

**BEFORE THE
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

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| _____) | |
| Utah Board of Water Resources) | Project No. P-12966-005 |
|) | Docket No. EL 18-56-000 |
| Lake Powell Pipeline Project) | |
| Utah BWR Petition for Declaratory Order) | Motion to Intervene |
| _____) | and Comments |

**WESTERN RESOURCE ADVOCATES' MOTION TO INTERVENE
AND COMMENTS**

Pursuant to 18 C.F.R. §§ 385.212, 385.214 (2017) Rules 212 and 214 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”), Western Resource Advocates (“WRA”) hereby moves to intervene in the above-captioned proceeding. In support of this request, WRA states the following:

I. COMMUNICATIONS

All communications, correspondence, and documents concerning this request should be directed to the following persons:

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II. BACKGROUND

The Utah Board of Water Resources (“UBWR”) submitted an application for a license for the Lake Powell Pipeline Project (“Pipeline”), FERC Project No. 12966, on April 30, 2016. The proposed Pipeline would be located in Washington and Kane Counties, Utah, and in Coconino and Mohave Counties, Arizona. Although the Pipeline, if approved, would be licensed to and constructed and operated by UBWR, the water delivered by the Pipeline would be used by the Washington County Water Conservancy District (“WCWCD”) and the Kane County Water Conservancy District (“KCWCD”) (collectively, the “Water Districts”) for municipal and industrial water supply. Under the State of Utah’s Lake Powell Pipeline Development Act, the State of Utah is the direct sponsor of the Pipeline. However, the Water Districts are the ultimate beneficiaries of the Pipeline and would be required to reimburse the State for the costs of developing the Pipeline.

The 140-mile proposed Pipeline would deliver water from Lake Powell, a federal reservoir in Arizona operated by the Bureau of Reclamation, to Sand Hollow Reservoir, near St. George, Utah for eventual distribution to the Water Districts’ municipal and industrial water customers. To help cover the cover the costs of conveying this water, the Pipeline proposes to include a series of hydroelectric turbines placed along the 89-mile downhill side of the Pipeline.¹ To this end, the Pipeline also proposes to include a pumped storage development in Washington County, Utah. Much of the proposed Pipeline would be located on public lands managed by the Bureau of Land Management.² UBWR plans to sell electricity generated by the Pipeline to regional transmission

¹ Application for Original License, Integrated Licensing Proposal (Public Filing) The Lake Powell Pipeline Project, FERC Project No. P-12966 at A-1 to -2 (April 30, 2016), eLibrary 20160502-5386.

² *Id.*, Draft Plan of Development – Pipeline and Hydro Facilities at 1-4 (describing proposed facilities that would be on land administered by the Bureau of Land Management).

operators as an incidental purpose of the Pipeline.³ UBWR’s application seeks to define the entire 89-mile downhill side of the water supply pipeline as a “hydro system” subject to FERC’s jurisdiction under Part I the Federal Power Act.⁴

On December 11, 2017 the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued its Notice of Application Accepted for Filing, Soliciting Motion to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions (“NREA”).⁵ In the NREA, FERC states that it has not yet determined whether these approximately 89 miles of water delivery pipelines will be included as part of the licensed hydro facilities.⁶

On December 27, 2017, UBWR petitioned the Commission urging FERC to declare that the water delivery pipelines are part of the hydropower project and subject FERC’s jurisdiction under the Federal Power Act.⁷ It concurrently moved for “the Commission to suspend the licensing proceeding immediately, and act expeditiously by issuing a declaratory order finding that the penstock alignments are subject to its licensing jurisdiction by the Commission’s February 15, 2018 open meeting date.”⁸

On January 10, 2018 the Commission issued its Notice of Petition for Declaratory Order, and therein provided all interested parties to make comments and motions or petitions to intervene on or before February 12, 2018. On January 11, 2018 the Commission issued its Notice

³ See Application at ES-7.

⁴ *Id.* at A-2; see also *id.* at Figure 5-1 (showing a map of the proposed action’s “hydro system”).

⁵ eLibrary 20171211-3022.

⁶ *Id.* at pp. 2-3.

⁷ UBWR, “Petition for Declaratory Order on Jurisdiction, Motion for Expedited Action, and Motion for Suspension of Procedural Schedule,” eLibrary no. 20171227-5166 (Dec. 27, 2017), p. 1 (Petition).

⁸ *Id.* at 2.

Suspending Procedural Schedule on the license application until after the Commission issues its decision on UWBR's Petition for Declaratory Order.

III. MOTION TO INTERVENE

Western Resource Advocates (WRA) hereby moves to intervene in the above-captioned docket.⁹ WRA is a not-for-profit organization that works to protect the West's land, air, and water. We help communities restore rivers, protect aquatic ecosystems, and reduce water pollution through environmentally sustainable management of the West's scarce water resources. Western Resource Advocates is a long-time member of the Upper Colorado River Endangered Fish Recovery Program—a large, multi-stakeholder effort to recover four endangered fish species in the Upper Colorado River Basin. Western Resource Advocates' members and employees are located throughout the arid and semi-arid states of the Interior West. Allowing WRA to intervene in this docket would be in the public interest pursuant to 18 C.F.R. § 385.214(b)(2)(iii) (2017).

WRA represents a diverse group of stakeholders in Utah and Arizona. WRA and its members have a special interest in protecting, restoring, and enjoying the Colorado River and its tributaries. WRA's team of scientists, lawyers, and economists craft and implement innovative solutions to the most complex natural resource challenges in the region. WRA's work in Utah and Arizona includes finding solutions to those states water needs that do not include large-scale development projects such as the Lake Powell Pipeline. WRA has experience in helping western communities meet their water needs, as well as extensive knowledge of the water delivery systems in the Colorado River Basin.

In 2013, WRA produced a report offering alternatives to Lake Powell Pipeline that would

⁹ Although the instant Motion only seeks intervention in Project No. P-12966-005, WRA reserves the right to seek intervention into any other docket or dockets under P-12966 at a later date.

meet southern Utah communities' foreseeable water needs without requiring construction of the Pipeline.¹⁰ WRA continues to seek alternatives to potentially unnecessary and environmentally damaging water development projects in the West. WRA's expertise in helping communities meet their municipal water needs through water conservation, reuse, and water sharing with agriculture, as well as our prior application of this knowledge and advocacy to the proposed Lake Powell Pipeline, give WRA a vested interest and valuable expertise in water use in southern Utah and Arizona. WRA will be able to apply this knowledge and experience to the proposed Pipeline, thereby adding value to these proceedings.

IV. WRA'S COMMENTS ON UBWR'S PETITION FOR DECLARTORY ORDER

a. FERC explicitly denied that it had jurisdiction over UBWR's proposed water delivery pipeline in *Wyco Power & Water Inc.*¹¹

UBWR erroneously claims that FERC has "consistently" – if has ever – treated the water delivery pipeline component of its proposed project as jurisdictional.¹² In a 2012 order, the Commission discusses Lake Powell Pipeline and states that "any eventual license issued by the Commission would be limited to the discrete hydropower developments along the Lake Powell Pipeline, and would not encompass the entire pipeline."¹³ The Commission's analysis in *Wyco Power & Water Inc.* disposes of UBWR's primary justification for the Petition. There is nothing "discrete" about an 89-mile stretch of pipeline, the primarily purpose of which is to deliver a raw water supply for municipal and industrial consumption. The obvious meaning of this Commission's analysis is that the Commission has jurisdiction only over the seven discrete

¹⁰ Amelia Nuding, Western Resource Advocates, Local Waters Alternative to the Lake Powell Pipeline (Mar. 13, 2013), eLibrary 20130314-5010.

¹¹ 139 FERC ¶ 61,124 at pp. 4-5 (May 17, 2012 Order Denying Request for Rehearing and Clarification), *attached as* Exh. 1.

¹² Petition at pp. 7-10.

¹³ 139 FERC ¶ 61,124 at 5 (emphasis added).

proposed hydro stations.¹⁴

In *Wyco*, the applicant sought to secure a preliminary permit for a 501-mile water supply pipeline from Flaming Gorge Reservoir in Wyoming to Colorado’s Front Range. There, as here, the primary purpose of the proposed pipeline project was to provide a new water supply to distant communities, notwithstanding the various hydropower facilities proposed at intervals along the way. *Wyco* requested a rehearing of FERC’s denial of a preliminary permit, arguing that its application was “indistinguishable” from the preliminary permit granted to the Lake Powell Pipeline.¹⁵ In upholding its earlier decision denying the preliminary permit, the Commission made it clear that its jurisdiction was only over the hydropower components authorized by the Lake Powell Pipeline Development Act, and not the whole water delivery pipeline.¹⁶ The Commission noted that *Wyco*’s application was “overly broad” because it presumed that FERC would issue a license for the whole pipeline, and reiterated that “it has long been the Commission’s practice not to license the entire water conveyance system itself.”¹⁷

In *Wyco*, as here, the applicant appears to have conflated FERC’s current role as the lead agency for environmental review of the Lake Powell Pipeline under the National Environmental Policy Act (NEPA) with an assertion of jurisdiction under the Federal Power Act.¹⁸ The Commission clarified that it accepted its role as the lead agency under NEPA for the proposed Lake Powell Pipeline despite its lack of jurisdiction over the water supply pipeline as a whole.¹⁹

¹⁴ See Application at A-2 to -3.

¹⁵ *Id.* at 1, 4-5.

¹⁶ *Id.* at p. 5 (citing U.C.A. §§ 73-28-101 through 405 (2012)).

¹⁷ *Id.* at p. 4 n.6 (internal citations omitted).

¹⁸ Compare Motions at p. 4 with 139 FERC ¶ 61,124 at p. 5 n.9 (citing a coalition of state and federal agencies asking the Commission to become the lead agency under NEPA).

¹⁹ 139 FERC ¶ 61,124 at p. 5 n.9. Western Resource Advocates continues to assert that FERC should not be the lead agency for environmental analysis of the proposed Lake Powell Pipeline under NEPA. See, e.g., Western Resource Advocates, “Comments on the Preliminary Licensing Proposal for the Lake Powell Pipeline Project, Project No. P-12966-001,” eLibrary no. 20160301-

Although questions of FERC’s jurisdiction and the identity of the best agency to lead environmental analysis under NEPA overlap somewhat, they are ultimately different issues with different standards.²⁰ The Commission should affirm its analysis of the Lake Powell Project, as stated in *Wyco*.

b. The Commission’s analysis in *Wyco* is consistent with extensive authority disfavoring Federal Power Act jurisdiction over water delivery pipelines.

The Supreme Court of the United States has held that jurisdiction under Section 4(e) the Federal Power Act²¹ is limited to structures designed for the primary purpose of hydropower production. In *Chemehuevi Tribe of Indians v. Fed. Power Commission*, the Court approvingly quoted the following excerpt from the Federal Power Commission’s First Annual Report, submitted to Congress in 1921:

Structures or diversions having any other [(i.e., non-power)] purpose, unless incidental to works constructed for power purposes or a necessary part of a comprehensive scheme of development, are not within the jurisdiction of the Commission.²²

The Court then adopted this long-standing interpretation of the Federal Power Act.²³

UBWR’s attempt to apply Federal Power Act jurisdiction to a water supply pipeline, with only an incidental hydropower purpose, flips the Court’s construction of the Federal Power Act

5013 (Mar. 3, 2016), pp. 12-13. However, this issue is outside the scope of this comment. Western Resource Advocates reserves the right to raise the question of the best lead agency under NEPA in later filings.

²⁰ See *North Carolina v. City of Virginia Beach*, 951 F.2d 596, 605 (4th Cir. 1991) (“FERC may choose to conduct a NEPA review beyond its required jurisdiction[.]”).

²¹ 16 U.S.C. § 797(e).

²² *Chemehuevi Tribe of Indians v. Fed. Power Comm’n*, 420 U.S. 395, 409 (1975), cited in *Metro. Dist. of S. Cal.*, 4 F.E.R.C. ¶ 61,064, 61,136 (1978).

²³ See *id.* at 414 (Congress intended the Act as a whole . . . to subject to regulation only that segment of the power industry involving the construction and operation of hydroelectric generating facilities), 423 (The legislative history of the Federal Water Power Act conclusively demonstrates that in 1920 Congress intended to provide for the orderly development of the power potential of the Nation’s waterways only through the licensing of hydroelectric projects.”).

upside down. The primary purpose of the proposed Lake Powell Pipeline is to deliver a raw water supply to distant municipal and industrial water customers. Only the seven discrete proposed hydro stations can arguably be said to have a dominant hydropower purpose. By contrast the 140 miles of pipeline connecting them, including the 89 miles of pipeline on the downhill side, are plainly for the primary purpose of transporting water to distant communities for eventual consumptive use. Because the proposed hydropower use of the pipeline is only incidental, FERC does not have jurisdiction over the water supply pipeline elements of the Lake Powell Pipeline Project under the Federal Power Act.

In *California Department of Water Resources*, the Federal Power Commission considered its jurisdiction under remarkably similar circumstances related to the California Aqueduct. The commission found that Federal Power Act jurisdiction only applies to the power facilities attached to a water conveyance project, and not the conveyance facilities themselves.²⁴ There, the commission stated that it would not “extend [its] jurisdiction beyond those facilities actually constructed for power purposes so as to include hundreds of miles of canals, pumping stations and other associated facilities unrelated to the production of power.”²⁵ Importantly, the commission also cited the “basic purpose” test in *Western Massachusetts Electric Company*,²⁶ as support for its conclusion that Federal Power Act jurisdiction over a project may be limited, and that jurisdiction must be analyzed in the context of the primary purpose of each element of the project.²⁷ The commission also noted that “[t]he mere fact that various facilities are proposed for licensing by an applicant is not sufficient reason to assume that all of such facilities are properly the subject

²⁴ 51 F.P.C. 529, 533-35 (1974), *cited in Wyco*, 139 FERC ¶ 61,124 at 4, 5.

²⁵ *Id.* at 533.

²⁶ 39 F.P.C. 723, 731 (1968).

²⁷ 51 F.P.C. at 534

of a license.”²⁸

The commission’s reasoning in *California Department of Water Resources* also shows that Federal Power Act jurisdiction should not apply to water supply pipelines, even where that pipeline is necessary to supply water to a jurisdictional hydroelectric facility. The Commission noted:

We have consistently licensed power facilities at projects where we have not licensed the remaining facilities because they were not part of the project or were not subject to our jurisdiction for other reasons. The most obvious example is those facilities licensed at government dams for the production of power even though we have no authority over the dam itself.²⁹

Therefore, the fact that a dam may supply water and hydroelectric head to a power generation facility does not automatically make that structure jurisdictional. Much like that dam, the fact that a water supply pipeline brings water flow and hydroelectric head to a power facility as an incident to its primary water supply purpose, does not automatically make that pipeline jurisdictional under the Federal Power Act. Accordingly, the overwhelming weight of authority supports the application of Federal Power Act jurisdiction to only discrete hydropower generating stations and not to water transportation infrastructure.

This Commission has not yet responded to UBWR’s Request for Leave to Answer WRA’s Answer to their motions and petition.³⁰ However, WRA notes that UBWR’s assertion of Federal Power Act jurisdiction over any part of UBWR’s proposed water delivery system “necessary” for the generation of power,³¹ finds no support in the above-described authorities and contradicts its

²⁸ *Id.*

²⁹ *Id.* at 534. See also *Metro. Dist. of S. Cal.*, 4 F.E.R.C. ¶ 61,064, 61,135-37 (1978) (applying Federal Power Act jurisdiction to hydropower facilities added to pre-existing water delivery systems, but not to the water transportation systems themselves), cited in *Wyco*, 139 FERC ¶ 61,124 at 4, 5; *City and County of Denver*, 10 F.P.C. 766, 767 (1951) (licensing an “incidental” hydroelectric facility along a transbasin water delivery system, but not the whole water delivery system), cited in *Metro. Dist. of S. Cal.*, 4 F.E.R.C. at ¶ 61,136 n.3.

³⁰ eLibrary 20180122-5113 (filed Jan. 22, 2018).

³¹ *Id.* at 3.

own Application. The Application only asserts FERC’s jurisdiction over the 89-mile “downhill” part of the pipeline;³² yet, the “uphill” part of the pipeline, including its proposed pumping facilities, is just as essential for bringing water to the proposed hydroelectric facilities in the first place. Plainly, the UBWR’s jurisdictional theory is arbitrary and finds no support in the case law considering similar fact patterns under Section 4(e) of the Federal Power Act. FERC should affirm its prior analysis and precedent applying Federal Power Act jurisdiction to discrete incidental hydropower stations, but declining to extend its jurisdiction to water delivery infrastructure primarily intended to deliver water to distant communities for consumptive municipal and industrial use.

V. CONCLUSION

WHEREFORE, for the reasons set forth herein, WRA submits that the Commission must deny UWBR’s request for Declaratory Order, or in the alternative declare that FERC has jurisdiction over ONLY the seven proposed hydropower stations along the Lake Powell Pipeline, but not the proposed water conveyance system itself.

Dated February 12, 2018

Respectfully submitted,



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³² Application at A-1.

DECLARATION OF SERVICE

Utah Department of Water Resources, Division of Water Resources,
Lake Powell Pipeline Project (P-12966)

I, Robert K. Harris, hereby certify that on this 12th day of February, 2018, I have served a copy of the forgoing **Western Resource Advocates' Motion to Intervene and Comments** electronically, or if no email address is provided, by first-class mail per Commission direction upon each person designated on the official Service List.

By:



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Exhibit 1

139 FERC ¶ 61,124
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Wyco Power and Water, Inc.

Project No. 14263-001

ORDER DENYING REQUEST FOR REHEARING AND CLARIFICATION

(Issued May 17, 2012)

1. On February 23, 2012, Commission staff dismissed a preliminary permit application filed by Wyco Power and Water, Inc. (Wyco) to study the feasibility of the Regional Watershed Supply Project No. 14263 to be located in Wyoming and Colorado.¹ On March 23, 2012, Wyco requested rehearing and clarification of the February 23 Order. This order denies Wyco's request.

I. Background

2. On September 1, 2011, Wyco filed a preliminary permit application to study the Regional Watershed Supply Project. This project would involve an interbasin transfer of water from the Green River Basin in Wyoming, through a proposed 501-mile-long, 72- to 120-inch-diameter buried water conveyance pipeline, to a proposed reservoir near Pueblo, Colorado, for municipal and agricultural uses. The project also would include seven hydropower projects along the length of the water conveyance pipeline, including two pumped storage projects and five in-pipeline turbines.

3. On October 5, 2011, Commission staff requested that Wyco correct deficiencies in its permit application and submit additional information. As presented in its application, Wyco's proposed project boundary included the entire 501-mile-long pipeline from the Green River in Wyoming to Pueblo, Colorado, as well as the seven proposed hydropower projects. Commission staff's October 5 letter directed Wyco to revise its process schedule for the pre-filing integrated licensing process because Wyco's proposed

¹ *Wyco Power and Water, Inc.*, 138 FERC ¶ 62,150 (2012) (February 23 Order).

schedule provided only six months to consult with participants and to conduct technical studies after submission of the pre-application document, which was not realistic for hydropower developments that would rely on a water conveyance pipeline that had not yet been constructed. Commission staff clarified to Wyco that because the Commission would only license the proposed hydropower developments, which are discrete components of the 501-mile-long water conveyance pipeline, construction of substantial portions of the overall project may require authorization from other federal agencies. In addition, Commission staff asked Wyco to identify the federal lands impacted by the Regional Watershed Supply Project and to prepare a separate map identifying the locations of the proposed hydropower facilities.

4. In response, on October 13, 2011, Wyco submitted a revised licensing process schedule, and updated its maps to include the locations of its proposed hydropower developments and the federal lands impacted by the Regional Watershed Supply Project.²

5. On October 18, 2011, Commission staff accepted Wyco's permit application and issued public notice of the application. In response to the public notice, over 200 comments expressly opposing the proposed project were submitted by the Governor of Wyoming, state agencies, counties, municipalities, water conservation districts, utilities, environmental or resource advocacy groups, and individuals.

6. On February 23, 2012, Commission staff dismissed Wyco's permit application. The February 23 Order found that Wyco's application proposed to study seven hydropower projects that are exclusively dependent on water from a proposed water conveyance pipeline that does not currently exist, and Wyco had failed to present information about its progress in obtaining the necessary authorizations for construction of the pipeline. Given the complexity of seeking a multitude of authorizations for a pipeline that would cross federal, state, county, and private lands, and the additional time required to actually construct such a substantial project, the February 23 Order dismissed Wyco's permit application as premature. The February 23 Order explained that until the water conveyance system is actually built, authorizations have been obtained for a specific route, or the process to identify a specific route has been substantially completed, Wyco would likely be unable to prepare license applications for the seven proposed hydropower projects during the term of a three-year permit.

² Wyco states that its proposed project would occupy lands managed by the U.S. Department of the Interior's (Interior) Bureau of Reclamation (Reclamation) and Bureau of Land Management, and the U.S. Department of Agriculture's Forest Service. A review of the maps submitted by Wyco indicates that the proposed pipeline also crosses lands managed by Interior's Fish and Wildlife Service.

7. On March 23, 2012, Wyco requested rehearing and clarification of the February 23 Order, arguing that Commission staff erred in dismissing the permit application. Colorado Springs Utilities; Colorado Environmental Coalition, National Parks Conservation Association, and Western Resource Advocates, filing jointly; and Sierra Club, Center for Biological Diversity, Rocky Mountain Wild, Save the Poudre: Poudre Waterkeeper, Biodiversity Conservation Alliance, Wyoming Outdoor Council, Citizens for Dixie's Future, Glen Canyon Institute, Living Rivers: Colorado Riverkeeper, and Utah Rivers Council, filing jointly, submitted answers to Wyco's request for rehearing. The answers oppose the request for rehearing and Wyco's proposed project. We will not permit the answers because the Commission's Rules of Practice and Procedure do not allow answers to a request for rehearing,³ and the answers repeat comments in opposition to the project submitted by the same entities in the permit proceeding.

II. Discussion

8. The Commission is not required to grant a permit application, so long as it articulates a rational basis for not issuing the permit.⁴ The Commission could issue a preliminary permit for the discrete hydropower projects along the water conveyance pipeline that Wyco has proposed. However, under the facts of this case, we do not believe it would be good policy to do so.

9. We agree with staff's conclusion that it is premature to issue Wyco a preliminary permit for its seven proposed hydropower developments, at least until more concrete information regarding the authorization of the water conveyance pipeline is available. Sections 4(f) and 5 of the Federal Power Act (FPA) authorize the Commission to issue preliminary permits for the sole purpose of maintaining priority of license application for up to three years to allow a permittee to prepare the maps, plans, and specifications required by section 9 of the FPA to be included in a license application.⁵

³ 18 C.F.R. § 385.213(a)(2) (2012).

⁴ See, e.g., *Kamargo Corp. v. FERC*, 852 F.2d 1392, 1398 (D.C. Cir. 1988) (The Commission "is not obliged to issue permits to anyone who seeks them.").

⁵ Section 4(f) of the FPA, 16 U.S.C. § 797(f) (2006), authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts required by section 9 of the FPA. Section 9 requires license applicants to submit "[s]uch maps, plans, specifications, and estimates of cost as may be required for a full understanding of the proposed project," together with satisfactory evidence of compliance with pertinent state laws, and

(continued...)

10. Wyco has presented no information in its permit application or its request for rehearing to indicate that the planning, routing, or authorizations for the water conveyance pipeline are in progress or reasonably foreseeable. Until Wyco is able to do so, there is no point in issuing a preliminary permit for the hydropower developments because Wyco would be unable to study the feasibility of, and prepare a license application for, a project whose location has not been sufficiently narrowed. Indeed, the degree of controversy surrounding the water pipeline, as evidenced by the substantial issues relating to the interbasin transfer of water and the construction of the pipeline, indicates that Wyco's pursuit of authorization for its water conveyance pipeline could be difficult and lengthy. Given Wyco's failure to provide any substantial information regarding the proposed pipeline, which is the water source for the proposed hydropower projects, we affirm staff's dismissal of Wyco's permit application because it is premature to issue a permit at this time.⁶

11. Furthermore, as discussed below, none of the issues raised by Wyco on rehearing warrants a different result. Wyco argues on rehearing that its proposal is indistinguishable from the Lake Powell Pipeline Project in which the Commission issued a preliminary permit to the Utah Board of Water Resources (Utah Board) for hydropower

“such additional information as the Commission may require.” 16 U.S.C. § 802 (2006). Section 5 allows the Commission to issue permits for the sole purpose of maintaining priority of application for a license for up to three years “for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.” 16 U.S.C. § 798 (2006).

⁶ Moreover, we note that Wyco's permit application is overly broad because it presumes the Commission would issue a license for a 501-mile-long water supply pipeline. While the Commission regularly licenses discrete hydropower developments within substantial water conveyance systems, it has long been the Commission's practice not to license the entire water conveyance system itself. *See, e.g., Metropolitan Water District of Southern Calif.*, 4 FERC ¶ 61,064 (1978) (asserting jurisdiction over hydropower developments along the 242-mile-long Colorado River Aqueduct, a water conveyance system that carries water from the Colorado River to Southern California, but not licensing the entire water conveyance system); *Calif. Dept. of Water Resources*, 51 F.P.C. 529, 533-35 (1974) (finding the Commission would only license those facilities that were “actually constructed for power purposes” within the California Aqueduct, a 475-mile-long water conveyance system that carries water from near San Francisco to the Los Angeles area).

development along the Lake Powell Pipeline.⁷ We disagree. In 2006, the State of Utah passed the Lake Powell Pipeline Development Act, which authorized the Utah Board to build the Lake Powell Pipeline, a water supply project that would intake water from the Bureau of Reclamation's Lake Powell, and deliver it to water conservation districts in three Utah counties – Washington, Kane, and Iron.⁸ In addition, the Lake Powell Pipeline Development Act allowed the Utah Board to construct and own hydropower developments, with Commission approval, along the pipeline. It is for these developments alone, and not for the Lake Powell Pipeline, which is a state water supply project authorized under state law, that a preliminary permit was issued to the Utah Board.⁹ Any eventual license issued by the Commission would be limited to the discrete hydropower developments along the Lake Powell Pipeline, and would not encompass the entire pipeline.¹⁰

12. Wyco also argues that the Commission has issued permits for proposed hydrokinetic projects in which the precise location of turbines in the river was unknown at the time of application, and other proposed closed-loop pumped storage projects where the initial fill or replacement water has yet to be authorized.¹¹ Neither of these

⁷ In February 2008, Commission staff issued a preliminary permit to the Utah Board to study the feasibility of three potential hydropower developments along the Lake Powell Pipeline. 122 FERC ¶ 62,131 (2008). In March 2008, the Utah Board submitted a Notice of Intent and Pre-Application Document to initiate the pre-filing integrated licensing process (ILP). Pre-filing activities and studies under the ILP schedule continued through the remainder of the permit term. In 2011, staff issued a successive permit to the Utah Board for the hydropower developments. 135 FERC ¶ 62,156 (2011).

⁸ Utah Code Ann. § 73-28-101 through 405 (LexisNexis 2012).

⁹ At the request of the State of Utah, its state agencies, and the federal agencies from which authorizations are required, Commission staff agreed to become the lead agency for purposes of the Lake Powell Pipeline Project environmental review under the National Environmental Policy Act. Unlike the Lake Powell Pipeline proceeding, no such coalition has asked the Commission to lead a multi-agency environmental effort for Wyco's proposed project.

¹⁰ See, e.g., *Metropolitan Water District of Southern Calif.*, 4 FERC ¶ 61,064 (1978); *Calif. Department of Water Resources*, 51 F.P.C. 529, 533-35 (1974).

¹¹ Pumped storage projects move water between two reservoirs located at different elevations to store energy and generate electricity. A closed-loop pumped storage project is a project that is not continuously connected to a naturally-flowing water feature.

circumstances support issuing Wyco a preliminary permit for the Regional Watershed Supply Project. In the case of the hydrokinetic permits, the Commission has issued preliminary permits for proposals to study a narrowly-defined stretch of river without knowing the precise locations of the turbines.¹² However, in these cases, the defined project boundary area, within which a permittee receives priority of license application, is generally a few miles at most for marine and riverine hydrokinetic projects.¹³ These proportions are in stark contrast to the 501-mile-long pipeline proposed in Wyco's permit application, the precise location of which has yet to be determined. We are not persuaded by Wyco's argument that the proposed locations of its hydropower projects along a hypothetical water conveyance pipeline is analogous to hydrokinetic preliminary permits where the precise location of the turbines is unknown within a defined project boundary.

13. In the case of closed-loop pumped storage projects, the Commission has also issued preliminary permits to study projects that would involve the use of unidentified initial fill and replacement water.¹⁴ These cases also do not support issuance of a permit to Wyco for its 501-mile-long water conveyance pipeline. None of these permit applicants proposed developing such a significant water conveyance system. Each of the permits was issued for a discrete proposed pumped storage project. In fact, in *Eagle Mountain Energy Company*, the Commission issued a permit to study a closed-loop pumped storage project that planned to use unallocated water in the Colorado River Aqueduct as the initial fill and replacement water,¹⁵ which was a similar proposal to

¹² See, e.g., *Verdant Power, LLC*, 100 FERC ¶ 62,162 (2002).

¹³ See, e.g., *Reedsport OPT Wave Park, LLC*, 134 FERC ¶ 62,244 (2011) (permit issued to study the feasibility of a hydrokinetic wave energy project with a project boundary area of approximately one mile wide by five miles long); *Verdant Power, LLC*, 100 FERC ¶ 62,162 (2002) (permit issued to study the feasibility of a hydrokinetic project in the East River with a project boundary that included a 1.8-mile-long stretch of the river). Project boundaries for hydrokinetic permits must be commensurate with the type of technology being proposed.

¹⁴ See, e.g., *Black Longview Energy Exchange LLC*, 139 FERC ¶ 62,072 (2012) (proposed pumped storage project that anticipates obtaining water from local groundwater sources); *Swan Lake North Hydro, LLC*, 127 FERC ¶ 62,077 (2009) (proposed pumped storage project that anticipates obtaining water from local wells). In the case of closed-loop pumped storage projects, the permit priority is usually for the location of the reservoir, rather than the water resource. See *Russell Canyon Corp.*, 58 FERC ¶ 61,288 (1992).

¹⁵ See, e.g., *Eagle Mountain Energy Co.*, 62 FERC ¶ 61,066 (1993) (confirming Commission jurisdiction of proposed closed-loop pumped storage project based on

(continued...)

Wyco's proposed pumped storage projects. Consistent with the Commission's longstanding practice, the Commission did not issue a permit for the entire Colorado River Aqueduct simply because the closed-loop pumped storage project would be diverting water from the aqueduct.

14. Wyco further argues that the intent of its permit is to receive permit priority under the FPA for the available unused portions of water in the Green River from the States of Colorado and Wyoming, and requests clarification as to how it can reserve this unused water if the Commission will not issue a permit. As discussed previously, it is the Commission's longstanding practice to license only discrete hydropower developments within large water conveyance systems, and not to license the entire water conveyance system itself. Therefore, the permit priority for hydropower developments that use water from a water conveyance pipeline like Wyco has proposed here would be for the water resource in the pipeline, not for the Green River. Once Wyco's water conveyance pipeline is actually built, or authorizations have been obtained for a specific route, or the process to identify a specific route has been substantially completed, Wyco could then seek permit priority for the discrete hydropower developments along, or diverting from, the water conveyance pipeline. Wyco would have to independently obtain the water rights to divert flows from the Green River.

15. Wyco contends that it complied with the Commission's regulations for submitting an adequate permit application and its proposal is not barred by any of the enumerated limitations to accepting permit applications in the Commission's regulations. Wyco is correct that it substantially complied with the letter of the Commission's regulations regarding the adequacy of a permit application for acceptance.¹⁶ Wyco also is correct that its permit application is not barred by any of the enumerated limitations in the Commission's regulations.¹⁷ However, whether an application is sufficiently adequate to be *accepted* has no bearing on whether the Commission will issue the applicant a

reservoir location on federal lands, and disclaiming need to assert jurisdiction on the 242-mile-long Colorado River Aqueduct water conveyance system, which would be the source of the water for the project).

¹⁶ See 18 C.F.R. § 4.32 and 4.81 (2012).

¹⁷ See 18 C.F.R. § 4.33(a) (2012). The Commission will not accept a preliminary permit application for project works that would use the same water resource as an unexpired preliminary permit, would interfere with a licensed project in a manner precluded by section 6 of the FPA, or would develop the same water resource as a project for which an initial development application has been filed. *Id.*

preliminary permit.¹⁸ Here, as discussed above, Wyco's permit application is both premature, because the pipeline that will supply water for the proposed hydropower projects currently does not exist and its route has yet to be determined or authorized, and overly broad, because Wyco's permit application presumes that the Commission would issue a license for a 501-mile-long water supply pipeline.

16. Wyco asserts that Commission staff erred in dismissing Wyco's permit application if the dismissal was the result of the hundreds of comments submitted in the permit proceeding opposing Wyco's proposed Regional Watershed Supply Project. The FPA requires that notice of permit applications be provided to the public.¹⁹ However, while the hundreds of comments in opposition to Wyco's project proposal indicate that obtaining the necessary authorizations for the siting and construction of its water pipeline may be difficult and lengthy, the adverse comments were not the reason Commission staff dismissed Wyco's permit application. We affirm the February 23 Order's dismissal of Wyco's permit application because it includes a proposed, unmapped 501-mile-long water conveyance pipeline that is a prerequisite for Wyco's development of hydropower as part of its proposal, and there is no indication that authorizations are forthcoming within the timeframes necessary to prepare a license application during a permit's three-year term.

17. Finally, Wyco states that a permit is necessary to seek financing for its proposed project. The fact that Wyco believes it needs a permit to seek financing for its project does not convince us to grant rehearing of the February 23 dismissal order, especially since that financing presumably is also for the water conveyance pipeline. When policy suggests that we decline to issue a permit, a developer's desire to obtain financing is not by itself a substantial countervailing consideration. In addition, Wyco emphasizes in its request for rehearing that it is not seeking a conduit exemption. The February 23 Order does not mention a conduit exemption, and it is unclear from the request for rehearing why Wyco mentions this topic. Nevertheless, we note that once a water conveyance system exists, depending on the ownership interests of the system, a conduit exemption may be a feasible hydropower development option.

18. In conclusion, we are not persuaded by any of Wyco's unsupported arguments that it should be issued a preliminary permit for its proposed Regional Watershed Supply

¹⁸ See *Browns Valley Assoc.*, 35 FERC ¶ 61,184 (1986) (applicants do not have vested rights in the acceptance of their applications, and either staff or the Commission may reject accepted applications).

¹⁹ See 16 U.S.C § 797(f) (2006).

Project No. 14263-001

- 9 -

Project. Therefore, we affirm the February 23 Order and deny Wyco's request for rehearing.

The Commission orders:

The request for rehearing and clarification, filed by Wyco Power and Water, Inc., on March 23, 2012, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

P-14263-001a.DOC.....1-9