

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.

Bear Creek Hydro Associates, LLC
Western Hydro, LLC

Project Nos. 12593-002
12592-001

ORDER DISMISSING FILING AS DEFICIENT

(Issued January 18, 2007)

1. Western Hydro, LLC (Western) and Bear Creek Hydro Associates, LLC (Bear Creek) filed competing applications for a preliminary permit under section 4(f) of the Federal Power Act¹ to study, respectively, the Cascade Project No. 12592 and the Bear Creek Project No. 12593, each of which would be located on Bear Creek, a tributary of the Baker River, in Skagit County, Washington. Western filed its application on May 19, 2005, and Bear Creek filed its application on May 24, 2005.² By order issued October 18, 2006,³ the Commission's Office of Energy Projects, Division of Hydropower Administration and Compliance (OEP), granted the permit to Western.
2. OEP's order found that, because neither applicant's plan was based on detailed studies, there were no significant substantiated differences between the plans to support a conclusion that one application was superior to the other.⁴ OEP's order issued the

¹16 U.S.C. § 797(f) (2000).

²By letter dated June 30, 2005, OEP found Western's application deficient and requested additional maps showing the proposed project facilities and boundary as well as information concerning the expected purchaser of the project's power (which is no longer required under the Commission's regulations). Western filed the requested information on July 18, 2005, and OEP thereafter accepted Western's application on August 22, 2005.

³117 FERC ¶ 62,041 (2006).

⁴*Id.* at 64,089.

preliminary permit to Western under section 4.37(b)(2) of the Commission's regulations,⁵ which requires the Commission, when granting preliminary permits, to prefer the first-in-time applicant whose plans are at least as well adapted as those of the other applicants.

3. On November 16, 2006, Bear Creek filed a request for rehearing of the order, arguing that OEP should have rejected Western's permit application as patently deficient and that the Commission should rescind Western's permit and issue it a permit instead.

4. Bear Creek's rehearing request is deficient because it fails to include a Statement of Issues section separate from its arguments, as required by Rule 713 of the Commission's Rules of Practice and Procedure.⁶ Rule 713(c)(2) requires that a rehearing request must include a separate section entitled "Statement of Issues" listing each issue presented to the Commission in a separately enumerated paragraph that includes representative Commission and court precedent on which the participant is relying.⁷ Under Rule 713, any issue not so listed will be deemed waived. Accordingly, we will dismiss Bear Creek's rehearing request.⁸

5. In any event, Bear Creek's arguments on rehearing have no merit. Bear Creek argues that Commission staff should have rejected Western's originally-filed application

⁵ 18 C.F.R. § 4.37(b)(2) (2006).

⁶ 18 C.F.R. § 385.713(c)(2) (2006). *See Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 70 *Fed. Reg.* 55,723 (September 23, 2005), *FERC Statutes and Regulations* ¶ 31,193 (2005). *See also*, Order 663-A, effective March 23, 2006, which amends Order 663 to limit its applicability to rehearing requests. *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 71 *Fed. Reg.* 14,640 (March 23, 2006), *FERC Statutes and Regulations* ¶ 31,211 (2006) (codified at 18 C.F.R. § 385.713(c)(2) (2006)).

⁷ As explained in Order No. 663, *supra*, the purpose of this requirement is to benefit all participants in a proceeding by ensuring that the filer, the Commission, and all other participants understand the issues raised by the filer, and to enable the Commission to respond to these issues. Having a clearly articulated Statement of Issues ensures that issues are properly raised before the Commission and avoids the waste of time and resources involved in litigating appeals regarding which the courts of appeals lack jurisdiction because the issues on appeal were not clearly identified before the Commission. *See* Order No. 663 at P 3-4.

⁸ *See, e.g., Duke Power Company, LLC*, 116 FERC ¶ 61,171 (2006); and *South Carolina Electric & Gas Company*, 116 FERC ¶ 61,218 (2006).

as patently deficient.⁹ It alleges that the application failed to include an “Initial Statement,” an adequate project description, sufficient information on the studies to be conducted under the permit, and adequate project maps, as required by section 4.81 of the Commission’s regulations.¹⁰

6. Because the purpose of a preliminary permit is to study the feasibility of a project, the Commission does not typically require a great deal of detail in permit applications. Moreover, under section 4.32(e) of the Commission's regulations,¹¹ OEP has broad discretion to determine whether to reject as patently deficient applications failing to comply with the preliminary permit regulations of section 4.81, and normally, under section 4.32(e)(1), OEP permits applicants to correct deficiencies in permit applications when they constitute minor changes or additions to the application. The Commission will not overturn OEP's decision on such matters unless it can be shown that OEP was acting arbitrarily or unreasonably,¹² which is not the case here.

7. While Western’s “Initial Statement” deviates somewhat from the format set forth in section 4.81(a), it included the information required by that section, with one minor exception.¹³ Therefore, Western’s application was adequate in this respect.

8. Exhibit I of Western’s application supplies an adequate description of the project, under the requirements of section 4.81(b), including the dimensions of the dam and

⁹ Bear Creek also contends that, following OEP’s acceptance of Western’s revised application, OEP staff contacted Western by telephone and requested additional information to make Western’s application comply more fully with Commission regulations. While prior to OEP’s acceptance of the Western’s application, OEP staff contacted Western by telephone concerning the need for additional maps, the call was followed by OEP’s June 30, 2005 deficiency letter requiring the filing of those maps and other information. Under section 4.32(e)(1) of the Commission’s regulations, 18 C.F.R. § 4.32(e)(1) (2006), OEP may notify an applicant of deficiencies “by letter or, in the case of minor deficiencies, by telephone.” In any event, OEP’s telephone call merely noted some of the same deficiencies later listed in OEP’s June 30, 2005 deficiency letter, and therefore it neither changed the outcome here in any way nor prejudiced Bear Creek.

¹⁰ See 18 C.F.R. §§ 4.81(a)-(d) (2006).

¹¹ See 18 C.F.R. § 4.32(e) (2006).

¹² See, e.g., *Pacific Gas and Electric Company*, 19 FERC ¶ 61,300 (1982).

¹³ Western’s Initial Statement failed to include information describing the owner of the existing dam to be used in Western’s proposed project, information that was later supplied by Bear Creek’s application and thus is now in the record.

penstock; the capacity of the generators, and the dimensions of the transmission line. OEP staff's conclusion that this information was sufficient at this stage is bolstered by the provisions of section 4.81(b), which state that the permit application must contain the requested information "to the extent possible."¹⁴

9. As to the requirement of section 4.81(c) that Western describe any studies, investigations, tests, or surveys that it proposes to carry out under the permit, Exhibit II of Western's application lists the types of studies it plans to perform during the term of the permit. This list, although general, meets the requirements of the regulations.¹⁵

10. Finally, while we agree that Western's application was incomplete because Exhibit IV failed to include maps showing the proposed project facilities, we affirm OEP staff's conclusion that this subsequently-corrected omission did not make the application patently deficient.¹⁶

The Commission orders:

The request for rehearing filed on November 16, 2006, by Bear Creek Hydro Associates, LLC, is dismissed.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

¹⁴ To the same effect, see *Pacific Water & Power, Inc., et al.*, 50 FERC ¶ 61,292 at 61,941 (1990) (permit application adequately fulfills the requirements of section 4.81(b), which requires information "to the extent possible").

¹⁵ See *County of Arapahoe and Town of Parker, Colorado*, 66 FERC ¶ 61,342 at 62,148 (1994). See also *McKay Hydro, LLC*, 105 FERC ¶ 61,045 at P 11 (2003) (study plans in permit applications are typically "sketchy").

¹⁶ See n. 2, *supra*. See generally *Inter-West, Ltd.*, 55 FERC ¶ 61,041 at 61,117 (1991) (permit application found deficient for lack of a project boundary map and other information and applicant given the opportunity to correct its application by filing the required map and information).