

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Red Circle Systems Corporation	Project Nos. 12498-002 12500-002 12497-002 12499-002 12502-002 12503-002 12504-002
--------------------------------	--

ORDER DENYING REHEARING

(Issued May 18, 2006)

1. On April 17, 2006, Red Circle Systems Corporation (Red Circle) timely filed a request for rehearing of a letter order issued by Commission staff on March 16, 2006, rejecting Red Circle's application to amend its preliminary permits for the above-captioned projects to include a joint permittee. Red Circle challenges staff's finding that the addition of a joint permittee is prohibited by the provision of section 5 of the Federal Power Act (FPA),¹ which states that permits are not transferable. For the reasons discussed below, we are denying rehearing.

Background

2. On February 9, 2005, and March 16, 2005, the Commission issued Red Circle preliminary permits to study development of seven proposed projects located in the Gulf Stream in the Atlantic Ocean approximately 25 miles off the west coast of Florida.² Under the permits, Red Circle will study the feasibility of projects that would use the marine currents of the Gulf Stream to generate electric power.

¹ 16 U.S.C. § 798 (2000).

² SeaGen's Miami Project No. 12497, 110 FERC ¶ 62,114; St. Lucie Project No. 12499, 110 FERC ¶ 62,115; St. Sebastien Project No. 12502, 110 FERC ¶ 62,113; Key Largo Project No. 12503, 110 FERC ¶ 62,117; Travernier Project No. 12504, 110 FERC ¶ 62,116; Fort Lauderdale Project No. 12498, 110 FERC ¶ 62,272; and West Palm Beach Project No. 12500, 110 FERC ¶ 62,271. The permits were each issued for a three-year term, the maximum term allowed under FPA section 5.

3. On March 6, 2006, Red Circle filed an application to amend the seven permits to add Ocean Renewable Power Company (Ocean Renewable) as a joint permittee. Staff's March 16, 2006 letter order rejected the amendment application on the ground that section 5 of the FPA prohibits the transfer of preliminary permits and adding a permittee constitutes a partial transfer of the permit. Red Circle's rehearing followed.

Discussion

4. Section 5 of the FPA provides, in pertinent part:

Each preliminary permit issued ... shall be for the sole purpose of maintaining priority of application for a license.... Each such permit shall set forth the conditions under which priority shall be maintained. Such permits shall not be transferable.

5. On rehearing, Red Circle argues that staff's letter order erred in finding that adding a joint permittee is barred by section 5 of the FPA. Red Circle contends that, in a 1978 order in *El Dorado County Water Agency (El Dorado)*,³ the Commission established a precedent of allowing a permittee to amend its permit to add a co-permittee.

6. Red Circle's reliance on the *El Dorado* order is misplaced. In that case, on rehearing of an order issuing a preliminary permit to El Dorado County Water Agency (Agency), the Commission denied the Agency's request to substitute the El Dorado Irrigation District (District) for itself as the sole permittee on the ground that FPA section 5 prohibits transfers of permits, but, without further comment on the prohibition against transfers, allowed the addition of the District as a co-permittee. The Commission made clear, however, that its action was not intended to establish a precedent, stating: "We should also emphasize that the action taken in this order is limited to the specific facts recited herein and may not be applicable in other proceedings." In any event, we note that, unlike the situation here, the permit in *El Dorado* was not administratively final and was therefore subject to modification.⁴

7. Section 4.82 of our regulations, promulgated after the *El Dorado* order, governs permit amendments. That section states explicitly that "[t]ransfer of a permit is prohibited by section 5 of the Federal Power Act."⁵ In issuing these regulations, the

³ 2 FERC ¶ 61,276 (1978).

⁴ Indeed, on rehearing the Commission also changed the effective date of the permit to coincide with issuance of the rehearing order and took no position on whether a license application by the District would have permittee priority.

⁵ See 18 C.F.R. § 4.82 (1986). This section contemplates amendments regarding all aspects of the permit, except for the identity of the permittee.

Commission stated that a “permit is issued to a person or a particular group of persons. Only that person or particular group of persons is entitled to priority.”⁶ Indeed, every permit issued by the Commission states:⁷

A permit is not transferable. The named permittee is the only party entitled to the priority of application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to construct, operate, and maintain the proposed project.

8. Since, as FPA section 5 states, the sole purpose of a permit is to maintain priority of license application, there is no reason to add permittees, except to vest the new permittees with the permit-based priority for filing license application. Consequently, amending a permit to add or delete an entity, thus changing the “named permittee,” constitutes a transfer of the permit. This is the case regardless of whether the change results in the complete or partial substitution of entities.⁸

9. For the above reasons, we affirm Commission staff’s rejection of the permit amendments as prohibited by section 5 of the FPA.

⁶ *Application for License, Permit, and Exemption From Licensing for Water Power Projects*, FERC Statutes and Regulations, Regulations Preambles, 1982-1985, ¶ 30,632 at 31,283 (Order No. 413) March 20, 1985.

⁷ *See, e.g.*, Red Circle’s permit for its Fort Lauderdale Project, 110 FERC ¶ 62,272 at 64,533.

⁸ Similarly, any addition or deletion of a licensee (whether or not it results in a complete substitution of entities) is a transfer to which the transfer provisions of section 8 of the FPA apply. *See* 16 U.S.C. § 801.

The Commission orders:

The request for rehearing filed in these proceedings on April 17, 2006, by Red Circle Systems Corporation is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.