

121 FERC ¶ 61,051
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

The Electric Plant Board of the City of
Paducah, Kentucky

Project Nos. 12911-001
12911-002

ORDER DENYING REHEARING, AND DENYING
MOTION FOR EXTENSION OF TIME, FOR STAY, AND REQUEST FOR WAIVER

(Issued October 18, 2007)

1. The Electric Plant Board of the City of Paducah (Paducah), Kentucky has filed a request for rehearing of an August 16, 2007 Commission staff letter denying Paducah's request to use the traditional licensing process and for other relief with respect to the City's effort to file an application for a license for the proposed new Robert C. Byrd Project, to be located on the Ohio River in West Virginia and Ohio. Paducah has also filed a separate motion for extension of time to file a license application or for stay of the license application deadline and request for waiver of certain of the Commission's regulations. Because we conclude that Paducah's requests are inconsistent with the regulations we have put in place to ensure fair competition in hydropower development, we deny the relief requested.

Background

2. The U.S. Army Corps of Engineers operates the Robert C. Byrd Locks and Dam on the Ohio River in West Virginia and Ohio. On March 22, 2007, Commission staff issued an order terminating a license for a project at that dam, due to the licensee's failure to timely commence construction.¹

3. Thereafter, four entities filed applications for preliminary permits to study proposed projects at the Byrd Locks and Dam. First, Brookfield Power US filed a permit application on April 23, 2007. Because that application was filed too early (before the

¹ *Gallia Hydro Partners*, 118 FERC ¶ 62,218, *reh'g denied*, 119 FERC ¶ 61,163 (2007).

first business day following the day when the license termination became effective), it was rejected.² Second, on April 24, 2007, the first day that a new application could be filed for the site,³ the City of Wadsworth, Ohio (Wadsworth) filed a permit application. Third, Rathgar Associates filed an application on April 26, 2007. Finally, Paducah filed three identical permit applications on May 17, May 18, and May 21, 2007.⁴

4. On May 30, 2007, the Commission issued a notice that Wadsworth's, Rathgar's, and Paducah's applications had been filed and were available for public inspection. The notice also established dates for the filing of comments, protests, and motions to intervene, and for competing permit and development applications. Pursuant to the notice, any entity wishing to file a competing development application was required to file a notice of intent by July 30, 2007, and the application itself by November 27, 2007.

5. On June 25, 2007, Paducah filed separate requests for rehearing with respect to the notice as it pertained to Wadsworth's and Rathgar's applications. In both instances, Paducah argued that the applications had been filed prematurely, and that the Commission should therefore have rejected them.

6. On July 30, 2007, Paducah filed a notice of intent to file a license application for a project at the Robert C. Byrd Locks and Dam. Paducah asked the Commission to allow it to use the traditional licensing process, rather than the integrated licensing process that is now the Commission's default process. Paducah also asked the Commission to waive certain of its licensing regulations, including those requiring pre-filing public consultation, in order to allow it to timely file the application.

7. On August 9, 2007, Wadsworth filed a motion to intervene, answer, motion for waiver, and request for expedited response. Wadsworth asked the Commission to deny Paducah's request for waiver, which it alleged was an attempt to gain a tactical advantage by eliminating any effective opportunity for pre-filing consultation. In the alternative, Wadsworth asked that, if the Commission were to grant Paducah the waivers it requested, the Commission do the same for Wadsworth. Wadsworth asked the Commission to act on the matter on an expedited basis.

8. On August 14, 2007, Paducah filed a response to Wadsworth's pleading, opposing Wadsworth's request for waivers and its request for expedited actions, and "seeking to

² See letter from William Guey-Lee (Commission staff) to Mr. Sam S. Hirschey, regarding Project No. 12795 (May 25, 2007).

³ See *Gem Irrigation District*, 41 FERC ¶ 61,186 (1987).

⁴ Paducah has stated that it filed the three applications "out of an abundance of caution," because it was uncertain when the license termination would be final.

correct mischaracterizations and errors” in Wadsworth’s pleading. Paducah did not oppose Wadsworth’s motion to intervene. The Commission’s regulations prohibit answers to answers.⁵ Given the somewhat tangled nature of the pleadings at issue – it was proper for Paducah to respond to the portion of Wadsworth’s pleading that constituted its motion to intervene, request for waiver, and request for expedited consideration, but not to that portion of the pleading that constituted an answer – we will in this instance accept Paducah’s entire August 8 pleading. However, we do not take our regulations prohibiting answers lightly and will not be inclined to allow further iterative pleadings.

9. On August 16, 2007, Commission staff issued a letter⁶ denying Paducah’s requests to use the traditional licensing process and for waiver of pre-filing consultation requirements. Staff stated that the Commission’s competition regulations are designed to discourage poorly-prepared development applications and to allow only applicants who have completed, or can quickly complete, necessary studies and pre-filing consultation to file development applications in competition with preliminary permit applications. Staff concluded that Paducah had provided no evidence that it needed a short time to complete an application, but rather that the City’s request appeared to be an attempt to gain a competitive advantage over other preliminary permit applicants.

10. On August 20, 2007, the Commission issued an order dismissing Paducah’s requests for rehearing of the notice of the Wadsworth and Rathgar permit applications, explaining that Paducah could raise whatever issues it deemed appropriate after the Commission acted on the applications.⁷

11. On September 13, 2007, Paducah filed a motion for an extension of time to file a license application, and a request for a waiver of all regulations that would preclude it from doing so. In the alternative, Paducah asked for a stay of the application deadline.

12. On September 17, 2007, Paducah filed a request for rehearing of the August 16 letter, arguing that staff had been unreasonable in denying its request and thereby preventing it from filing a timely development application.

13. On September 27, 2007, Wadsworth filed an answer opposing Paducah’s motion for extension of time, waiver, or stay.

⁵ See 18 C.F.R. § 385.213(a)(2) (2007).

⁶ Letter from J. Mark Robinson to Ms. Frances E. Francis (counsel for Paducah) (dated August 16, 2007).

⁷ *City of Wadsworth, Ohio and Rathgar Development Associates, LLC*, 120 FERC ¶ 61,172 (2007).

Discussion

14. Hydropower projects licensed under the Federal Power Act (FPA) make use of the nation's waterways. Consequently, the FPA requires the Commission to undertake a thorough public interest inquiry in considering hydropower license applications.⁸ Because the commitment of water resources is of such significance, the FPA and the Commission's regulations thereunder provide both that the public be put on notice of proposed projects and that the public have opportunities to participate in licensing proceedings.

15. The Commission's regulations for hydropower development applications establish three separate application processes: the integrated licensing process, the alternative licensing process, and the traditional licensing process.⁹ Under the integrated process, which the Commission has established as the default, a prospective applicant, Commission staff, and other interested entities -- federal and state resource agencies, Indian tribes, non-governmental organizations, and members of the public -- engage in

⁸ See FPA section 10(a)(1), 16 U.S.C. § 803(a)(1) (2000) (requiring the Commission to license projects that, in its judgment, "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes") and FPA section 4(e), 16 U.S.C. § 797(e) (2000) (requiring the Commission, in considering whether to issue a license, to give equal consideration "in addition to the power and developmental purposes for which license are issued . . . to the purposes of energy conservation, the protection, mitigation of damages to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality").

⁹ See generally 18 C.F.R. Part 4, Subpart D (traditional process), 18 C.F.R. § 4.34(i) (alternative process), and 18 C.F.R. Part 5 (integrated process) (2007). In the traditional process, the Commission's environmental review occurs after the application is filed, and there is little Commission staff involvement during pre-filing consultation. The alternative process combines the pre-filing consultation process with aspects of the environmental review process and allows for an applicant-prepared draft environmental document, with Commission staff involvement that is advisory in nature during pre-filing activities. It is flexible and collaborative, but lacks the scheduling structure and consistent Commission staff assistance offered by the integrated process. Since there has been no suggestion that the alternative process be used here, we will not discuss it further.

extensive pre-filing consultation, designed to identify potential issues and develop as full a record as possible on environmental and other relevant matters (including the performance of environmental studies) before an application is filed, with the goal of having all information necessary for processing the application expeditiously once it is presented to the Commission.¹⁰ Because this process is so heavily “front-loaded,” the pre-application process under the integrated licensing process generally takes on the order of three years.

16. Under the traditional licensing process, some of the record development that takes place before filing in the integrated process may be shifted to the period after filing. However, the traditional process does include significant public consultation during pre-filing, including requirements that the licensee: provide members of the public a pre-application document; hold a public meeting 30-60 days after the pre-filing process begins; allow 60 days for public comments, including proposed study requests; conduct any necessary studies; and provide resource agencies and affected Indian tribes a draft license application and allow them 90 days to comment on it.¹¹ Given these requirements, the pre-filing portions of the traditional process can take as long as those of the integrated process.¹²

17. Section 4.37 of our regulations¹³ establishes detailed procedures governing competing applications. Where both competing permit or license applicants are municipalities¹⁴ (as is the case with Wadsworth and Paducah), and where neither applicant has shown that its plans are better adapted to use the water resources in

¹⁰ See *Hydropower Licensing under the Federal Power Act*, 68 Fed. Reg. 51070 (August 25, 2003), FERC Stats. & Regs., Regulations Preambles 2001-05, ¶ 31,150 (2003) (Order No. 2002).

¹¹ See 18 C.F.R. § 4.38 (2007).

¹² Considering only the timeframes listed above (some of which are subject to extension at the request of resource agencies or tribes), and even assuming that the license applicant does not have to perform any significant studies (which is in our experience rarely the case, and certainly not for an unconstructed project), the pre-filing portion of the traditional process will take well over 180 days, absent agreement by the relevant agencies to waive consultation.

¹³ 18 C.F.R. § 4.37 (2007).

¹⁴ Section 7 of the FPA, 16 U.S.C. § 800 (2000), provides that in issuing preliminary permits or original licenses where no permit has previously been issued, and where proposed plans are equally well-adapted to utilize water resources, the Commission must give preference to state and municipal applicants.

question,¹⁵ the Commission will favor the applicant with the earliest application acceptance date, that is, the first to file.¹⁶ Section 4.36(a) of the regulations,¹⁷ provides that the deadline for filing applications in competition with preliminary permits is no later than 120 days after the deadline for interventions in the permit proceeding. The regulations also provide that, where both a permit application and a license application have been filed to develop the same water resources, the Commission generally will favor the license applicant.¹⁸

18. Applying those standards to the matter at hand, if we were to consider only the competing preliminary permit applications, we would likely issue a permit to Wadsworth,¹⁹ and if Paducah alone were to file a timely, complete license application in competition with the permit applications, we would likely prefer Paducah's application.²⁰

¹⁵ See 18 C.F.R. § 4.37(b)(1) (2007). The Commission has explained that, because permit applicants generally cannot support their proposals -- or demonstrate the superiority of one competing proposal over another -- without the results of the detailed studies that they seek to conduct under the permit, the Commission cannot except in unusual cases determine that one permit applicant's plans are better adapted than another's. See *Wind River Hydro, LLC, Eastern Shoshone Tribe of the Wind River Reservation*, 115 FERC ¶ 61,009 at P 12 and n. 12-13 (2006).

¹⁶ 18 C.F.R. § 4.37(b)(2) (2007).

¹⁷ 18 C.F.R. § 4.36(a) (2007).

¹⁸ See 18 C.F.R. § 4.37(a) (2007). As we noted in *Electric Plant Board of the City of Augusta, Kentucky*, 115 FERC ¶ 61,198 at n. 13 (2006), we are unaware of any instance in which we have granted a permit application in competition with a timely license application.

¹⁹ We are aware that Paducah has argued that Wadsworth's preliminary permit application was filed prematurely, but that is an issue to be resolved in the permit proceedings.

²⁰ If more than one license application were filed by applicants with same status (all municipal or all non-municipal applicants), we would have to decide whether one application was better adapted than the other and, failing that, apply a first-to-file tiebreaker.

19. We established our current regulations regarding competitive applications in 1985, in Order No. 413.²¹ In the notice of proposed rulemaking that led to the final rule, the Commission considered codifying its then-current policy, set forth in *Georgia Pacific Corporation*,²² of allowing a license application to be filed in competition with a preliminary permit application at any time before the permit was issued. However, the Commission received comments that the *Georgia-Pacific* rule introduced too much uncertainty into an already complex process, and that permit applicants needed a deadline after which they would not be subject to competition from development applications.²³

20. The Commission ultimately decided to reverse *Georgia-Pacific* and establish a firm deadline for the filing of development applications in competition with permit applications. Because our rationale in the rulemaking proceeding is so applicable to the case at hand, it is worth quoting at some length. We explained that

While the Commission does favor development over studies [*i.e.*, license or exemption applications over permit applications], it has found that applicants sometimes file development application merely as a tactic. Frequently, they file competing license or exemption applications when they have not completed the necessary studies and therefore are not prepared to file an acceptable development application. They do so knowing that they would be unable to file competing permit applications that would be better adapted than the initial permit application to develop a region's resources in the public interest and that the initial permit application would therefore be granted under the Commission's "first to file" rule, assuming that municipal preference did not apply.

The Commission does not object to shifting competition from the studies [permit] phase to the development phase. In fact, the Commission encourages it. However, where competing applicants in their rush to prepare and file development applications have not performed the necessary studies and have not adequately developed their plans, the Commission's staff wastes time and effort reviewing and ultimately rejecting poorly-prepared competing development applications, and the development of hydropower is delayed rather than enhanced.

²¹ See *Applications for License, Permit, and Exemption for Licensing for Water Power Projects*, 50 Fed. Reg. 11658 (March 25, 1985), FERC Stats. & Regs., Regulations Preambles 1982-85, ¶ 30,632 (1985).

²² 17 FERC ¶ 61,174 (1981) (*Georgia-Pacific*).

²³ See FERC Stats. & Regs., Regulation Preambles 1982-85 ¶ 30,632 at p. 31,266.

In order to discourage the submission of prematurely-filed, poorly-prepared development applications and to introduce greater certainty into the process for all prospective competing applicants and the Commission, the Commission is reversing the *Georgia-Pacific* rule. The final rule requires an initial development applicant to file its application within a prescribed deadline, usually 60 days, after the first filing of the notice of acceptance for filing of the initial permit application. However, to allow prospective competing applicants that have already completed or very quickly can complete, all necessary studies and pre-filing consultations, a short additional time to complete their applications, they will be allowed to file notices of intent and obtain an additional 120 days to file their competing development applications.^[24]

21. Paducah argues that staff was incorrect in concluding that the period provided by our regulations for the filing of license applications in competition with permit application is only intended to allow entities to complete well-advanced applications, and is not meant to allow the creation from scratch of applications prompted by the filing of a permit application. The City contends that the regulations preamble alluded to by staff was intended only to reverse *Georgia-Pacific* and is irrelevant here.²⁵ In fact, staff's interpretation of our regulation is accurate and conforms with Commission policy.

22. In the preamble to our regulations, cited above, we explicitly explained our desire to discourage situations in which "applicants . . . file development applications merely as a tactic . . . when they have not completed the necessary studies and therefore are not prepared to file an acceptable development application." We plainly stated that the short window after the acceptance of a permit application for other entities to file development applications was only to "allow prospective competing applicants *that have already completed or very quickly can complete*, all necessary studies and pre-filing consultations, a short additional time to complete their applications" (emphasis added).

²⁴ *Id.* (footnotes omitted).

²⁵ Request for rehearing at 13-15. Paducah also contends that, by declining to accept its proposed procedures, staff "ignored" section 5.5(g) of the Commission's regulations, 18 C.F.R. § 5.5(g) (2007), which states that the regulations regarding the integrated licensing process and other processes "shall be construed in a manner that best implements the purposes of each part and gives full effect to applicable provisions of the Federal Power Act." Given that this regulation simply provides general guidance that the Commission will construe its regulations in light of the requirements of the Federal Power Act, it is difficult to imagine how it could be violated, in the absence of a showing that the mandates of the FPA itself had been violated. In any case, Paducah has made no showing of how staff's rejection of its proposals is inconsistent with the FPA.

Paducah's effort to convert these unambiguous statements into an endorsement of its tactics is not credible.²⁶

23. Moreover, on several previous occasions, we have interpreted our regulations in the same manner as we do here. In *Marseilles Hydro Power, LLC, et al.*,²⁷ we rejected an argument that the competition window was not sufficiently long to prepare a license application, stating that: "It is not supposed to be. As we stated in Order No. 413, notices of intent are to be used by prospective applicants 'that have already completed, or very quickly can complete, all necessary studies and pre-filing consultations.'" In *Manter Corporation*,²⁸ we explained that while "[i]t is clearly difficult for applicants to carry out the full consultation process within the 120 days provided by a notice of intent to file a license application . . . notice of intent periods are not designed to accommodate prospective applicants that have not even begun the consultation process."²⁹

24. The policy enunciated in Order No. 413 protects good-faith applicants for both preliminary permits and license applicants. An entity that has been preparing a development application and is faced with the risk of losing the site because someone else has filed a permit application will have a reasonable amount of time to complete its application. By the same token, a permit applicant is protected against an entity seeking to trump the permit application through the filing of a late-conceived, likely-incomplete

²⁶ Paducah contends that another portion of the preamble supports its contention that we intended our regulations to allow an entity to develop a wholly-new application during the competition window. Request for rehearing at 14, *citing* FERC Stats. & Regs., Regulations Preambles 1982-85 at p. 31,264. This is incorrect. In the cited portion of the preamble, the Commission explained that it had considered, but discarded after reviewing comments, the notion of eliminating the 60-day period, following the notice of acceptance of an application, during which potential competitors could file notices of intent to file competing applications. The Commission explained that retaining the 60-day period would give municipalities more time to obtain approval to file applications, enhance the possibility of competition, and allow more time for agency consultation. However, nothing in this discussion in any way undercuts our subsequent statements that the competition window was only for the purpose of completing well-advanced applications.

²⁷ 99 FERC ¶ 61,011 at p. 61,038, n.19 (2002).

²⁸ 52 FERC ¶ 61,071 (1990).

²⁹ *See also Blycol, Inc.*, 52 FERC ¶ 61,146 at p. 61,597 (1990) (holding that fact that competitor wanted to file application within 120-day deadline was "no defense" to failure to complete consultation); *Ashuelot Hydro Partners, Ltd.*, 35 FERC ¶ 61,304 at p. 61,703, n. 33 (1986).

license application. Paducah fails to explain why we should not continue to follow the terms of our regulations and apply our long-standing policy in this case.

25. While Order No. 413 on its own articulates well the basis for our competition rules, consideration of Paducah's arguments leads us to reaffirm the conclusions we reached there. Granting Paducah's request would distort competition for hydropower permits and licenses. If we allow potential development applicants who have not hitherto been working on license applications to cobble together hasty applications within the 120-day competition window, we will essentially be creating a game of high-stakes poker, in which all competitors will themselves be forced to match one competitor's bet by also hastily crafting license applications, or face being thrown out of the game. Many *bona fide* potential applicants, especially small developers, tribes, and municipalities, may not have the financial resources to expend large sums of money early on for a project they have not yet had a chance to study. Thus, if faced with the choice of pulling together a license application in 120 days or being trumped, they might well be forced out of the process. Further, if more than one entity could create license applications, more or less from scratch, our staff would be forced to expend resources reviewing and likely rejecting them, and, as we explained in order No. 413, the ultimate development of hydropower would be delayed.

26. In addition, Paducah does not address the fact that all of our licensing processes are designed to provide information to, and obtain comments from, not just resource agencies, but also other government agencies, tribes, non-governmental organizations, and members of the public. While Paducah does propose some expedited agency consultation, Paducah's proposal would essentially overlook tribes, non-governmental organizations and individual members of the public, in direct contradiction to the express intent of all of our licensing processes.

27. The schedule proposed by Paducah would radically alter the public information-sharing and participation required by our regulations. Paducah appears to have suggested that it would hold its initial meeting perhaps only a week or two after serving its preliminary application document. The public comment period would then have been cut by approximately two weeks. Paducah proposed to perform all necessary studies between August 1 and November 15. This is highly problematic, given that proposals for studies would not be due until August 29, that there is no provision for resolving disagreements about studies, which occur in many proceedings, and that it is highly unlikely that necessary data could be developed in this timeframe. Paducah also appeared to intend to preclude the public from participating in the joint meeting required by the regulations, and to eliminate the opportunity for entities to comment on a draft application.³⁰ We find no basis for limiting public participation in the manner proposed.

³⁰ See Wadsworth's motion to intervene and answer, at 6-7, for a list of the portions of a licensing process that Paducah proposes to alter or eliminate.

28. Perhaps most important, Paducah has not demonstrated that there is any reason to grant its extraordinary requests. It does not assert that there is an urgent need for power in the vicinity of the project, or that failure to begin project development immediately will somehow render the project infeasible. It does not claim that it has power sales agreements in hand, financing lined up, or contractors ready now that will be unavailable in the future. It cites no legal or logistical issues that would support abridging public participation and allowing the hastened development of the record. In fact, it appears that the only reason for doing so would be to advance Paducah to the head of the queue. Nothing in the record demonstrates that waiving key aspects of our process to benefit Paducah would in any way comport with the public interest, or with our policy of furthering fair competition in the development of hydropower. Indeed, the reverse appears to be true: granting Paducah's requests would prejudice the other competitors to no sound policy end, and would constrain or preclude interested stakeholders from participating in the licensing process.

29. Paducah contends that the August 16 letter "is contrary to Commission precedent, in which the Commission has consistently granted such waivers to similar-situated entities."³¹ Yet Paducah cites only two instances of waiver, both in the same contested proceeding, and both granted by Commission staff, rather than by the Commission itself. It is, therefore, misleading to suggest that what occurred in those instances represents consistent Commission precedent.

30. We see no need to revisit the cited proceeding, involving the Meldahl Project No. 12667, in any detail, given that no party to those proceedings objected to staff's actions, and that we therefore had no occasion to rule upon the matters at issue in that case. We do, however, find it significant that the potential competing applicants in the Meldahl case were apparently willing to pursue expedited proceedings and there were no allegations that one entity was trying to obtain an unfair advantage over the other. Here, on the other hand, Wadsworth, while apparently willing, if forced, to pursue an expedited development application, manifestly objects to Paducah's filings, which it asserts, with some justification, are intended to overcome Wadsworth's advantage as the first to file a permit application.

31. Paducah also asserts that staff incorrectly assumed "that the [traditional licensing process] is available only to potential applicants that 'need[] a short amount of time to finish an already well-advanced license application.'"³² In our view, Paducah misreads staff's statements. The traditional process generally is available to any applicant that can demonstrate that that process is appropriate, and we do not read the August 16 letter as

³¹ Request for rehearing at 8.

³² Request for rehearing at 9.

asserting otherwise. The issue at hand is whether Paducah should be allowed to use the traditional process under the facts at hand, and we agree with staff that it should not.

32. When we established the integrated licensing process and set it as the default process, we set forth several criteria under which we would review requests to use the traditional licensing process. We concluded that “[t]he more likely it appears from the participants’ filings that an application will have relatively few issues, little controversy, can be expeditiously processed, and can be processed less expensively under the traditional process, the more likely the Commission is [to approve a request to use the traditional process].”³³

33. It is apparent from Paducah’s and Wadsworth’s filings in this proceeding that an application from Paducah would have many issues and be highly controversial.³⁴ Therefore, Paducah’s request does not satisfy our criteria. What we understand staff to have meant is not that an entity seeking to file a competing application cannot use the traditional process, but rather that our regulations contemplate that during the period for filing license applications in competition with filed permit applications, entities may complete well-advanced applications (under any process), but may not create new ones from whole cloth. This is a proposition with which we fully agree.

34. In any event, Paducah’s focus on utilizing the traditional process instead of the integrated process assumes too much. As we have discussed, all of the Commission’s current hydropower licensing processes involve substantial pre-filing consultation. This consultation goes to the heart of our ability to determine the issues in a given case, to obtain the information necessary to understand the impacts of a proposed project, and allow the public a full and fair opportunity to review project proposals and provide comments on them. It would likely not be possible for Paducah to complete either the traditional or the integrated process within the competition window unless we radically altered either process. It would take a strong public-interest justification to support such an action and Paducah has not provided one.

35. Paducah contends that the competition window provided by the May 30 notice is inconsistent with the August 16 letter, because it will not be possible for Paducah to complete the integrated process within the time allowed.³⁵ We disagree. Paducah’s

³³ FERC Stats. & Regs., Regulations Preambles 2001-05, ¶ 31,150 at P 48. These criteria are not bright-line standards, but we have informed the public that we will use them, and they do provide useful guidance.

³⁴ These issues and controversy, in turn, could well delay the processing of an application and make the proceeding more expensive.

³⁵ Request for rehearing at 15-19.

argument presumes that it is the Commission's responsibility to ensure that Paducah can file a license application within the competition window. On the contrary, it is Paducah's burden either to file a complete application by the deadline or to convince us that we should waive our otherwise-applicable requirements, which it has failed to do.

36. Paducah also asserts that the decision here renders waiver of the integrated process a "null set," because that process takes a number of years, and (Paducah correctly notes) we would not accept an application for a project with an existing license, which was until recently the case with the site here. Thus, Paducah, states, it could not have begun the integrated process in time to compete with a permit application.³⁶

37. Paducah is correct that where, as here, there was an extant license, an entity might well be unable to complete the integrated process in time to meet the competition window with respect to a permit application that was filed immediately after the license was terminated. As discussed above, in our view the same is most likely also true for an application under the traditional process: absent waivers by resource agencies and highly unusual circumstances, an application under the traditional process also could not be completed within the competition window. However, these facts do not lead us to conclude that staff erred. There may not always be a realistic opportunity to file a development application in competition with a permit application. This in no way conflicts with the FPA or with sound policy, neither of which demands that such competition be possible in all cases. Here, Paducah in fact filed multiple permit applications in competition with other entities, and Paducah's applications will be reviewed under the same standards as the others. It therefore has had an opportunity to compete for the project site. Nothing more is required.

38. Paducah maintains that staff's denial of its request to use the traditional process has prejudiced it because staff has "discouraged relevant agencies from expending any resources or energy on meaningful consultation."³⁷ Paducah puts the cart before the horse. In justifying a request for us to waive our procedures, the burden is on Paducah to convince affected entities to support its suggestions. It is hardly staff's fault if other agencies decline to support the City's proposal. More to the point, our regulations provide that portions of our pre-filing requirements can be waived "[i]f a resource agency or Indian tribe waives in writing compliance with any [consultation] requirement."³⁸ Thus, where, as here, we have no evidence that a current environmental record has been

³⁶ *Id.* at 16-18.

³⁷ Request for rehearing at 12. *See also id.* at 21-22.

³⁸ *See* 18 C.F.R. § 4.38(e) (2007).

developed or that Paducah has engaged in a significant level of consultation, it is not appropriate for the City to ask us to waive the consultation regulations.³⁹

39. In addition to its request for rehearing, Paducah has also filed a request for us either to waive section 4.36(a) of the regulations and to extend for three years the deadline for filing license applications in competition with the preliminary permit applications in order to allow it to complete the integrated licensing process, or, in the alternative, to stay the running of the 120-day deadline for three years or more, for the same purpose.⁴⁰

40. As we have discussed above, our regulations allow a 120-day period, following the deadline for intervening in preliminary permit proceedings, for entities that have been developing license applications to finish and file those applications. The intent of the regulations is to discourage the preparation from scratch of applications by entities seeking to steal a march on their competitors. Granting Paducah's requests would turn our regulations on their head, prejudice good-faith preliminary permit applicants, and risk turning preliminary permit proceedings into untimely competitive license proceedings, at great time and expense to both applicants and the Commission. We therefore deny Paducah's motion.

³⁹ Indeed, the material submitted by Paducah with its request for rehearing appears to indicate that further extensive agency consultation will in fact be required. *See, e.g.*, request for rehearing at Exhibit 5, electronic message from Brian Mitch (Ohio Department of Natural Resources) to Mike Hoover (Paducah) (providing comment from the state Division of Wildlife that it "would like to review the project with consideration to current environmental conditions [I]t will be necessary for the applicant to work with the [U.S. Army] Corps [of Engineers], Federal and State resource agencies, and interested stakeholders to develop an appropriate minimum flow requirement . . . and that water temperature and DO [dissolve oxygen] must be maintained at an appropriate level. . . . [T]he applicant must consult with resource agencies and stakeholders in proposing design features and other operation measures . . . ,” and listing a series of biological surveys that may need to be performed). While Paducah would apparently prefer to put off the development of this type of information until after it files its application, we cannot see how the City could file a complete application without detailed consultation on these matters.

⁴⁰ We also understand Paducah to ask that, if we grant its rehearing request, we stay the deadline for 120 days from the date that our order is final, to give Paducah time to complete an application under the traditional licensing process. Since we are denying the request for rehearing, the alternative request for stay is moot.

The Commission orders:

(A) The motion for extension of time, request for waiver and alternative request for stay filed by the Electric Plant Board of the City of Paducah, Kentucky on September 13, 2007 is denied.

(B) The request for rehearing filed by the Electric Plant Board of the City of Paducah, Kentucky on September 17, 2007 is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Acting Deputy Secretary.