

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Green Island Power Authority

Project No. 12522-000

ORDER DISMISSING APPLICATION FOR PRELIMINARY PERMIT

(Issued January 21, 2005)

1. Green Island Power Authority (GIPA) has filed an application for a preliminary permit for the proposed Cohoes Falls Project No. 12522, to be located on the Mohawk River in the Town of Waterford and the City of Cohoes, New York, near the site of the existing School Street Project. As discussed below, we deny GIPA's application, because it is barred by the Federal Power Act (FPA) and our regulations thereunder. This order is in the public interest because it is consistent with the requirements of the FPA.

Background

2. The 38.8-megawatt (MW) School Street Project No. 2539, licensed to Erie Boulevard Hydropower, L.P. (Erie),¹ is located on the Mohawk River in Albany and Saratoga Counties, New York. The School Street Project includes a 16-foot-high dam located about 4,000 feet above Cohoes Falls, which impounds a reservoir with a surface area of about 100 acres. Water is diverted at the dam to a power canal, through which it is conveyed to a powerhouse just below Cohoes Falls, and then is returned to the river.

3. In December 1991, Erie's predecessor filed applications for new licenses for the School Street Project and nine other projects, the licenses for which all expired in 1993. The New York Department of Environmental Conservation (NYSDEC) initially denied

¹ The project license was held by Niagara Mohawk Power Corporation and was thereafter transferred to Erie. *See Niagara Mohawk Power Corp.*, 88 FERC ¶ 62,082 (1999), *reh'g denied*, 90 FERC ¶ 61,148 (2000).

Clean Water Act certification² for all ten projects, following which the state, Erie's predecessor, and other interested parties entered into settlement negotiations with respect to the projects, dealing with one project at a time. Settlements have been reached and new licenses issued with respect to the first nine projects. NYSDEC has issued water quality certifications for each project as the settlement negotiations have concluded. The School Street Project, the last of the 10, has been operating under annual licenses since 1993. Because NYSDEC has not yet issued water quality certification for the project, the Commission has been unable to act affirmatively on the School Street license application.

4. On July 19, 2004, GIPA, a power authority created by the State of New York, filed an application for a preliminary permit to study the potential development of the 100-megawatt (MW) Cohoes Falls Project. As described in its application, the project would be located at about river mile 2.5 on the Mohawk River in the Town of Waterford and the City of Cohoes. GIPA proposes to construct, slightly downstream of the School Street Project's powerhouse, a new dam that would be approximately 20 feet high and have a 750-foot-wide spillway. The dam would impound a reservoir with a surface area of approximately 200 acres. According to GIPA, construction of the Cohoes Falls Project would inundate the School Street dam, and also involve the decommissioning of various other facilities of the School Street Project,³ such that the School Street Project would no longer be operable.

5. Concurrent with its application, GIPA filed supporting comments. GIPA stated that, given the lengthy and as-yet unconcluded nature of the School Street relicensing and the age of that project, it had concluded that the public interest would be better served by its proposed project.⁴ GIPA contended that the Cohoes Falls Project would provide a number of benefits, including improving the local economy, improving the local fishery

² Pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341, a license applicant must obtain state certification or waiver thereof before the Commission can issue a hydropower license.

³ See GIPA's July 19, 2004, preliminary permit application at 11. See also GIPA's July 19, 2004, supporting comments at 12 ("[t]he new Cohoes Falls Project will necessarily require the use of the flows now used at the School Street Project . . . It would also render redundant the power facilities of the existing project.").

⁴ See GIPA supporting comments at 1-6.

and water quality, producing more power, and providing continuous aesthetic flows at Cohoes Falls.⁵

6. GIPA recognized that, pursuant to its regulations, the Commission has rejected preliminary permit applications to study projects that would utilize all or part of the resources that are currently held under an existing license or would interfere with such projects. However, it asked the Commission to waive its regulations to the extent necessary to consider GIPA's application, in view of the failure to complete the School Street relicensing and the alleged superiority of the Cohoes Falls Project.⁶

7. A number of persons and entities filed comments supporting GIPA's application.⁷ The Mohawk Nation Council of Chiefs filed comments opposing the application.

8. On August 12, 2004, Erie filed a motion to intervene, protest, and request for rejection of GIPA's permit application, and for denial of GIPA's requests for waiver of statutory or regulatory requirements.

9. Erie reviewed the history of the ten relicensing proceedings, contending that the phased approach to relicensing adopted by it, federal and state resource agencies and other major stakeholders has proved successful, and is not indicative of any inappropriate action on its part.⁸ Erie next argued that GIPA's application is barred by section 15(c)(1)

⁵ *Id.* at 6-9.

⁶ *Id.* at 10-23. GIPA stated in addition that it intended to file in the School Street relicensing proceeding an application for a non-power license for the School Street Project to accommodate its proposal to decommission the project.

⁷ These included: United States Senators Hilary Clinton and Charles Schumer, United States Representatives John Sweeney and Michael McNulty, New York State Senators Neil Breslin and Joseph Bruno, New York State Assemblymen Pat Casale and Sheldon Silver, Albany County Executive Michael G. Breslin; Albany County Legislators Sean Ward and Ron Canestrari, Town of Green Island Mayor Ellen M. McNulty-Ryan and Supervisor Mary Perfetti, Town of Colonie Supervisor Mary Brizzell, City of Troy Mayor Harry Tutunjian, New York Bicycling Coalition, Scenic Hudson, Inc, and Mr. Peter Skinner (a private citizen).

⁸ *See* Erie's August 12, 2004, protest generally at 2-7.

of the Federal Power Act (FPA), which establishes a statutory deadline for the filing of relicensing applications, as well as by the Commission's regulations, which preclude preliminary permit applications that conflict with filed development applications, and by applicable precedent.⁹ Finally, Erie asserted that GIPA has overstated the potential benefits of the Cohoes Falls Project, particularly with respect to aesthetic flows, that the project would destroy sensitive riverine and wetlands habitat, and that the project would be contrary to NYSDEC's fisheries management plan for the lower Mohawk River.¹⁰

10. On August 27, 2004, GIPA filed an answer to Erie's pleading. GIPA reiterated its contention that the Commission can and should waive its regulations under the circumstances presented, disputed Erie's view of Commission precedent, repeated its concerns about the length of the School Street relicensing, averred that Erie's discussion of the merits of the Cohoes Falls Project was premature and unsound, and argued that the Commission should determine, pursuant to section 10(a)(1) of the FPA,¹¹ that the Cohoes Falls Project is the project best adapted to the comprehensive development of the Mohawk River.

11. On December 9, 2004, the Commission held a public workshop on the status of hydropower projects the license applications for which had been pending at the Commission for more than three years. The purpose of the workshop was to identify the unresolved issues associated with each project, and determine the best course of action to remove obstacles to final action on these applications. One of these projects under consideration was the School Street Project.

12. Congressman Peter McNulty (D-NY) attended the workshop and made a presentation supporting the Cohoes Falls Project. He stated in part that

if the end result of all this . . . is that you approve [the School Street Project] which kills more fish, does not enhance the beauty of the falls and is owned by a private corporation I am not going to let that stop at that point. I believe at that point the bureaucracy is broken. If a decision like

⁹ *Id.* at 8-15.

¹⁰ *Id.* at 16-21.

¹¹ 16 U.S.C. § 803(a)(1).

that is made, if the facts that I laid out are correct . . . and you go in the other direction, the bureaucracy is broken. That is what would be the worst of bureaucracy in government and I intend to take [this] beyond this room to the floor of the United States House of Representatives and I'm going to ask the Energy Committee or another appropriate committee to investigate this Commission and this case if it goes in that direction because that just does not make common sense. And it is clearly, clearly not in the public interest.

Congressman McNulty did not address the legal issues surrounding the Cohoes Falls preliminary permit application.

Discussion

13. Section 15 of the FPA¹² authorizes the Commission, at the expiration of an existing license and where the United States does not exercise its right to take over the licensed project, to issue a new license to the existing licensee or to a new licensee.¹³ Where the United States does not take over a project and where the Commission does not issue a new license before the existing license expires, the Commission must issue from year to year an annual license to the current licensee under the terms and conditions of the existing license until the project is taken over or a new license is issued.¹⁴ Section 15(c)(1) provides that “[e]ach application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license.”¹⁵ Section 15 applies to all relicense applications, whether filed by the current licensee or by a competing applicant.¹⁶

¹² 16 U.S.C. § 808.

¹³ *See* 16 U.S.C. § 808(a)(1).

¹⁴ *Id.*

¹⁵ 16 U.S.C. § 808(c)(1).

¹⁶ *See City of Fremont v. FERC*, 336 F.3d 910, 916 (9th Cir. 2003) (“Section 15(c)(1) applies to “*each* application for a new license, not just the applications of incumbent licensees.”).

14. GIPA itself states that the Cohoes Falls Project would require the decommissioning of the School Street Project. Since the two projects cannot co-exist, any development application for the Cohoes Falls Project would be a relicense application filed in competition with the School Street application.¹⁷ However, the section 15(c)(1) deadline for filing relicense applications for the Cohoes Falls project fell in 1991, two years before the School Street license expired. Thus, any development application GIPA might file would be more than 13 years late. Such applications are not permitted by section 15(c)(1).¹⁸ That being the case, there is no reason for us to process a preliminary permit to study a project for which an application cannot lawfully be filed.

15. Moreover, section 6 of the FPA¹⁹ states that hydropower licenses “may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days’ public notice.” Issuance of a license to GIPA for a project that would require decommissioning of School Street, over the licensee’s manifest objection, would constitute either a revocation or alteration of the School Street license in a manner inconsistent with section 6. As discussed above with respect to FPA section 15(c)(1), if GIPA cannot file at this late date an application for a project that would compete with the School Street Project, it would serve no purpose to issue a

¹⁷ See *Skokomish Indian Tribe*, 72 FERC ¶ 61,268 at 62,181 (1995).

¹⁸ While GIPA suggested that the length of the School Street relicensing allows us to consider its permit application, nothing in the FPA allows us to determine that section 15(c)(1) becomes inapplicable if a licensing process takes more time than we would prefer.

¹⁹ 16 U.S.C. § 799.

preliminary permit to study the project.²⁰ GIPA presents no reason for us to depart from our long-standing policy of rejecting preliminary permit applications to study projects that would use all or part of the resources that are currently held under an existing license,²¹ or that would interfere with the operation of existing, licensed projects.²²

16. In addition to the statutory bars to a competing application by GIPA, our regulations regarding preliminary permits also require rejection of GIPA's application. Section 4.33(a) of the regulations²³ provides in pertinent part that

[t]he Commission will not accept an application for a preliminary permit for project works that . . . (2) [w]ould interfere with a licensed project in a manner that, absent the licensee's consent, would be precluded by section 6 of the Federal Power Act [or] (3) [w]ould develop, conserve, and utilize, in whole or in part, the same water resources that would be developed, conserved, and utilized by a project for which an initial development application has been filed . . .²⁴

²⁰ Because GIPA did not timely file a competing relicense application, we cannot find under FPA section 10(a)(1), as GIPA would have us do, that its project is better adapted than Erie's to the comprehensive development of the waterway.

²¹ See *Holyoke Gas and Electric Department of the City of Holyoke, Massachusetts*, 5 FERC ¶ 61,116 (1978), reh'g denied, 8 FERC ¶61,254 (1979), *aff'd*, *Gas and Electric Department of the City of Holyoke, Mass. v. FERC*, 629 F.2d 197 (1st. Cir. 1980).

²² *Gas and Electric Dept. of the City of Holyoke*, 21 FERC ¶ 61,357 (1982).

²³ 18 C.F.R. § 4.33(a) (2004).

²⁴ We have explained that the phrase "initial development application" is not meant to refer to original license applications as opposed to those for new licenses, but rather to distinguish the first acceptable application during any license cycle from subsequent applications. See *Alpine Hydroelectric Company*, 58 FERC ¶ 61,127 at 61,411 (1992).

17. GIPA argues that the length of the School Street relicensing process, which it asserts is the result of Erie's failure to submit an acceptable licensing proposal, makes it appropriate for us to conclude that GIPA's putative project would not be in competition with the School Street application. Instead, it proposes that the Commission should consider its application to be part of the development of an original license application rather than a competing relicense application²⁵ or should establish a new deadline for filing applications in competition with the School Street application.²⁶ It envisions that under those scenarios, the regulations would not preclude consideration of its permit application. GIPA further suggests that section 4.33(a) is a mere procedural regulation, established for the purpose of facilitating the orderly conduct of business rather than to confer procedural rights, and may therefore be waived.²⁷

18. On the contrary, when faced with this issue we have interpreted our regulations to require the rejection of late-file permit applications that would have competed with filed license applications. In *Skokomish Indian Tribe*,²⁸ the Tribe filed a preliminary permit application in 1994 to study a project to be located at a dam that was included in a relicense application that had been filed in 1974. We concluded that, because the Tribe's proposal would have used the same water resources proposed to be used by the relicense application, the permit application must be rejected under section 4.33(a).²⁹ On rehearing, we stated that "[t]he water can be used by one project or another, but under the applicants' proposals, it is physically impossible for both projects to exist. Thus, the two do in fact compete."³⁰ We further explained that "[i]f a license application has been accepted for filing, the Commission will not accept a later-filed permit application that

²⁵ GIPA supporting comments at 10-11, 22.

²⁶ *Id.* at 23.

²⁷ *Id.* at 18-19.

²⁸ 71 FERC ¶ 61,023, *reh'g denied*, 72 FERC ¶ 61,268 (1995), *aff'd sub nom. Skokomish Indian Tribe v. FERC*, 121 F. 3d 1303 (9th Cir. 1997).

²⁹ *See* 71 FERC at 61,099.

³⁰ 72 FERC at 62,181.

conflicts with the license application . . .”³¹ On review, the court held that the Commission’s regulations on their face necessitated denial of the preliminary permit application, and that the Commission had correctly concluded that the permit application conflicted with the license application because the project proposed to be studied would use the same water that license applicant proposed to use.³² *Skokomish*, in turn, followed our earlier ruling in *Alpine Hydroelectric Company*³³

19. In attempting to distinguish these cases, GIPA asserts that “the Commission is not obligated to follow a prior interpretation, so long as it acknowledges its changes in position and provides a reasoned explanation for the change.”³⁴ GIPA further asserts that *Alpine* was decided while the Commission was in the process of establishing rules of preference with respect to incremental development, and that *Skokomish* involved the specific facts of the hotly-contested *Cushman* relicensing proceeding, such that these cases are not applicable here.³⁵

³¹ *Id.*

³² *See* 121 F. 3d at 1307.

³³ 58 FERC ¶ 61,127 (1992) (rejecting competing preliminary permit application proposing development of waters which were subject of previously-filed relicense application).

³⁴ GIPA’s August 27, 2004 answer at 2.

³⁵ GIPA’s answer at 3-5. GIPA also maintains that in *Skokomish* the Tribes’ proposal was inextricably linked with the licensee’s, whereas GIPA’s study plans would not be affected by any license issued to Erie for the School Street Project. *Id.* at 5. Given that GIPA’s proposal would require decommissioning School Street and that any conceivable license issued for School Street would preclude a license being subsequently issued for the Cohoes Falls Project, it is hard to follow this logic. *Skokomish* also disposes of another of GIPA’s arguments – that changes during the relicensing proceeding to the original School Street Project proposal provide grounds to allow the preliminary permit. We stated that “[w]e do not believe it is reasonable to expect the Commission to allow proposals for such reconfiguration to become an opportunity, in the middle of a licensing proceeding, for third parties to file [competing] permit or license applications . . .” 71 FERC at 61,100.

20. We find these distinctions unpersuasive. First, GIPA's proposal – which would ignore precedent and the clear language of section 4.33(a) – does not represent a reasonable interpretation of the regulations. Moreover, we have consistently and clearly applied the only reasonable reading, namely, that our regulations require the rejection of late-filed permit applications that would compete with filed license applications. GIPA has presented no reason to justify an alternative reading. While the length of the School Street relicensing proceeding is indeed distressing, it does not provide a basis for a complete shift in policy.³⁶ Indeed, the issues that GIPA raises with respect to the School Street relicensing are best addressed in that proceeding, not through the vehicle of an untimely permit application.

Conclusion

21. GIPA has proposed to study a project that is barred by the FPA, as well as by our regulations thereunder. We therefore dismiss its preliminary permit application. While we appreciate Congressman McNulty's expression of his views as to the best interests of his constituents, we believe that the result we have reached here is required by law.

³⁶ GIPA's proposal that we treat a future license application for the Cohoes Falls Project as an application for an original license, filed pursuant to FPA section 7, 16 U.S.C. § 800, would allow it to obtain the municipal preference available in original license proceedings. However, when Congress enacted the Electric Consumers Protection Act of 1986 (ECPA), it intended to eliminate municipal preference in all proceedings involving the issuance of a license following the expiration of an original license. See *FERC Stats. & Regs., Regulations Preambles 1986-1990* ¶ 30,854, at 31,442-444 (Order No. 513) (May 17, 1989). We cannot ignore ECPA and the existence of the School Street Project in order to grant GIPA the preference it desires.

The Commission orders:

The application for a preliminary permit, filed by Green Island Power Authority on July 19, 2004, is dismissed.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.