

FERC Limits Hydro Municipal Preference to Projects in Vicinity of Municipality

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On December 19, 2013, the Federal Energy Regulatory Commission (FERC) issued an order in a competitive hydroelectric project preliminary permit proceeding between a municipality and a non-municipality in which it held for the first time that municipal preference will apply only to projects that are in the “vicinity” of the municipality. *FFP Qualified Hydro 14, LLC*, 145 FERC ¶ 61,255.

BACKGROUND

The competing applications were filed for a project at the U.S. Army Corps of Engineers’ Saylorville Dam on the Des Moines River in Iowa. The non-municipal application was filed by FFP Qualified Hydro 14, LLC (FFP). The municipal application was filed by the Western Minnesota Municipal Power Agency (WMMPA). Both applications were deemed to be filed on the same day and time following the expiration of a first preliminary permit held by FFP. Following acceptance of the applications, FERC issued on October 10, 2013, a notice of its intent to hold a random drawing to determine priority of filing. WMMPA filed a protest, stating that under FERC’s regulations regarding preference among competing applications and FERC precedent, priority of filing is not relevant as between municipalities and non-municipal applicants. On October 23, 2013, FERC held the drawing, which resulted in FFP being assigned the first priority.

ORDER ISSUING PRELIMINARY PERMIT

In the December 19 order, FERC determined that neither application was better adapted to the comprehensive development of the waterway. It then stated that Federal Power Act Section 7(a), which requires FERC to give preference to applications by states and municipalities in issuing preliminary permits or original licenses when no preliminary permit has been issued, provides no guidance as to the scope of municipal preference. FERC held that the best reading of the statute is that municipalities should have preference “only with respect to the development of water resources that are located in their vicinity.” FERC explained that it is appropriate to give a municipality preference in developing “nearby hydropower sites for the benefit of its citizens,” but that it could discern no public interest in giving a municipality preference regarding a project “far from the site of the municipality.”

FERC then stated that WMMPA was seeking municipal preference for a project almost 400 miles from the site of WMMPA’s office in Minnesota and that the record showed no relationship between WMMPA and the proposed project other than a business development interest. FERC found that to give WMMPA municipal preference under such circumstances would not be in the public interest. Having decided that WMMPA is not entitled to municipal preference, FERC then issued a successive permit to FFP based on FFP’s first priority status resulting from the random drawing.



IMPLICATIONS

FERC's limit of municipal preference to projects in the vicinity of the municipality departs from its consistent practice for over 80 years of applying the preference regardless of the location of the project in relation to the municipality. If the new policy is retained, the breadth of municipal preference will be substantially limited and FERC will likely have to resolve many disputes regarding whether a proposed project is in the vicinity of the municipal applicant.

FOR MORE INFORMATION

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