

157 FERC ¶ 61,113
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Rivertec Partners, LLC

Project No. 14754-001

ORDER DENYING REHEARING

(Issued November 17, 2016)

1. On July 1, 2016, Commission staff issued an order dismissing Rivertec Partners, LLC's (Rivertec) application for a preliminary permit for the proposed Lincoln Hydroelectric Project No. 14754 (Lincoln Project).¹ The proposed project would be at the U.S. Army Corps of Engineers' (Corps) Libby Dam, located at Lake Koocanusa on the Kootenai River in Lincoln County, Montana. On July 22, 2016, Rivertec filed a timely request for rehearing of the July 1 Order. For the reasons discussed below, we deny the request for rehearing.

I. Background

2. On April 12, 2016, Rivertec filed an application for a preliminary permit to study the feasibility of the proposed Lincoln Project. The proposed project would utilize one, two, or all three of the vacant bays (bays six through eight) in the Corps' existing powerhouse at the Libby Dam and would tie into an existing transmission line. The project would have an installed capacity of 120 to 360 megawatts (MW), depending on the number of generating units installed.

3. On February 25, 2016, Commission staff sent the Corps a letter asking whether a non-federal project under the jurisdiction of the Commission could be authorized at the site.² The Corps responded on April 4, 2016, stating that the Commission does not have jurisdiction to issue a preliminary permit or license for a project at the site based on the

¹ *Rivertec Partners, LLC*, 156 FERC ¶ 62,003 (2016).

² The letter was in response to a preliminary permit application for the project that Rivertec filed on February 16, 2016, and which was superseded by Rivertec's April 12 application.

authorizing statute for the Libby Dam. The Corps stated that it has the exclusive right to expand the powerhouse's hydropower production to reach its fully authorized capacity. On April 5, 2016, and June 27, 2016, Rivertec filed responses to the Corps' letter, arguing that the Commission retains jurisdiction to authorize non-federal hydropower development at the Libby Dam, and in particular at bays six through eight.

4. On July 1, 2016, Commission staff dismissed Rivertec's preliminary permit application, finding that the Commission lacked authority to issue Rivertec a permit for the Lincoln Project.

5. On July 22, 2016, Rivertec filed a timely request for rehearing, again arguing that the Commission retains jurisdiction to issue a preliminary permit or license for hydropower development at the Libby Dam. In particular, Rivertec argues that the Corps does not have exclusive authority over such development, and that the Corps' authority to develop bays six through eight should have been deauthorized by Congress.

II. Discussion

6. Sections 4(e) and 4(f) of the Federal Power Act³ authorize the Commission to issue preliminary permits and licenses for non-federal hydropower projects to be located at federal dams and facilities. This jurisdiction is withdrawn if federal development of hydropower generation at the site is authorized, or if Congress otherwise unambiguously withdraws the Commission's jurisdiction over the development of such generation.⁴

7. The July 1 Order found that the Commission lacked authority to issue a permit for the Lincoln Project at the Corps' Libby Dam. Construction of the Libby Dam was authorized by the Rivers and Harbors Act of 1950, as recommended in House Document 81-531 (House Document 531).⁵ House Document 531 recommends the construction of a powerhouse at the Libby Dam that, along with the Corps' proposed Katka Dam, "would develop all the available head of the Kootenai main stem in the United States."⁶ House Document 531 also notes that space would be provided in the

³ 16 U.S.C. §§ 797(e), (f) (2012).

⁴ See, e.g., *Richard D. Ely, III*, 87 FERC ¶ 61,176 (1999) (citing *City of Gillette, Wyoming*, 25 FERC ¶ 61,366 (1983)).

⁵ Rivers and Harbors Act of 1950, Pub. L. No. 81-516, 64 Stat. 163; House Document 531, 81st Congress, 2nd Session.

⁶ House Document 531 at 458.

powerhouse for “future expansion” and additional units.⁷ Upon construction of the powerhouse, four hydroelectric generating units were initially installed in the powerhouse, with “provision for four additional units.”⁸ A fifth unit was installed in 1985.⁹ The Water Resources Development Act of 1996 provided funding for the Corps to complete construction and installation of generating units six through eight.¹⁰ The act stated that the funds are to “remain available until expended.”¹¹ Based on the authorizing legislation, the July 1 Order concluded that the Corps has exclusive authority over hydropower development at the Libby Dam, and in particular at the three vacant bays.

8. On rehearing, Rivertec asserts that the Commission does have jurisdiction to authorize non-federal hydropower development at the Libby Dam. Rivertec argues that the Corps does not have exclusive authority over hydropower development at the Libby Dam because operation of the dam is subject to the International Joint Commission¹² and the Columbia River Treaty.¹³ In addition, Rivertec argues that the Corps’ authority to install units in bays six through eight should have been deauthorized by Congress pursuant to the Water Resources Reform and Development Act of 2014.¹⁴ Rivertec

⁷ *Id.* at 463.

⁸ 1974 Annual Report of the Chief of Engineers, United States Army at 38-12.

⁹ In 1982, Congress temporarily halted spending for units in bays six through eight. *See* Senate Report 97-39, 97th Congress, 1st Session at 409 (“It is the Committee’s intent that any present appropriations be used solely for the completion of the fifth installed unit at the main Libby Dam, and for the immediate termination of work on the sixth, seventh, and eighth installed units.”).

¹⁰ Water Resources Development Act of 1996, Pub. L. No. 104-303, § 549, 110 Stat. 3658, 3779.

¹¹ *Id.*

¹² The International Joint Commission was established by the Boundary Waters Treaty of 1909 to address matters regarding the use of boundary waters between Canada and the United States.

¹³ The Columbia River Treaty is an agreement between the United States and Canada, under which the two nations jointly regulate and manage the Columbia River basin for power and flood control.

¹⁴ Water Resources Reform and Development Act of 2014, Pub. L. No. 113-121, 128 Stat. 1193.

contends that the Corps should have included “Libby Dam Units 6-8” on an interim deauthorization list, which the Water Resources Development Act of 2014 required the Corps to develop. Rivertec argues that, if the project had been included on the interim deauthorization list, it is “virtually certain” Congress would have subsequently deauthorized the project.

9. We affirm the July 1 Order and find that hydropower development at the Libby Dam, and in particular at bays six through eight, has been reserved for exclusive federal development.¹⁵ This development is exclusive in that it has been specifically authorized by Congress to the Corps and thus, the Commission’s jurisdiction over that development is withdrawn.¹⁶ The Corps’ international obligations regarding water rights and power benefits do not change the fact that authority over hydropower development at the Libby Dam has been specifically authorized to the Corps. Rivertec’s contention that the Corps should have included Libby Dam Units 6-8 on an interim deauthorization list and that Congress would then have deauthorized those facilities is unavailing: these events did not occur and thus cannot affect our finding regarding jurisdiction. The authority over hydropower development in the bays at issue remains with the Corps.

¹⁵ On October 12, 2016, in a supplemental filing with the Commission, the Corps also affirmed its position that hydropower development at the Libby Dam is reserved to the federal government, and that the Commission does not have jurisdiction to issue a preliminary permit for the Lincoln Project. In addition, the Corps discussed several operational concerns it has with the proposal. In an October 21, 2016 Filing, Rivertec alleges that Corps officials have told it that they are “not for or against” issuance of a permit for the project. While this is not entirely consistent with the Corps’ statement in its October 12, 2016 filing that “the Corps has significant operational concerns regarding the applicant’s proposal to install three additional units in the Libby Dam powerhouse,” our conclusion that the Corps has exclusive jurisdiction over the site of the proposed project makes the issue of the Corps’ position regarding the viability of the project moot.

¹⁶ See, e.g., *City of Cascade Locks and Public Utility District No. 1 of Skamania County*, 29 FERC ¶ 61,315, at 61,660 (1984); *City of Gillette, Wyoming*, 25 FERC ¶ 61,366, at 61,817 (1983).

10. The remainder of Rivertec's arguments, including the extent to which it is the policy of the Corps that the private development of hydropower at Corps projects be given priority and the fishery benefits that the proposed project might have, are irrelevant and do not warrant further consideration.

11. For these reasons, we affirm staff's finding that the Commission lacks authority to issue a permit or license for hydropower development at the vacant bays at the Libby Dam and deny rehearing.

The Commission orders:

Rivertec's request for rehearing, filed July 22, 2016, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.