

123 FERC ¶ 61,272  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

City of Wadsworth, Ohio	Project Nos. 12796-002
Rathgar Development Associates, LLC	12797-002
Kentucky Municipal Power Agency	12801-001

ORDER DENYING REHEARING

(Issued June 19, 2008)

1. Kentucky Municipal Power Agency (KMPA) has filed a request for rehearing of an April 11, 2008, Commission staff order<sup>1</sup> issuing a preliminary permit to the City of Wadsworth, Ohio (Wadsworth), to study the feasibility of the proposed Robert C. Byrd Lock & Dam Project No. 12796, to be located on the Ohio River in Mason County, West Virginia, and Gallia County, Ohio, at the United States Army Corps of Engineers' (Corps) existing Robert C. Byrd Lock and Dam. Because we find no merit in KMPA's arguments we deny rehearing.

**Background**

2. On September 27, 1989, the Commission issued Gallia Hydro Partners (Gallia) a license to construct and operate the proposed Gallipolis Lock and Dam Project No. 9042, to be located at the Corps' Robert C. Byrd Dam.<sup>2</sup> Article 301 of the license required Gallia to commence project construction by two years following the issuance of the license.

3. After years of extensions and delays,<sup>3</sup> by certified letter dated January 24, 2007, and filed January 29, 2007, Commission staff gave notice to Gallia of probable

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<sup>1</sup> 123 FERC ¶ 62,042 (2008) (*Order Issuing Preliminary Permit*).

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

<sup>3</sup> See *Order Issuing Preliminary Permit* for a detailed procedural history.

termination of the license on the ground that project construction had not commenced by the extended due date of December 8, 2006.<sup>4</sup> Gallia did not respond to the notice.

4. 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.<sup>5</sup> Rathgar Associates, to which Gallia had received authorization to transfer the license in a transaction that was never completed, filed a request for rehearing of the license termination order. The Commission denied rehearing on May 18, 2007.<sup>6</sup>

5. Wadsworth filed a preliminary permit application seeking to study the Robert C. Byrd site on April 24, 2007, the next business day following the effective date of the termination order;<sup>7</sup> Rathgar filed a permit application for the same site on April 26, 2007; and KMPA filed identical permit applications on May 17, 18, and 21, 2007.

6. By order issued April 11, 2008, Commission staff granted Wadsworth's permit application, and denied Rathgar's and KMPA's. Commission staff found that there was no basis for determining that any of the three applicants' plans to develop the water resource at issue was superior to the others.<sup>8</sup> In consequence, the order issued the preliminary permit to Wadsworth, citing the Commission's regulations,<sup>9</sup> which provide that the Commission will, when considering competing permit applications in cases where all else is equal, favor the first-in-time applicant.

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<sup>4</sup> See letter from William Guey-Lee (Commission staff) to Michael G. LaRow.

<sup>5</sup> *Gallia Hydro Partners*, 118 FERC ¶ 62,218 (2007) (March 22 Order).

<sup>6</sup> *Gallia Hydro Partners*, 119 FERC ¶ 61,163 (2007) (May 18 Order). 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>7</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).

<sup>8</sup> *Order Issuing Preliminary Permit*, 123 FERC ¶ 62,042 at P 25.

<sup>9</sup> 18 C.F.R. § 4.37(b)(2) (2007).

7. On May 12, 2008, KMPA filed a timely request for rehearing.

### **Discussion**

#### **A. Commission Staff Correctly Found that No Competing Permit Application was Superior**

8. KMPA argues that Commission staff's finding that no competing application was superior to the others erroneously ignores KMPA's statements in its application that KMPA would reduce by one-third the time proposed by the other applicants to file a license application,<sup>10</sup> thereby significantly reducing the time needed to develop the project site, consistent with federal policy, as KMPA says is expressed in *Mt. Hope Waterpower Project LLP*.<sup>11</sup> KMPA contends that no detailed studies are necessary to find KMPA's application superior to the others in light of its proposal for quicker project development.<sup>12</sup>

9. KMPA's argument is unpersuasive. The Commission has never found one permit application to be superior to another based on the asserted date that a license application would be filed. Indeed, we cannot choose between competing permit applications based on such claims, because they are purely speculative. No applicant can know in advance, among other variables, what pre-license studies it will be required to undertake, how long those studies will take to perform, or how successful and how lengthy its consultation with resource agencies and interaction with the public will be. Accepting KMPA's assertions here would simply prompt competing permit applicants to outbid each other as

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<sup>10</sup> KMPA requested a permit with a two-year term and its competitors each requested a three-year permit. KMPA's application (at 45) stated its expectation that KMPA would file a license application by July 2009; Rathgar's application (at 11) expressed the intent to file a license application in August 2011; and Wadsworth's application (at 12 and 13) stated its intent to consult with government agencies and the public and to conduct studies needed to develop a license application during the term of the permit.

<sup>11</sup> 116 FERC ¶ 61,232 (2006) (*Mt. Hope*).

<sup>12</sup> Beyond referring to its claim that it would file a license application more quickly than its competitors, KMPA does not even assert that its plans to develop the water resource at issue were superior to the others.

to how quickly they will file a license application, despite the fact that those claims might have little, if any, basis in reality.<sup>13</sup>

10. We find no error in Commission staff's determination that: "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."<sup>14</sup>

**B. Commission Staff Properly Accepted the Competing Permit Applications upon the Effective Date of the License Termination Order.**

11. The FPA and the Commission's regulations thereunder make it clear that Commission orders become effective by their terms and remain effective notwithstanding the filing of requests for rehearing. Section 309 of the FPA<sup>15</sup> states that "[o]rders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe." FPA section 313(c)<sup>16</sup> provides that "[t]he filing of a request for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order." These principles are echoed by Rule 2007(c) of our Rules of Practice and Procedure,<sup>17</sup> which states that Commission orders (including delegated orders) are effective when issued, unless stayed or otherwise ordered by the decision-maker, whether or not they are subject to rehearing, and section 385.714(e) of the regulations,<sup>18</sup> which states that unless otherwise ordered by the Commission, a request for rehearing does not stay a Commission decision or order.

12. As noted, the order terminating Gallia's license, by its terms,<sup>19</sup> became effective on April 23, 2007. The Commission will not accept preliminary permit applications for

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<sup>13</sup> Moreover, while in the abstract the sooner an application can be filed might be the better, the caliber and completeness of the application are at least as important. We would not want to sacrifice quality in the service of speed.

<sup>14</sup> 123 FERC ¶ 62,042, *supra*, at P 25.

<sup>15</sup> 16 U.S.C. § 825*h* (2000).

<sup>16</sup> 16 U.S.C. § 825*l* (2000).

<sup>17</sup> 18 C.F.R. § 385.2007(c) (2007).

<sup>18</sup> 18 C.F.R. § 385.714(e) (2007).

<sup>19</sup> 118 FERC ¶ 62,218, *supra*, at 61,640 (Ordering Paragraph A).

project works that would interfere with a licensed project in a manner precluded by FPA section 6.<sup>20</sup> Thus, as long as Gallia's license was in effect, we would not accept an application for a preliminary permit to study developing that site. On April 24, the day after the termination had become effective, permit applications respecting the project site could be filed. Accordingly, Commission staff accepted Wadsworth's and Rathgar's permit applications, which, as noted, were filed on April 24 and 26, 2007, respectively.

13. On rehearing, KMPA presses its argument, rejected in the *Order Issuing Preliminary Permit*, that Commission staff erroneously accepted Wadsworth's and Rathgar's permit applications. While KMPA acknowledges that the March 22 Order terminating Gallia's license became effective on April 23, 2007, it argues that Rathgar's request for rehearing of that order preserved Gallia's license until the Commission's final disposition of the Rathgar rehearing request on May 18, 2007, and therefore section 4.33(a)(2) barred the filing of Wadsworth's and Rathgar's earlier-filed permit applications for the site.

14. KMPA argues that it is not the effectiveness of the license termination order or merely the availability of rehearing, but rather the administrative finality of the order that terminates a license and allows the filing of permit applications for the project's site. To support its position, KMPA cites *Mt. Hope*, which involved a terminated license whose licensee attempted to submit a permit application for its former site, despite a Commission-imposed "cooling off" period barring the application. In rejecting the former licensee's permit application, the Commission stated:

Finally, *Mt. Hope* points out that no competing permit or license applications were filed following the December 15, 2005, termination of the 1992 license .... It is hardly surprising that no competing permit applications have been filed at this point. The December 15 Order was not administratively final until the close of business on January 16, 2006, when *Mt. Hope* failed to file a request for rehearing by the statutory deadline.

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We would ... have dismissed any competing permit applications filed before the statutory period for *Mt. Hope* to seek rehearing.<sup>[21]</sup>

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<sup>20</sup> See 18 C.F.R. § 4.33(a)(2) (2007).

<sup>21</sup> *Mt. Hope*, 116 FERC ¶ 61,232, *supra*, at P 13 and n.28.

KMPA argues<sup>22</sup> that the policy rationale underlying *Mt. Hope* is that the Commission should not accept new applications when it could still reverse the order terminating the prior license for the site.<sup>23</sup>

15. However, *Mt. Hope*'s license termination order was, by its terms, effective 30 days following its issuance, which coincides with the termination order's 30-day rehearing period. Consequently, as we stated in *Mt. Hope*, the Commission would indeed have had to dismiss a permit application filed during that 30-day period, since the order terminating the license would not have then been effective. We do not read *Mt. Hope* to suggest a license termination order's administrative finality and rehearing period govern its effective date: to do so would be inconsistent with section 385.714(e) and Rule 2007(c), as well as with FPA sections 309 and 313(c).

16. In addition, KMPA ignores clear Commission precedent contrary to its position. For example, in *Midwest Hydraulics*,<sup>24</sup> an applicant asserted that the timely filing of its request for rehearing of an order rejecting its license application prevented the rejection from becoming effective. We explained that the applicant

is confusing the finality of a Commission order with its effectiveness. Section 313(c) . . . expressly provides that the filing of a request for rehearing or a petition for judicial review does not operate as a stay of the order of which rehearing or judicial review is sought. Although a request for rehearing may make an order non-final and thus subject to revocation

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<sup>22</sup> Rehearing request at 13.

<sup>23</sup> To further support its argument, KMPA cites, as it did in its motion to intervene in Wadsworth's permit application, *Marseilles Land & Water Co.*, 114 FERC ¶ 61,150, at P 11 (2006), where, in the context of resolving a procedural question concerning the timeliness of a request for rehearing of an order issuing a preliminary permit, the Commission stated: "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 [dismissing Hydro Power's request for rehearing as moot.]" The *Order Issuing Preliminary Permit* addressed the quoted findings, concluding: "There is nothing in *Marseilles* that even suggests that the permit involved was not in effect during the rehearing of the order issuing it." 123 FERC ¶ 62,042 at P 18. We affirm this conclusion.

<sup>24</sup> 120 FERC ¶ 61,247 (2007).

or modification, the request does not stay the effectiveness or enforceability of the order's provisions.<sup>[25]</sup>

17. KMPA argues<sup>26</sup> that the Commission has never invoked the effective date of a license termination order as being determinative of when permit applications for the previously-licensed project site may be filed. However, as the *Order Issuing Preliminary Permit* noted,<sup>27</sup> in *City of Augusta, Kentucky*,<sup>28</sup> the Commission entertained preliminary permit applications filed immediately after an order terminating a license for a site.<sup>29</sup> The *Order Issuing Preliminary Permit* also cited *Niagara Mohawk Power Corp.*,<sup>30</sup> 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, notwithstanding the fact that a request for rehearing of the license's surrender was pending. KMPA did not address these orders on rehearing.<sup>31</sup>

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<sup>25</sup> *Id.* P 8. See also *Mirant Kendall, LLC and Mirant Americas Energy Marketing, L.P.*, 110 FERC ¶ 61,272, at P 9 (2005) (Commission's reliance on order subject to rehearing proper because order remained effective); *Sullivan Island Associates*, 58 FERC ¶ 61,129, at n.4 (1992) (order dismissing pending license application was effective when issued, so proper to accept permit application while period for seeking rehearing of dismissal order was pending); *City of Tacoma, Washington*, 85 FERC ¶ 61,130, at p. 61,477 (1998), *reh'g denied*, 87 FERC ¶ 61,197, at p. 61,732 (1999) (although licensee not required to decide whether to accept license until completion of rehearing and judicial review, issued license remains in effect); *John N. Webster*, 58 FERC ¶ 61,168, at n.12 (1992) (license effective as of issuance date, even if requests for rehearing filed).

<sup>26</sup> Rehearing request at 15.

<sup>27</sup> 123 FERC ¶ 62,042, *supra*, n.13.

<sup>28</sup> 51 FERC ¶61,056 (1990).

<sup>29</sup> The applications were later dismissed, based not on the pendency of rehearing or the lack of administrative finality of license termination order, but rather because of the issuance of a stay of the termination order that retroactively reinstated the license.

<sup>30</sup> 89 FERC ¶ 61,003, at 61,009 (1999).

<sup>31</sup> KMPA contends (rehearing request at 13-15) that there are policy reasons for concluding that a license is preserved until an order terminating it is administratively final, because rehearing could result in reversing the license termination order, prejudicing a permit holder that expended funds in reliance on the permit. It further argues that any interpretation of section 4.33(a)(2) that allows the filing of permit applications before termination of a pre-existing license becomes administratively final

(continued...)

18. Accordingly, we reject KMPA's contentions that Gallia's license was preserved by the filing of a request for rehearing of the order terminating the license.

**C. Commission Staff Correctly Applied the 30-day Regulation of Section 375.308(f).**

19. As noted, on January 24, 2007, staff issued a certified letter to Gallia giving notice of probable termination of Gallia's license, pursuant to section 375.308(f) of its regulations.<sup>32</sup> Section 375.308(f) authorizes the Director of the Office of Energy Projects to issue an order terminating a license 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.

20. KMPA reiterates its argument, made in its motion to intervene in Wadsworth's permit application proceeding, that staff erred in terminating Gallia's license by invoking the 30-day notice requirement of section 375.308(f) on the grounds that section 375.308(f) does not override section 6.3 of the Commission's regulations,<sup>33</sup> which provides that licenses may be terminated for failure to begin construction by written order of the Commission "not less than 90 days after notice thereof shall have been mailed to the licensee by certified mail to the last address whereof the Commission has been notified by the licensee...."<sup>34</sup> KMPA argues that section 375.308(f) is merely a delegation of authority and does not create new authority for staff that the Commission lacks for itself under section 6.3; that section 375.308(f) merely adds an obligation that staff must provide notice an additional 30 days before issuance of a termination, where the order is issued by staff rather than by the Commission itself; and that section 375.308(f) does nothing to reduce or eliminate section 6.3's requirement for a 90-day notice period.

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would improperly "commence giving away the licensee's interest in the license," *id.* at 15, which it contends is inconsistent with basic principals of due process. Aside from the fact, as discussed above, that KMPA's position is inconsistent with the FPA, our regulations, and our precedent, an entity seeking a permit in such a case would be aware of the potential risk that the Commission might reverse the termination order. And, once a license is terminated, the licensee no longer has an interest of any kind in it.

<sup>32</sup> 18 C.F.R. § 375.308(f) (2007).

<sup>33</sup> 18 C.F.R. § 6.3 (2007).

<sup>34</sup> *Id.*

21. KMPA further contends that OEP's *Order Issuing Preliminary Permit* erroneously found that KMPA was barred from raising the issues related to termination of Gallia's license on the grounds that KMPA's contentions constituted an improper collateral attack on the license termination orders. It argues that its challenges to the termination of Gallia's license do not constitute an improper collateral attack on the license termination orders, since it could not have known that its rights would be affected by the license termination orders when they were issued and therefore it should not now be barred from challenging the application of the 30-day requirement in section 375.308(f) in the license termination proceeding.

22. KMPA is wrong on all counts. In the first place, KMPA has no standing to question the propriety of the termination proceeding. KMPA did not even seek to intervene in the Gallia proceedings, a prerequisite to obtaining standing.<sup>35</sup> In any case, the only party that could properly have been heard to argue that the Commission erred in applying a 30-day, rather than a 90-day, period was Gallia, the licensee.<sup>36</sup> KMPA, which has no interest in the Gallia license, was not aggrieved by the termination order.<sup>37</sup> Given that the order was clear as to the termination date, KMPA was on notice of that date and had every opportunity to file a permit application on the day following the termination. If it chose not to do so, it must live with the consequences.

23. Moreover, KMPA's contentions are an improper collateral attack not only on the Gallia license termination orders but also on Order No. 556.<sup>38</sup> There, the Commission modified the predecessor to section 375.308(f) by reducing the 90-day notice provision in

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<sup>35</sup> See, e.g., *PJM Interconnection, LLC*, 122 FERC ¶ 61,082, at P 13 (2008).

<sup>36</sup> Gallia did not seek rehearing of the termination order. Rathgar, which did argue on rehearing that it in fact was the licensee, did not object to the 30-day notice period.

<sup>37</sup> See, e.g., *Indian River Power Supply, LLC*, 117 FERC ¶ 61,089 (2006) (third party not aggrieved by rejection of application, which is matter between applicant and Commission); *Bridger Pipeline, LLC*, 112 FERC ¶ 61,349, at P21 (2005) (entity that was not shipper lacked standing to protest pipeline tariff filings); *Puget Sound Energy*, 112 FERC ¶ 61,244 (2005) (entity not required to be consulted with respect to post-license plan lacked standing to seek rehearing of order approving plan); *City of Tacoma, Washington*, 86 FERC ¶ 61,311, at n.198 (1999) (industry groups with no direct interest in licensing group and not aggrieved by conditions in licensed lacked standing to raise takings issue).

<sup>38</sup> *License Termination*, 58 Fed. Reg. 51,222 (October 1, 1993), FERC Statutes and Regulations, Regulations Preambles January 1991-June 1996 ¶ 30,979 (September 24, 1993) (Order No. 556).

the predecessor regulation to the currently-required 30-day notice provision in section 375.308(f). The modification to the notice requirement came after public notice of the proposed change was issued,<sup>39</sup> and the Commission received no comments on the proposed change.<sup>40</sup> The Commission found:<sup>41</sup>

As discussed in the [Notice of Proposed Rulemaking], most of the Commission's license termination proceedings are initiated for failure to commence construction after having received a one-time extension of two years in addition to the two-year period prescribed in the license. Thus, the notices are usually issued after a four-year period in which to commence construction has expired and no construction has occurred. By that time, the licensee's unwillingness or inability to commence construction has in virtually every case become common knowledge to both the licensee and the Commission's staff such that the notice becomes a procedural formality that confirms the obvious. Reducing the waiting period will expedite the processing of the Commission's license termination workload. Therefore, we will revise the regulation as proposed in the NOPR.

24. While the Commission apparently inadvertently failed to also modify the related 90-day notice requirement of section 6.3 of its regulations, the quoted findings supporting the modification of what is now section 375.308(f) of the Commission's regulations clearly show a reasoned decision to shorten the license-termination notice requirements for staff-issued orders, and not a mere narrow change to a "delegation rule" as KMPA argues. Thus, even if KMPA were not barred by lack of aggrievement and untimeliness from raising this argument at this late date, KMPA's contention that section 6.3 somehow negates section 375.308(f) fails.

25. KMPA contends that, even if section 375.308(f) applies to termination of Gallia's license, a letter filed February 23, 2007, by Rathgar, purporting to be on behalf of itself and Gallia, constitutes an objection by the licensee to termination, such that 30-day termination by Commission staff was no longer possible, and the termination would have

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<sup>39</sup> *License Termination*, 58 Fed. Reg. 35,415 (July 1, 1993), FERC Statutes and Regulations, Proposed Regulations 1988-1998 ¶ 32,496 (June 24, 1993).

<sup>40</sup> *See* Order No. 556 at 30,890.

<sup>41</sup> *Id.*

had to have been by the Commission, upon 90-days' notice.<sup>42</sup> The *Order Issuing Preliminary Permit* properly rejected that argument, finding<sup>43</sup> that it is not at all clear that Rathgar had any authority to act on Gallia's behalf, and that in the order denying rehearing of termination of Gallia's license, the Commission determined that Rathgar was not the licensee, and Rathgar's letter contained no authorization from Gallia to act on its behalf.

26. KMPA maintains that these conclusions are belied by the Commission's acceptance of Rathgar as an appropriate party to seek a stay of Gallia's license and rehearing of the order terminating the license. However, the March 22 Order terminating Gallia's license found that Rathgar was not the licensee,<sup>44</sup> a conclusion affirmed in the May 18 Order denying rehearing.<sup>45</sup> KMPA's arguments to the contrary are, again, an improper collateral attack on the orders terminating Gallia's license, made by a party with no standing with respect to those orders.

The Commission orders:

The request for rehearing, filed in this proceeding on May 12, 2008, by Kentucky Municipal Power Agency is denied.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>42</sup> Rehearing request at 20-21.

<sup>43</sup> 123 FERC ¶ 62,042, *supra*, n.19.

<sup>44</sup> 118 FERC ¶ 61,218 at n.9.

<sup>45</sup> 119 FERC ¶ 61,163 at P 19-20. The fact that we considered a request for rehearing by a putative transferee provides no indication that we considered that entity to be the licensee.

Document Content(s)

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