

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives

COMMITTEE ON ENERGY AND COMMERCE

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November 6, 2017

The Honorable Neil Chatterjee
Chairman
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Dear Chairman Chatterjee:

We write to express our concern about the process the Federal Energy Regulatory Commission (FERC) followed to issue two hydropower licenses on September 29, 2017 to FFP Missouri/Rye Development (FFP/Rye) for projects on existing dams operated by the U.S. Army Corps of Engineers (US ACOE) on the Monongahela River.¹ We understand from press reports² that the state of West Virginia plans to challenge these licenses because the Commission did not incorporate all the conditions included in the water quality certificate (WQC) issued by West Virginia's Department of Environmental Protection (WVDEP) in plans for these projects. By denying the state its allotted time to review this application and submit requirements on these licenses, FERC is undermining the State's authority under the Clean Water Act and Federal Power Act to impose conditions that will ensure water quality standards are met.

Section 9(a)(2) of the Federal Power Act mandates that each applicant provide the Commission with: "Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States"³ Yet, the Commission's regulations state: "The failure to

¹ Federal Energy Regulatory Commission, *Morgantown Lock and Dam Hydroelectric Project*, FERC Project No. 13762-002; and *Opekiska Lock and Dam Hydroelectric Project*, FERC Project No. 13753-002

² *WVDEP Opposes Power Projects at Locks, Dams*, The Dominion Post (Oct. 6, 2017) (www.dominionpost.com/WVDEP-opposes-power-projects-at).

³ Federal Power Act § 9(a)(2), As Amended Through P.L. 114-64 (2015).

act on a request for certification within a reasonable period of time, not to exceed one year, after receipt of such request constitutes a waiver.”⁴

States’ requirements are not likely to be fulfilled by an incomplete application. It therefore, appears counterproductive to start the “shot clock” on the issuance of a water quality certificate at the point when a state receives a request because it is possible that request may be deficient with respect to information required by the state to issue a valid certificate. This may even create a perverse incentive wherein an applicant may actually be rewarded for submitting an incomplete application by not being required to meet some or all water quality conditions imposed by a state. Such a situation is unacceptable under the current statutory regime, and gives us serious concern over any legislative proposal that would provide FERC more authority to set the hydroelectric licensing schedule. In this particular case, although WVDEP missed the Commission’s deadline, the state acted in a timely manner and in accordance with its law. WVDEP formally acknowledged receipt of FFP/Rye’s application and deemed it to be complete, and therefore ready for evaluation, less than one month after receiving it. According to records contained in the docket for these projects, the WVDEP provided the applicant with a letter on March 9, 2016 indicating its application for a water quality certificate was complete.⁵ That letter also stated WVDEP’s intention to review the application and provide a certificate within one year. The state completed its work and issued a WQC to the applicant on March 8, 2017.⁶ Ultimately, WVDEP provided the requested water quality certificate within one year of determining the application to be complete, and more than six months prior to the Commission issuing the licenses for these projects.

It appears the Commission is creating unnecessary controversy over these projects that will not only result in undue delay in moving these projects forward, but also could have profound implications for the licensing process generally. Specifically, this case illustrates a problem with the way the Commission coordinates with state and federal agencies that have statutory responsibilities to fulfill in conjunction with the hydropower licensing process authorized by the Federal Power Act.

FFP/Rye filed its application for a preliminary permit with the Commission on May 18, 2010.⁷ The Commission responded to the company nine weeks later, listing deficiencies in the

⁴ Federal Energy Regulatory Commission, *Waiver of the Water Quality Certification Requirements of Section 401(a)(1) of the Clean Water Act*, 52 Fed. Reg. 5446 (Feb. 11, 1987) (final rule).

⁵ Letter from Nancy J. Dickson of the West Virginia Department of Environmental Protection to Mr. Don Lauzon of Rye Development, LLC (Mar. 9, 2016).

⁶ Letter from Nancy J. Dickson of the West Virginia Department of Environmental Protection to Mr. Don Lauzon of Rye Development, LLC (Mar. 8, 2017).

⁷ Federal Energy Regulatory Commission, *Application for Preliminary Permit (Opkiska L&D) of Free Flow Power Corporation*, Docket P-13753 (May 18, 2010).

application identified by the Commission staff.⁸ Rye then submitted its amended, Draft License Application to the Commission on October 22, 2013, followed by a completed, final application on February 27, 2014.⁹ The iterative process the Commission uses to evaluate hydropower projects results in an application that is ready to move through the license process, and enables decisions to be made in a timely fashion. States and other agencies with responsibilities for issuing permits, certifications, or conditions related to the proposed project also require complete information to execute their statutory responsibilities. The Commission does not accept deficient applications; the Commission should not set deadlines that effectively require a state, tribe, or federal agency to accept a deficient submission.

As lead agency for the license process, FERC should be coordinating with relevant federal, state, and tribal agencies and the applicant to ensure that all requirements associated with the project are being met. Yet, the license FERC issued on September 29, 2017 does not include all of the conditions proposed by West Virginia in its WQC. By not including the conditions the state submitted, FERC is creating controversy over a project that appears to have considerable support, including the support of the host state. The resulting hearings will take time and resources that could be better spent by the applicant, the state, and FERC on moving this project forward.

We understand the value of setting and adhering to schedules to ensure applications are processed in a timely fashion. In general, we welcome FERC actions to improve the hydropower license process and to avoid unnecessary delay in issuance of a license and acquisition of all associated permits that allow projects to move forward. However, the Commission should not be expediting its own schedule and review by denying federal, state, and tribal agencies access to information adequate for their decision-making, or at the expense of ensuring compliance with all public laws and adequate protection of one of our most basic and vital public resources – water. FERC's apparent intent to ride roughshod over the rights and responsibilities of its federal resource agency, tribal and state partners in the face of an applicant's inability to provide a complete application, makes us pause at the idea of providing the Commission with greater authority over the licensing process than it currently possesses.

⁸ Letter from the Federal Energy Regulatory Commission to Free Flow Power Corporations (Aug. 4, 2014).

⁹ Federal Energy Regulatory Commission, *Application for Preliminary Permit (Opkiska L&D) of Free Flow Power Corporation*, Docket P-13753 (Feb. 27, 2014).

Thank you for your attention to our concerns. We hope the Commission will reconsider its decision to exclude conditions requested by the state of West Virginia in this license. More importantly, we urge the Commission to revise its regulations to ensure that schedules for reviewing and issuing licenses reflect federal, state and tribal agencies' rights and the need to receive complete applications that support timely decision-making on their parts.

Sincerely,



Frank Pallone, Jr.
Ranking Member



Bobby L. Rush
Ranking Member
Subcommittee on Energy



Paul D. Tonko
Ranking Member
Subcommittee on Environment



John Sarbanes
Member of Congress