERICA 123 FERC ¶ 62,042  
FEDERAL ENERGY REGULATORY COMMISSION

City of Wadsworth, Ohio	Project No. 12796-000
Rathgar Development Associates, LLC	Project No. 12797-000
Kentucky Municipal Power Agency	Project No. 12801-000

ORDER ISSUING PRELIMINARY PERMIT

(Issued April 11, 2008)

1. The City of Wadsworth, Ohio (Wadsworth), in Project No. 12796, Rathgar Development Associates, LLC (Rathgar), in Project No. 12797, and Kentucky Municipal Power Agency (KMPA), in Project No. 12801, have filed applications for a preliminary permit under Section 4(f) of the Federal Power Act (FPA)<sup>1</sup> to study the feasibility of the proposed Robert C Byrd Lock & Dam Project. Each project would be located on the Ohio River in Mason County, West Virginia, and Gallia County, Ohio. For the reasons discussed below, this order issues the preliminary permit to Wadsworth.

2. Each proposed project would utilize the U.S. Army Corp of Engineers' (Corps) existing Robert C. Byrd Lock and Dam; and would consist of: (1) a proposed intake structure, (2) a proposed powerhouse containing two generating units with a total installed capacity of 44 to 48 megawatts, (3) a proposed 138-kV transmission line, and (4) appurtenant facilities.

**BACKGROUND**

3. On September 27, 1989, the Commission issued a license for the proposed site to Gallia Hydro Partners (Gallia) in Project No. 9042.<sup>2</sup> Gallia's license was one of 16 licenses then issued by the Commission for projects to be located at Corps dams in the upper Ohio River Basin.

4. Article 301 of the license for the Project No. 9042 required Gallia to commence project construction by two years following the issuance of the license. On December 17,

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<sup>1</sup>16 U.S.C. § 797(f) (2000). Wadsworth and Rathgar each requested a permit with a three-year term and KMPA requested a permit with a two-year term. Three years is the maximum term for a preliminary permit. *See* FPA section 5, 16 U.S.C. § 798 (2002).

<sup>2</sup> *Gallia Hydro Partners, et al.*, 48 FERC ¶61,369 (1989).

1990, effective September 27, 1990, the Commission issued an order partially staying the licenses (including the commencement of construction deadline) for 11 of the upper Ohio River Basin licenses, including the license Project No. 9042, pending judicial review of the licenses.<sup>3</sup>

5. In 1992, the Commission's licensing orders were affirmed, after which, on April 16, 1992, the Commission lifted the 1990 stay and moved the commencement-of-construction deadline to April 15, 1993.<sup>4</sup> By unpublished letter order dated February 11, 1993, Commission staff subsequently granted Gallia's request to extend the deadline for another two years, until April 15, 1995.

6. On November 29, 1993, the Commission granted Gallia's request for another stay of most of the license, again including the commencement of construction deadline, because Gallia could not obtain Corps approval for project construction until the Corps completed certain rehabilitation work on the dam.<sup>5</sup>

7. On August 10, 2004, Gallia and Rathgar filed an application seeking Commission approval to transfer the project license from Gallia to Rathgar. On March 4, 2005, the Commission issued an order lifting the 1993 stay (making the deadline for commencing project construction December 8, 2006) and approving the transfer.<sup>6</sup> Ordering paragraph (C) provided that approval of the transfer was contingent upon: (1) transfer of title of the properties under license and delivery of all license instruments to Rathgar, and (2) Rathgar acknowledging acceptance of the order and its terms and conditions by signing and returning an attached acceptance sheet. Within 60 days from the date of the order, Rathgar was to submit certified copies of all instruments of conveyance and the signed acceptance sheet.

8. On May 3, 2005, Rathgar submitted the signed acceptance sheet required by the transfer order, but included a request for an extension of time, until June 31, 2005, to file the instruments of conveyance, stating that it expected to arrange closing with Gallia during the month of May, 2005. The extension request was granted by unpublished order

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<sup>3</sup> *City of Orrville, Ohio, et al.*, 53 FERC ¶ 61,387 (1990).

<sup>4</sup> *City of Orrville, Ohio, et al.*, 59 FERC ¶ 61,080 (1992).

<sup>5</sup> *Gallia Hydro Partners*, 65 FERC ¶ 61,274 (1993).

<sup>6</sup> *Gallia Hydro Partners and Rathgar Development Associates, LLC*, 110 FERC ¶ 61,237 (2005).

issued May 27, 2005. However, Rathgar did not file the conveyance documents.

9. By certified letter dated January 24, 2007, and filed January 29, 2007, Commission staff gave notice to Gallia of probable termination of the license on the ground that project construction had not commenced by the extended due date of December 8, 2006. Gallia did not respond to the notice.

10. On March 22, 2007, Commission staff issued an order terminating Gallia's license for failure to commence construction by the statutory deadline, effective 30 days following issuance of the order, or April 23, 2007; the Commission denied Rathgar's request for rehearing of the termination order on May 18, 2007.<sup>7</sup>

11. Wadsworth filed its preliminary permit application on April 24, 2007, the next business day following the effective date of the termination order;<sup>8</sup> Rathgar filed its application on April 26, 2007; and KMPA filed identical applications on May 17, 18, and 21, 2007.

12. Public notice of the competing applications and their acceptance for filing was issued on May 30, 2007, setting July 30, 2007, as the deadline for filing motions to intervene, protests, and comments. Comments were filed by the following 24 Ohio, Pennsylvania, Michigan, and West Virginia municipalities supporting Wadsworth's application and protesting KMPA's application: the City of New Martinsville, WV; the Village of Clinton, MI; the Borough of Eldwood City, PA; the Cities of Amherst, Shelby, Jackson, Celina, Piqua, Clyde, Dover, Columbiana, and Wapakoneta, OH; and the Villages of Milan, Carey, Arcanum, Minster, Edgerton, Plymouth, Oak Harbor, Eldorado, Montpelier, Sycamore, Monroeville, and Mendon, OH.

13. On June 25, 2007, as corrected July 7, 2007, KMPA filed a motion in Project

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<sup>7</sup> *Gallia Hydro Partners*, 118 FERC ¶ 62,218 (2007), *reh'g denied*, 119 FERC ¶ 61,163 (2007). The Commission rejected Rathgar's contention that, since, as Rathgar claimed, there was no project property to be conveyed at the federal site, the transfer order had been fully complied with by simply Rathgar's filing of the sheet accepting the provisions of the transfer order and it, not Gallia, was the licensee for Project No. 9042.

<sup>8</sup> Since the 30<sup>th</sup> day following the issuance of the termination order fell on a Saturday, the effective date of the order was the close of business Monday, April 23, 2007. *See* 18 C.F.R. § 385.2007(a)(2) (2007).

No. 12796 opposing Wadsworth's application.<sup>9</sup> KMPA contended that Wadsworth's application was filed prematurely, and therefore should have been rejected, because it was filed while Rathgar's request for rehearing of the order terminating Gallia's license was pending. It also separately contended that Commission regulations prohibited the Commission from terminating Gallia's license until April 24, 2007, and Wadsworth's application was filed on that day, one day prematurely.

## DISCUSSION

### A. KMPA's Arguments

14. KMPA first argues that, since Rathgar's timely request for rehearing of staff's order terminating Gallia's license for the project site in Project No. 9042 was filed, the termination order was not final until the order denying the rehearing was issued on May 18, 2007, and therefore the license for Project No. 9042 was still in existence on April 24, 2007, when Wadsworth filed its permit application. It contends that staff's March 22, 2007 license termination order expressly provided a 30-day period before the order became effective, which, in accordance with the Commission's orders in *Mount Hope Waterpower Project LLP (Mount Hope)*<sup>10</sup> and *Marseilles Land and Water Co. (Marseilles)*<sup>11</sup>, is intended to coincide with the 30-day period within which requests for rehearing can be filed. Therefore, according to KMPA, the availability of rehearing of the order terminating the license preserved the existence of the license and, accordingly, Wadsworth's application was filed prematurely and should have been rejected.

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<sup>9</sup> KMPA's motion to intervene was timely, unopposed, and consequently granted 15 days following its filing, pursuant to Rule 214(c)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 214(c)(1) (2007). Wadsworth filed a motion for leave to answer and an answer (but not in opposition to intervention) on July 10, 2007. KMPA's filing included a request for rehearing of the staff action of accepting Wadsworth's permit application, which the Commission dismissed as interlocutory and therefore premature, and found that KMPA could raise any arguments it deemed appropriate on rehearing of the order on the merits of KMPA's preliminary permit application. *See City of Wadsworth, Ohio and Rathgar Development Associates, LLC*, 120 FERC ¶ 61,172 (2007).

<sup>10</sup> 116 FERC ¶ 61,232, P 13 (2006).

<sup>11</sup> 114 FERC ¶ 61,150, P 11 (2006).

15. However, these arguments confuse “administratively finality,” which pertains to an order being subject to rehearing, with “effectiveness,” which pertains to the date that the requirements of an order become operative. Under Rule 2007(c) of the Commission’s Rules of Practice and Procedure,<sup>12</sup> Commission orders, including staff orders, are effective when issued unless stayed or otherwise ordered by the decision-maker, whether or not they are subject to rehearing. Therefore, for example, the Commission has entertained preliminary permit applications filed for a site on the next business day following the effective date of an order terminating a license for the site, notwithstanding the fact that the license termination order was subject to rehearing.<sup>13</sup> Accordingly, Wadsworth’s permit application was properly accepted, even though staff’s order terminating Gallia’s license for the project site was subject to rehearing.

16. Nor do the orders cited by KMPA demonstrate otherwise. In *Mount Hope*,<sup>14</sup> the Commission affirmed its order rejecting Mount Hope’s preliminary permit application filed immediately following termination of Mount Hope’s license for the project site and establishing a “cooling off” period when Mount Hope could not file permit applications for the site. The Commission rejected Mount Hope’s argument that its permit application should be accepted because no competing applications had been filed following termination of Mount Hope’s license, finding that the order terminating Mount Hope’s license: “...was not administratively final until the close of business on January 16, 2006,

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<sup>12</sup> 18 C.F.R. § 385.2007(c) (2007).

<sup>13</sup> See *City of Augusta, Kentucky*, 51 FERC ¶ 61,056 (1990), where the Commission entertained on rehearing (then appeal) preliminary permit applications filed immediately after an order terminating a license for the site and dismissed them based not on the pendency of rehearing and the lack of administrative finality of license termination order, but rather on a stay of the termination order that retroactively reinstated the license. Compare *Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,003 at 61,009 (1999), where the Commission rejected a license transfer application on the ground that it was filed following the effective date of the order accepting surrender of the license, and notwithstanding the fact that a request for rehearing of the license’s surrender was pending. The cited orders are consistent not only with Rule 2007(c), *supra*, but also section 313(c), of the FPA, 16 U.S.C. § 825(c), and Rule 713(e) of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.713(e) (2007), both of which provide that the filing of a request for rehearing, unless the Commission orders otherwise, does not stay the order of which rehearing is sought.

<sup>14</sup> 116 F.E.R.C. ¶ 61,232.

when Mount Hope failed to file a request for rehearing by the statutory deadline.”<sup>15</sup> According to KMPA,<sup>16</sup> it follows from the quoted finding that, had Mount Hope actually filed a timely request for rehearing of the order terminating the license, no competing application would have been accepted until the Commission had issued an order on rehearing and the proceeding became administratively final.

17. However, KMPA misinterprets *Mount Hope*. First, KMPA’s interpretation flies in the face of Rule 2007(c) and other statutory and regulatory provisions and related Commission precedent cited above standing for the well-established rule that Commission orders are effective when issued. Second, like the termination order issued for Gallia’s license, the order terminating Mount Hope’s license was made effective 30 days from its issuance date, which, in accordance with the requirements of Rule 2007(c), precluded the filing of competing application prior to the business day immediately following the effective date (albeit the same date that the termination order became administratively final).

18. KMPA’s contentions related to the *Marseilles* order are unpersuasive. Quoting from the *Marseille* order, KMPA argues that the order’s finding that a request for rehearing kept the permit in that case “open” means that the permit remained in existence, thus precluding the filing of new permit applications.<sup>17</sup> However, the *Marseilles* proceeding involved a resolution of a procedural question concerning the timeliness of a request for rehearing of an order issuing the permit for the site involved in that proceeding, which was also the subject of a licensed project. The order issuing the permit had found that the permit could be issued because it was not clear that the project proposed in the permit application impermissibly conflicted with the licensed project. There is nothing in *Marseilles* that even suggests that the permit involved was not in effect during the rehearing of the order issuing it. Consequently, the *Marseilles* order is

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<sup>15</sup> *Id.*, P 13.

<sup>16</sup> KMPA’s June 25, 2007 filing at 7.

<sup>17</sup> See *Marseilles Land and Water Co.*, 114 F.E.R.C. ¶ 61,150, P 11 (2006), where the Commission found: “Hydro Power [licensee for the site involved] 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 [dismissing Hydro Power’s request for rehearing as moot].”

inapposite here.<sup>18</sup>

19. Taking a different tack, KMPA next argues that, in accepting Wadsworth's application for filing, the Commission failed to follow the Commission's regulations at 18 C.F.R. § 6.3 (2007), which states, in part, that licenses may be terminated for failure to timely commence project construction "not less than 90 days after notice thereof shall have been mailed to the licensee by certified mail ...." KMPA contends that the staff order terminating Gallia's license for Project No. 9042 and the Commission's order denying rehearing of the license termination order both erroneously found, contrary to section 6.3, that license termination became effective 30 days following issuance of the termination order or, as noted, April 23, 2007, and consequently, Wadsworth's preliminary permit application, filed on April 24, 2007, the next business day following the effective date of the termination order, was erroneously accepted.

20. KMPA acknowledges that the Commission's regulations at 18 C.F.R. §375.308(f) (2007), authorize staff (the Director of the Office of Energy Projects) to issue an order terminating a license under section 13 of the FPA for failure to timely commence project construction provided: (1) The Director gives notice by certified mail to the licensee of probable termination no less than 30 days prior to the issuance of the termination order; and (2) the licensee does not oppose the issuance of the termination order.

21. KMPA contends, however, that while staff issued a certified letter noting probable termination of Gallia's license on January 24, 2007, on February 23, 2007, Rathgar filed a letter on behalf of itself and Gallia, opposing termination of the license and therefore the 30-day effective date included in section 375.308(f) does not apply, and instead the 90-day effective date of section 6.3 applies. KMPA contends that therefore the earliest possible date that Gallia's license could have been terminated was 90 days following the January 24, 2007 notice of probable termination letter or April 24, 2007; that consequently the earliest date that a permit application could have been lawfully filed for the site was the next business day or April 25, 2007; and that, accordingly, since Wadsworth's application was filed one day early, on April 24, 2007, it should have been dismissed.

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<sup>18</sup> KMPA also cites *St. Maries Naturalists*, 42 FERC ¶ 61,384 (1988) for the proposition that that a preliminary permit application cannot be filed while rehearing of a preliminary permit is pending. However that order did not involve the filing of permit applications in relation to the pendency of rehearing but rather in relation to the expiration date of the term of the prior permit for the site involved.

22. However, KMPA's assertions of error in the orders terminating Gallia's license, based on a failure to apply the 90-day termination period of section 6.3, are being made long after the orders became administratively final; they therefore constitute an improper collateral attack on the termination orders; and consequently, they must be rejected. Moreover, only Gallia, the licensee, could have properly raised questions regarding the propriety of the termination orders, which it did not do. KMPA, which had no cognizable interest in the license for Project No. 9042, lacks standing to make these arguments.<sup>19</sup>

23. In addition, KMPA cannot show that it acted in reliance on a 90-day termination period, rather than a 30-day period. A 90-day termination period would have run on April 25, 2007, yet KMPA filed its application over three weeks later, on May 18, 2007. Thus, KMPA's arguments regarding the termination period are simply *post hoc* rationalizations.

24. Accordingly, KMPA's arguments do not merit relief here.

#### B. Issuance of Preliminary Permit

25. Since none of the applicants has presented a plan based on detailed studies, there is no basis for concluding that any applicant's plan would be superior to the other. Additionally, since Wadsworth and KMPA are municipalities, and after taking into consideration the ability of each applicant to carry out its plans, the Commission will favor the applicant with the earliest application filed date.<sup>20</sup> Therefore, this preliminary permit is being issued to the Wadsworth for Project No. 12796, which was filed first.

26. The purpose of a preliminary permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepares an acceptable development application. The permit confers no authority on the permittee to undertake construction of the proposed

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<sup>16</sup> In addition, while KMPA implies that Rathgar's February 23, 2007, letter, purporting to be on behalf of itself and Gallia, constitutes an objection by the licensee to termination, such that 30-day termination by the Director was no longer possible, and the termination would have had to have been by the Commission, upon 90-day's notice, it is not at all clear that Rathgar had any authority to act on Gallia's behalf. In the May 18, 2007 order denying rehearing, the Commission determined that Rathgar was not the licensee, and Rathgar's letter contained no authorization from Gallia to act on its behalf.

<sup>20</sup> 18 CFR § 4.37(b)(2) (2007).

project or any part thereof,<sup>21</sup> or to occupy or use lands or other property of the United States or of any other entity or individual.

27. If, during the course of the permittee's investigation into the feasibility of the proposal, the permittee decides to prepare a development application, it must first prepare a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to Sections 5.5 and 5.6 of the Commission's Regulations. Pursuant to Part 5 of the Commission's regulations, 18 C.F.R. Part 5, the permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Pursuant to Section 5.3, such a request must accompany the NOI and PAD and set forth specific information justifying the request.<sup>22</sup> 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.

28. A preliminary permit is not transferable. The named permittee is the only entity entitled to the priority of 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 applicants for license, the joint application will not be eligible for any permit-based priority. See City of Fayetteville, 16 FERC ¶ 61,209 (1981).

The Director orders:

(A) A preliminary permit is issued for this project to City of Wadsworth, Ohio, in Project No. 12796, for a period effective the first day of the month in which this permit is issued, and ending 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.

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<sup>2</sup> Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment.

<sup>3</sup> See 18 C.F.R. §§ 5.3(b) and (c) (2007).

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(B) The competing application for preliminary permit for Project No. 12797, filed by Rathgar Development Associates, LLC on April 26, 2007, is denied.

(C) The competing application for preliminary permit for Project No. 12801, filed by Kentucky Municipal Power Agency on May 21, 2007, is denied.

(D) 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.

(E) 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 authorized purposes of the federal project.

(F) This order is issued under authority delegated to the Director and constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713.

William Guey-Lee  
Chief, Engineering & Jurisdiction Branch  
Division of Hydropower  
Administration and Compliance

**Form P-1 (Revised February 2007)****FEDERAL ENERGY REGULATORY COMMISSION****TERMS AND CONDITIONS OF  
PRELIMINARY PERMIT**

**Article 1.** The purpose of the permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if said project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the Permittee undertakes, the Permittee shall at all time exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. All test sites shall be restored as closely as possible to their original condition and to the satisfaction of the Commission's authorized representative or, where federal lands are affected, to the satisfaction of the agency administering such lands.

**Article 2.** The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the Permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

**Article 3.** The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the Permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

**Article 4.** At the close of each six-month period from the effective date of this permit, the permittee shall file four copies of a progress report with the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426; and shall serve a copy on the interveners in this proceeding. The report shall describe, for that report period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 CFR §§ 4.38 and 5 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission therefor.

Document Content(s)

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