

122 FERC ¶ 61,149
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 No. 12911-005

ORDER DENYING REHEARING

(Issued February 21, 2008)

1. The Electric Plant Board of the City of Paducah, Kentucky (Paducah) has filed a request for rehearing of a Commission staff letter order rejecting as patently deficient Paducah's application for a license for the proposed Robert C. Byrd Project, to be located at the U.S. Army Corps of Engineers' Robert C. Byrd Locks and Dam on the Ohio River, in West Virginia and Ohio. Because Paducah demonstrates no error in staff's order, but rather largely reiterates arguments disposed of in previous orders in these proceedings, we deny rehearing.

Background

2. We have discussed the background of this proceeding in previous orders,¹ and will repeat it only in brief summary here.

3. Paducah filed an application for a preliminary permit to study the Robert C. Byrd Project approximately one month after two other entities, the City of Wadsworth, Ohio, and Rathgar Associates, had done so.² Paducah thereafter requested waivers of substantial portions of our regulations so that it could prepare and file a development application to compete with Wadsworth's and Rathgar's permit applications.

¹ *The Electric Plant Board of the City of Paducah Kentucky*, 122 FERC ¶ 61,026 (2008); *The Electric Plant Board of the City of Paducah Kentucky*, 121 FERC ¶ 61,051 (2007).

² Wadsworth's application was filed in Project No. 12796, and Rathgar's in Project No. 12797.

4. Commission staff, and subsequently, on rehearing, the Commission itself, denied Paducah's requests, explaining that our regulations regarding competition with permit applications are designed to permit those applicants who have already been preparing license applications an opportunity to complete and file them shortly after the permit applications are filed. As we made clear, the regulations are designed to preclude entities, like Paducah here, who have not been working on a license application from quickly creating one from scratch as a tactic to out-compete a permit applicant.³

5. On November 27, 2007, Paducah filed a license application for the Robert C. Byrd Project. By letter dated December 20, 2007,⁴ Commission staff rejected the application as patently deficient, for failing to comply with the Commission's application regulations.⁵ Staff appended to the letter a list of some 80 separate deficiencies in the application.

6. On January 22, 2008, Paducah filed a request for rehearing of the rejection letter.

Discussion

7. As an initial matter, we note that much of Paducah's request for rehearing is devoted to arguments that it was not proper for the Commission and its staff to deny Paducah the waivers and other special treatment it requested.⁶ Paducah has availed itself of the opportunity to seek rehearing of the orders which made those determinations, and we have issued rehearing orders dealing with these matters. To the extent it seeks to revisit its previous arguments, Paducah's current request for rehearing is an improper attempt to supplement its earlier pleadings and to collaterally attack our prior orders. The only matter properly at issue here is whether Commission staff erred in determining that Paducah's license application should be dismissed as patently deficient.

8. Part 5 and Part 4, Subpart F, of the Commission's regulations set forth the information that must be contained in applications, such as Paducah's, for a license for a

³ See 122 FERC ¶ 61,026 at P 6-12; 121 FERC ¶ 61,051 at P 19-40.

⁴ See letter from J. Mark Robinson (Commission staff) to Ms. Frances E. Francis (Counsel for Paducah).

⁵ 18 C.F.R. § 5.18 (2007).

⁶ See, e.g., request for rehearing at 12; 13-17; 18-25. For example, Paducah argues at length that the Commission's prior rulings were in error, and asserts the merits of the proposed project, neither of which is relevant to whether Paducah's application was patently deficient.

major project at an existing dam.⁷ Our regulations also establish procedures for dealing with incomplete applications. Section 5.20(a)(2) provides that where, in the judgment of the Director of the Office of Energy Projects, an application does not comply completely with our filing requirements, it may be considered deficient, and the applicant will be given time (up to 90 days in the case of a license application) to correct any deficiencies.⁸ However, where the Director determines that an application patently fails to substantially comply with our requirements, the application will be rejected as patently deficient.⁹

9. We have explained the difference between situations where deficiencies that can be corrected and those that cannot as follows: “The Director allows applicants to correct deficiencies through submission of additional information when the deficiencies constitute minor changes or additions to an application. However, where the [necessary] changes are substantial, the Director may use the wide discretion the regulations give him to reject an application as patently deficient.”¹⁰ We explained in Order No. 413¹¹ that we reject as patently deficient:

⁷ See 18 C.F.R. §§ 5.18(a)(5)(iii) and 4.51 (2007). While we generally cite herein to the Part 5 regulations, which apply to applications filed under the integrated licensing process, as Paducah’s was required to be, the requirements applicable to the contents of applications filed under the traditional licensing process, found at Part 4 of the regulations, are essentially the same. See 18 C.F.R. § 5.18(a)(5)(iii) (2007). While the Part 5 Exhibit E (environmental exhibit) is different in format than the environmental report required under Part 4, the substance of the two documents is the same.

⁸ See 18 C.F.R. § 5.20(a)(2) (2007).

⁹ See 18. C.F.R. § 5.20(b)(1) (2007). The authority to reject an application as patently deficient rests with the Director for the first 30 days after it has been filed. Thereafter, an order rejecting an application as patently deficient must come from the Commission itself. 18 C.F.R. § 5.20(2)(i) (2007).

¹⁰ *California Hydroelectric*, 33 FERC ¶ 61,056 at p. 61,120 (1985) (footnote omitted) (affirming rejection of application as patently deficient where it failed to include significant technical information, contained contradictory project descriptions, and agency consultation was based on a project that differed significantly from that covered by the application). See also *Willow Springs Water District*, 27 FERC ¶ 61,273 (1984) (affirming rejection of preliminary permit application where staff was unable to understand the project proposed); *Pacific Gas and Electric Company*, 19 FERC ¶ 61,300 (1982).

¹¹ *Application for License, Permit, and Exemption from Licensing for Water Power Projects, FERC Stats. & Regs., Regulations Preambles 1982-1985* ¶ 30,632 at p. 31,286.

any application that fails in any material respect either to comply with the Commission's substantive requirements or to supply the required information necessary to consider the application on its merits. Applications are most often rejected for failing to meet substantive requirements because they fail to include all required exhibits or results of studies.

While we have not regularly found it necessary to reject applications as patently deficient, we have certainly done so on a number of occasions.¹²

10. We review the Director's decision to dismiss an application as patently deficient on a *de novo* basis.¹³ Comparing Paducah's application to those we have previously

¹² See, e.g., *Idaho Water Resource Board*, 84 FERC ¶ 61,146 at p. 61,791 and n. 11 (1998) (noting rejection of application for failure to comply with consultation requirements); *Oregon Trail Electric Consumers Cooperative, Inc.*, 81 FERC ¶ 61,074 (1997) (affirming rejection of application for failure to complete pre-filing consultation); *Murphy Hydro Company, Inc.*, 71 FERC ¶ 61,071 (1995) (affirming rejection of application where consultation requirements not satisfied); *Vernon F. Ravencroft*, 69 FERC ¶ 61,210 (1994) (affirming rejection of application as patently deficient for failure to provide, *inter alia*, drawings and specific information on project structures, a current construction description, a description of project impacts on various resources, and evidence of consultation); *Carl and Elaine Hitchcock*, 66 FERC ¶ 61,002 at p. 61,002, n.5 (1994) (noting rejection of application as patently deficient); *Tropicana Limited Partnership*, 65 FERC ¶ 61,094 at p. 61,550, n.4 (1993) (noting rejection of application as patently deficient for failure to comply with pre-filing consultation requirements); *Robert Shaw*, 59 FERC ¶ 61,346 (1992); *Manter Corporation*, 52 FERC ¶ 61,071 (1990) (affirming rejection of application for failure to provide agencies with sufficient information on which to base consultation); *City of Augusta, Kentucky*, 51 FERC ¶ 61,056 at pp. 61,120-25 (1990) (affirming rejection for wholesale deficiencies); *City of Bellevue, Washington*, 42 FERC ¶ 61,284 (1988) (affirming rejection for failure to provide sufficient environmental information); *Nevada Irrigation District*, 40 FERC ¶ 61,146 (1987) (affirming rejection for failure to include statement as to how application was as well or better adapted as previously-filed competing application); *Ashuelot Hydro Partners, Ltd.*, 35 FERC ¶ 61,304 (1986) (affirming rejection where necessary studies not performed, and environmental and other information not satisfactory); *Renewable Resource Development and Hat Creek Corporation*, 33 FERC ¶ 61,341 (1985) (affirming rejection for failure to comply with consultation requirements and to provide proper environmental information); *Trans Mountain Construction Company*, 33 FERC ¶ 61,231 (1985) (affirming rejection for failure to provide cost, engineering, and design information, scale drawings, and environmental information).

rejected as patently deficient and examining it for compliance with our regulations dictates rejecting the application. Paducah has failed to provide much of the information required by the regulations and has also failed to conduct meaningful pre-filing consultation.

11. As noted above, Part 5 and Part 4, Subpart F, of our regulations set forth the material that was required to be included in Paducah's application. Among other things, the application was to include: Exhibit A (project description), Exhibit B (project operation and resource utilization), Exhibit C (construction history and proposed construction schedule), Exhibit D (costs and financing), Exhibit E (environmental exhibit), Exhibit F (general design drawings), and Exhibit G (project map, showing, *inter alia*, project boundaries and features). Each of these exhibits, the contents of which our regulations spell out in detail, contains information without which the Commission – and other agencies and stakeholders -- cannot obtain the full understanding of the project and its effects needed to decide whether, and under what conditions, to issue a license.

12. Paducah's application does not include even one of these exhibits. Thus, the application on its face clearly is patently deficient. In addition, the application is patently deficient in that Paducah has not complied with the consultation process required by the regulations.¹⁴ It is this consultation process, a cornerstone of our licensing process, that gives state and federal resource agencies, Indian tribes, and other stakeholders, the opportunity to become informed about a proposed project and to develop proposed license terms, conditions, and recommendations. We have previously discussed the significance, which Paducah does not appear to recognize, of Paducah's failure to engage in appropriate consultation with state and federal resource agencies (as well as other stakeholders).¹⁵ As we have explained,

[t]he requirement of our consultation process is not, as [the applicant] seems to believe, merely intended as a procedural courtesy to agencies which can be side-stepped at the option of an applicant. The requirement ensures that agencies have a full opportunity to effectively comment on proposals and that applications filed with the Commission reflect any

¹³ See *The Halecrest Company*, 34 FERC ¶ 61,331 at p. 61,609 (1986).

¹⁴ See 18 C.F.R. § 5.1(d) (2007).

¹⁵ 121 FERC ¶ 61,051 at P 26-27.

alterations in design and/or operation that may arise as a result of the agency consultation and review process. This in turn ensures that we can process applications with a minimum of delay and procedural problems.¹⁶

13. Paducah asserts that “except for those requirements made impossible by FERC’s procedural rulings,” Paducah had furnished “substantially all” required information, and that Commission staff erred in finding that the information had not been provided.¹⁷ As evidence, Paducah cites to Attachment A to its request for rehearing, which purports to respond to staff’s checklist of missing items. This assertion is unconvincing.

14. First, Paducah does not even contend that it filed the application in the form required by the Commission. Rather, it claims that some of the required information can be gleaned from its pre-application document, filed as part of its application.¹⁸ Even were it the case that the pre-application document contained all of the information required by our regulations, the application would still be patently deficient as to format. The pre-application document, which our regulations do not contemplate as a substitute for an application, is not organized in the form of the required exhibits. An applicant cannot expect that we or our staff will parse through the disparate parts of such a document and piece together and reassemble from it the information that our regulations require be presented in a specific, detailed manner.

¹⁶ *Ashuelot Hydro Partners, Ltd.*, 36 FERC ¶ 61,250 at p. 61,605 (1986). *See also Murphy Hydro Company, Inc.*, *supra*, 71 FERC at p. 61,246 (stating that a consultation meeting requirement “provides expanded opportunities for participation by resource agencies and the public and the failure to hold such a meeting hampers the free and open exchange of information before an application is filed”).

¹⁷ Request for rehearing at 12.

¹⁸ The pre-application document is required as an initial filing under both the traditional and the integrated licensing processes. *See* 18 C.F.R. § 5.6 (2007). The purpose of the pre-application document is not to serve as a stand-in for a full application, as Paducah attempts to do here, but rather to “provide[] the Commission [and other stakeholders] with existing information relevant to the project proposal that is in the potential applicant’s possession . . . to enable them to identify issues and related information needs, develop study requests and study plans, and prepare documents analyzing any applications that may be filed.” 18 C.F.R. § 5.6(b)(1) (2007). The regulations make clear that the pre-application document is not itself an application, stating that it is “a precursor” to the applicant’s preliminary licensing proposal or draft license application, Exhibit E of the application, and the Commission’s scoping document and environmental analysis. *Id.*

15. In any case, Paducah's assertions that it provided the information required by our regulations are unconvincing. By its own admission, Paducah's Attachment A lists more than 30 items as not being provided because they were "not available without consultation with agencies." Paducah then blames its failure to conduct the necessary consultation on our refusal to grant it the waivers it requested, which it asserts then led to agency unwillingness to consult.¹⁹ However, even had we allowed Paducah to proceed under our Part 4 traditional licensing process, Paducah nonetheless would have been required to satisfy our pre-filing consultation requirements. While the Part 4 regulations do provide that portions of the pre-filing consultation requirements can be waived, waiver can only occur if resource agencies and tribes waive in writing compliance with particular portions of the process.²⁰ Paducah provided no evidence of any stakeholder waiver, and is therefore responsible for the consequences of its failure to comply with the regulations.²¹

16. In addition, we are unconvinced that Paducah could not have provided much of the information the absence of which it lays at the resource agencies' door. For example, Paducah alleges that it could not provide basic Exhibit B data on project operation without agency consultation. While it may be true that pre-filing consultation might result in some alteration of an applicant's original design, that does not provide an excuse for the failure to provide initial engineering data.²² Similarly, Paducah's suggestion that it could not develop Exhibit C (a construction history and schedule of proposed work),

¹⁹ *Id.* at 14-15.

²⁰ *See* 18 C.F.R. § 4.38(e) (2007); 121 FERC ¶ 61,051 at P 38.

²¹ Under the Part 5 integrated licensing process, which involves greater pre-filing interaction among the applicant, other stakeholders, and Commission staff than does the traditional licensing process, the consultation process generally takes on the order of three years. Even though under the Part 4 traditional licensing process some record developed is shifted to the period after the application is filed, that process may take two or three years to complete. *See* 121 FERC ¶ 61,051 at P 15-16. Thus, no matter which process Paducah used, it could not have completed an application by the November 27, 2007 deadline, unless we agreed to essentially cut the resource agencies and the public out of the process, which we are extremely disinclined to do. *Id.* at P 34.

²² Paducah asserts in Attachment A that "decisions regarding final design cannot be made without input from the agencies" While it may be true that agency input is necessary for final design, there would be nothing for the agencies to review if an applicant did not provide initial design information. Paducah has not even provided a minimal amount of detailed information for any agency to examine. Further, since the lock and dam are existing facilities, information about impoundment storage and design should have been readily available or relatively easy to obtain.

and Exhibit D (costs and financing) without agency consultation is not credible. Paducah's attachment does not in any way explain its complete failure to provide an Exhibit E environmental exhibit, perhaps the most important part of an application. Paducah provides no convincing reason why it did not make such an effort.²³

17. In our experience, applicants prepare thorough design, construction, cost, and environmental information on their own, to serve as the basis for consultation. Paducah's Attachment A is unconvincing in other respects, as well. For example, Paducah responds to staff's statement that Paducah failed to provide documentation that it published notice of its application in local newspapers by asserting that it provided this information on January 7, 2008. This was 18 days after the application was rejected. Paducah asserts that it provided Exhibit A (project description) information in its pre-application document. Setting aside the fact, noted above, that Paducah cannot expect our staff to search through its filings for information that is not presented in anything remotely resembling the required format, we have not been able to locate the data at issue, particularly with respect to the project transmission line, and what portions of the project would be located on federal lands, information that is required so that relevant federal land management agencies can determine what, if any, action they need to take with respect to an application.

18. While Paducah contends that its filing contains certain Exhibit B information regarding items such as proposed facilities and operations and estimates of dependable capacity and generation, we have not been able to locate all of the required information.²⁴

²³ Indeed, in the *Meldahl* proceeding, which Paducah has repeatedly cited to us as an example of our allowing waivers of our regulations, the two competitors filed within the competition deadline applications which, while imperfect and requiring supplementation, contained a full set of exhibits. In fact, in those proceedings, the Commission initially dismissed as patently deficient an application by the City of Hamilton, Ohio, in Project No. 12667, in large part for failing to consult with relevant resource agencies. In so doing, Commission staff denied a request by Hamilton that the Commission waive pre-filing consultation, and stated that the burden was on Hamilton "to demonstrate in your filed license application that agencies and the public have been adequately consulted" See letter from Ann F. Miles (Commission staff) to Mr. Michael Perry (City of Hamilton) at 1 (August 10, 2006). Hamilton subsequently filed a revised application that was accepted.

²⁴ For example, Paducah states that its filing provides information on dependable capacity and generation, but we were able to locate only average annual production, not (as required) estimated dependable capacity, which is the maximum generation a project can reliably produce under adverse conditions for a specified period of time.

19. With respect to costs and financing (Exhibit D), Paducah asserts that costs relating to existing structures are not relevant, although it proposes to rehabilitate an existing, decommissioned lock. Also, Paducah cites to a declaration attached to its application as being its statement on sources and extent of financing, yet that declaration contains no mention of financing the project at issue here.

20. As to Exhibit F (design drawings), Paducah states that the pre-application document contains powerhouse plans and sections, but we are unable to find in the document required section views of the lock walls. Similarly, Paducah contends that the pre-application document includes elevation views, but the referenced section does not, as required, show the front elevation views of all project facilities. Moreover, the proposed substation is not shown on any design drawings.

21. Concerning the project maps required by Exhibit G, Paducah alleges that it provided “basic, available information.” However, this does not amount to all of the detailed information the regulations require. Notwithstanding Paducah’s assertions that its project boundary drawing is adequate, the drawing does not enclose the entire project (the lock, powerhouse, substation, and transmission line), it is not stamped by a registered land surveyor, and it does not include three known reference points. And a statement by Paducah that existing structures are federally-owned does not satisfy our requirement that federal land boundaries lines be labeled or identified.²⁵ Although Paducah asserts in Attachment A that the project is encompassed within federal lands, the application fails to identify lands to be acquired for the proposed switchyard and proposed 1.7-mile-long transmission line, which will not be integral with the existing, federally-owned locks and dam.

22. In sum, Paducah produced an application which was substantially deficient in numerous ways, and while it may be the case that Paducah could not have completed required consultation by the deadline for filing the application, Paducah provides no convincing justification for its failure to provide the Commission with basic initial project information of the type that applicants routinely develop without a need for extensive input from third parties.

23. Paducah suggests that Commission staff could have “follow[ed] its own precedents” by accepting Paducah’s application and then issuing a deficiency letter, providing the city time to supplement its application.²⁶

24. In fact, accepting Paducah’s application would not have been consistent with prior staff actions or with our regulations. As discussed above, the regulations contemplate

²⁵ See 18 C.F.R. §§ 4.41(h)(3)(iv) and 4.81(b)(5) (2007).

²⁶ Request for rehearing at 17.

two types of deficient applications. In the first instance, where an application omits some necessary information, our staff may give the applicant up to 30 days to correct the deficiencies.²⁷ Where, however, “an application, patently fails to substantially comply with the [filing] requirements,” the application will be rejected as patently deficient.²⁸ In this case, Paducah’s application failed to include some 80 pieces of required information, contained no exhibits, and failed to present evidence of compliance with our public consultation requirements. This is not the type of relatively small deficiency that can easily be cured in a short period, but rather represents a wholesale failure to meet the requirements of the regulations. We therefore conclude that our staff was correct to dismiss Paducah’s application as patently deficient.²⁹

The Commission orders:

The request for rehearing, filed on January 22, 2008, by The Electric Plant Board of the City of Paducah, is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁷ See 18 C.F.R. § 5.20(a)(2) (2007).

²⁸ See 18 C.F.R. § 5.20(b)(1) (2007).

²⁹ Paducah cites to various instances in which staff issued deficiency letters. Request for rehearing at 17-18, n.17. Examination of the cited letters shows that in those cases, staff listed between 4 and 11 specific items to be corrected, and did not find complete failure to file required exhibits. Those instances are not comparable to this proceeding, where Paducah failed to comply with dozens of requirements, did not file the exhibits required by our regulations, and failed to satisfy our consultation requirements.