

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeen G. Kelly.

Symbiotics, LLC

Project No. 11925-003

ORDER DENYING REHEARING

(Issued March 4, 2005)

1. Symbiotics, LLC, has requested rehearing of a Commission staff letter order dismissing Symbiotics' application for an original license for the proposed Arthur R. Bowman Dam Project No. 11925, based on the requirements of the Wild and Scenic Rivers Act (Rivers Act).<sup>1</sup> This order, which denies rehearing, is in the public interest because it is consistent with the Rivers Act.

**Background**

2. On March 28, 2001, Symbiotics filed an application, under section 4(f) of the Federal Power Act,<sup>2</sup> for a preliminary permit to study the proposed 3.0-megawatt Bowman Project, to be located at an existing dam owned by the U.S. Department of the Interior's Bureau of Reclamation on the Crooked River in Crook County, Oregon. The application was silent with respect to whether the proposed project would be located on a reach designated as part of the Wild and Scenic River System. The Commission issued Symbiotics the requested permit in August 2001.<sup>3</sup>

3. On July 30, 2004, Symbiotics filed an application for a license for the Bowman Dam Project, now proposed to have a capacity of 6.8 megawatts. The application stated that "[a]n 8-mile section of the Crooked River below the dam is designated as a National Wild and Scenic River," but did not state that the project would be located in that section.<sup>4</sup>

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<sup>1</sup> 16 U.S.C. § 1271 *et seq.*

<sup>2</sup> 16 U.S.C. § 797(f).

<sup>3</sup> 96 FERC ¶ 62,132.

<sup>4</sup> Application at E-4; *see also id.* at E-20.

4. By later dated August 10, 2004, the Department of the Interior's Bureau of Land management (BLM) informed Symbiotics that, while it had previously concluded that the proposed project would be outside the Lower Crooked Wild and Scenic River, it had subsequently determined that the project would be within that corridor, and thus, pursuant to the Rivers Act, could not be licensed by the Commission.<sup>5</sup>

5. On October 4, 2004, Commission staff wrote to Symbiotics, noting BLM's conclusion with respect to the Rivers Act, stating staff's preliminary conclusion that the project could not be licensed, and asking the company to either concur in that conclusion or provide information showing why it was incorrect.<sup>6</sup>

6. Symbiotics filed a response on October 12, 2004.<sup>7</sup> The company did not dispute that the proposed project would be located on a portion of Wild and Scenic River System. Rather, it stated that it had learned of this issue relatively late in the process, but chose to file its application before the matter could be resolved, due to the imminent expiration of its preliminary permit. Symbiotics asserted that BLM is willing to consider a change to the Wild and Scenic River boundary, and asked the Commission to keep the application on file until this issue "can be fully evaluated."

7. On October 27, 2004, Commission staff issued a letter rejecting Symbiotic's application as patently deficient because of the proposed project's conflict with the Rivers Act.

8. On November 22, 2004, Symbiotics filed a timely request for rehearing, arguing that its application should not be dismissed.

### **Discussion**

9. Section 7 of the Wild and Scenic Rivers Act states, in part, that

[t]he Federal Energy Regulatory Commission shall not license the construction of any dam, water conduit, reservoir, powerhouse,

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<sup>5</sup> Letter to Brent L. Smith (Symbiotics) from Alan Barron Bail (BLM District Manager) (filed August 12, 2005).

<sup>6</sup> See letter to Brent L. Smith from Timothy J. Welch.

<sup>7</sup> See letter to Magalie R. Salas from Brent L. Smith.

transmission line, or other project works under the Federal Power Act, as amended, on or directly affecting any river which is designated in section 1274 of this title as a component of the national wild and scenic river system or which is hereafter designated for inclusion in that system . . .

The portion of the Rivers Act enumerating the rivers that are components of the national wild and scenic rivers system includes “the 8-mile segment [of the Crooked River] from Bowman Dam to Dry Creek . . .”<sup>8</sup> In consequence of these provisions, we are precluded from issuing a license for the Bowman Project.

10. Symbiotics does not dispute that the Bowman Project would be located within a component of the Wild and Scenic Rivers System, or that the law would not allow us to issue it a license for the project. Instead, it asserts that the circumstances of this case, including the late point at which it become aware of the conflict with the Rivers Act and its belief that BLM is willing to consider a change in the boundaries of the designated corridor, justify the Commission retaining the application on file until Symbiotics is able to resolve the matter.

11. We are sympathetic to Symbiotics’ concerns. The company has expended significant effort developing its license application, and it is true that BLM did not conclude that the project would be located on a wild and scenic river until relatively late in the process.

12. At the same time, we have an established policy of dismissing applications for licenses of projects that are barred by the Rivers Act, because we are without authority to license those projects.<sup>9</sup> While Symbiotics asserts that BLM may be willing to support a boundary change that would allow the project to be licensed, it has produced no evidence that such a process is underway and what the process would involve, and in fact states that it does not know how long the process might take. Indeed, the Rivers Act itself does not provide a method for removing segments from the Wild and Scenic River System, so it may be that an act of Congress would be required to achieve the result Symbiotics

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<sup>8</sup> 16 U.S.C. § 1274(72)(B).

<sup>9</sup> See, e.g., *Town of Summersville, West Virginia*, 28 FERC ¶ 61,257 (1984), *aff’d*, *Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986); *Feldspar Energy Company*, 38 FERC ¶ 61,152 (1987); *City of Rome, New York*, 35 FERC ¶ 61,175 (1986); *Carrasan Power Company*, 32 FERC ¶ 61,150 (1985).

seeks. In these circumstances, we will not retain Symbiotics' application on file.<sup>10</sup> The dismissal of the application, however, is without prejudice to its being refiled should the project site be removed from the Wild and Scenic River System.<sup>11</sup>

The Commission orders:

The request for rehearing filed by Symbiotics, LLC on November 22, 3004, is denied.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>10</sup> In *Summersville*, for example, we declined to keep an application on file where the river reach in question has been proposed by the Secretary of the Interior to be studied for designation as part of the Wild and Scenic Rivers System, even though the proposed designation would subsequently have to be confirmed by Congress. Here, the reach at issue has already been listed by Congress as part of the system. *See also City of Redding, California*, 43 FERC ¶ 61,303 (1988) (referring to “Commission’s policy against holding hydroelectric applications in abeyance pending the outcome of future determinations”).

<sup>11</sup> To the extent that Symbiotics is concerned that it could lose priority to a competitor, we note that no such competitor has come forward during the four years since Symbiotics filed its preliminary permit application. Moreover, given that completion of the third-stage consultation process takes at least a year or two, it is unlikely that any other entity would be in a position any time soon to compete with Symbiotics, which has essentially completed that process.