

121 FERC ¶ 61,221
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

(Docket No. PL08-1-000)

Policy Statement on Conditioned Licenses for Hydrokinetic Projects

(Issued November 30, 2007)

AGENCY: Federal Energy Regulatory Commission.

ACTION: Policy Statement.

SUMMARY: The Federal Energy Regulatory Commission is giving notice of a new policy with respect to the issuance of licenses for hydrokinetic projects. In the Policy Statement, the Commission concludes that, in appropriate cases, where the Commission has completed its processing of license applications for hydrokinetic projects, but where other authorizations required under federal law have not yet been received, it will issue conditioned licenses for hydrokinetic projects, predicated on the licensee being precluded from commencing construction until the necessary authorizations are received.

EFFECTIVE DATE: This Policy Statement is effective November 30, 2007.

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SUPPLEMENTARY INFORMATION:

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FEDERAL ENERGY REGULATORY COMMISSION

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

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for Hydrokinetic Projects

Docket No. PL08-1-000

POLICY STATEMENT ON CONDITIONED LICENSES
FOR HYDROKINETIC PROJECTS

(Issued November 30, 2007)

1. The Commission is issuing this Policy Statement as part of its ongoing effort to establish a regulatory climate that supports the development of innovative hydropower projects that use the forces of currents, waves, and tides (generally referred to herein as “hydrokinetic projects”) to generate clean, renewable electric energy. In the Policy Statement, the Commission sets forth a new policy, applicable only to hydrokinetic projects, pursuant to which the Commission will, in appropriate cases, issue licenses pending actions by other entities under federal law. The goal of this action is to shorten the regulatory process and speed the development of meritorious hydrokinetic projects.

I. Background

2. In recent years, the Commission has become aware of efforts by the hydrokinetic industry to test and develop projects that harness the nation’s water resources to produce new supplies of much-needed electric power. Estimates suggest that new hydrokinetic

technologies, if fully developed, could double the amount of hydropower production in the United States, bringing it from just under 10 percent to close to 20 percent of the national electric energy supply. Given the potential benefits of this new, clean power source, the Commission has taken steps to lower regulatory barriers to its development.

3. On December 6, 2006, the Commission held a technical conference on Hydroelectric Generation from Ocean Waves, Tides, and Currents and from Free-Flowing Rivers.¹ At the conference, the Commission heard from state and federal regulators, developers, and other stakeholders interested in hydrokinetic projects. Following the conference, the Commission received public comments. A number of the comments focused on issues relating to the issuance of preliminary permits for hydrokinetic projects,² while other comments discussed the licensing process for such projects.

4. On February 15, 2007, the Commission issued a notice of inquiry and interim statement of policy with respect to preliminary permits for hydrokinetic projects.³ The Commission explained that there had been a surge in applications for preliminary permits

¹ Docket AD06-13-000.

² Preliminary permits, issued for a term of up to three years pursuant to section 4(f) of the Federal Power Act, 18 U.S.C. § 797(f) (2000), allow a potential applicant to develop sufficient information to prepare a license application and give the permit holder a priority with respect to filing a license application, but confer no property rights in the project site and no authority to conduct construction or other land-disturbing activity.

³ The notice of inquiry and interim statement of policy is published at FERC Stats. & Regs. ¶ 35,555.

to study potential hydrokinetic projects, and noted the potential for new energy production from those projects. In consequence, the Commission proposed to implement a “strict scrutiny” approach to reviewing preliminary permit applications, in order to respond to issues that had been raised at the technical conference, and to encourage thoughtful permit applications and promote competition.⁴ The Commission also sought comment on this proposal, and the great majority of the commenters supported the Commission’s approach.

5. On October 2, 2007, the Commission held a Commissioner-led technical conference, in Portland, Oregon, to discuss a Commission staff proposal for a pilot licensing process regarding hydrokinetic projects. The staff proposal called for an expedited licensing process, to be completed in as few as six months. Staff suggested that pilot project licenses would be available only for proposed projects that are small (five megawatts or less), are removable or able to be shut down quickly, are not located in sensitive areas, and are for the purpose of testing new technologies or locating appropriate sites.⁵ Staff proposed that pilot project licenses (1) have a short term (five years), (2) include a standard condition requiring project alteration or shutdown in the event that there was an unacceptable level of environmental effect, (3) provide the option

⁴ Id. at ¶ 14, 16.

⁵ See Notice of Technical Conference and Soliciting Comments, Docket No. AD07-14-000 (issued July 19 2007).

of applying for a standard 30-50 year license, and (4) require decommissioning and site restoration at license expiration, if a standard license is not sought. The comments filed regarding the pilot project license proposal were largely supportive of a more expedited, less burdensome process, and included a number of specific suggestions as to how the process could be implemented.

II. Discussion

6. Based on the Commission's experience, it has often been the case that Commission staff has completed its processing of a hydropower license application, including preparation of an environmental document, but that authorizations required from other entities under federal laws including the Clean Water Act, the Coastal Zone Management Act, and the Endangered Species Act, have not yet been received. Typically, the Commission has not acted in such instances, sometimes resulting in substantial delays in developers' abilities to undertake non-construction activities. This has a concomitant adverse impact on developers' abilities to move quickly with project construction once the pending authorizations are filed with the Commission.
7. The Commission has taken a different approach with respect to authorizations issued under the Natural Gas Act. In those cases, the Commission has issued pipeline certificates and authorizations to construct liquefied natural gas facilities while action by

other entities is still pending, and included in the Commission order provisos that construction may not commence until the necessary authorizations have been received.⁶

8. In light of the nation's interest in the development of its water power resources to meet the growing need for clean, renewable energy, the Commission has decided to adopt the natural gas procedural model with respect to new, hydrokinetic projects. Thus, for new hydrokinetic projects only, we will, in appropriate cases, issue project licenses where the Commission has completed processing an application but other authorizations remain outstanding. In such cases, the license will include conditions precluding the licensee from commencing construction until it has obtained all necessary authorizations.

9. There are a number of policy reasons to consider adopting the gas pipeline practice rather than the conventional hydropower practice with respect to conditioned licensing of hydrokinetic technologies. First, issuing licenses as described will have no environmental impacts. By the terms of the licenses, licensees will not be permitted to commence construction until they have obtained all authorizations required by federal law. When the authorizations are obtained, licensees will be required to file them with the Commission, and the Commission then will review them and incorporate their terms in the licenses, as appropriate.

10. Second, issuing an appropriately conditioned license would in no way diminish the

⁶ See, e.g., Crown Landing LLC, 117 FERC ¶ 61,209 at P 21 and n.19 and n. 36 (2006); Georgia Strait Crossing Pipeline LP, 108 FERC ¶ 61,053 at P 13-16 (2004); Millennium Pipeline Company, L.P., 100 FERC ¶ 61,277 at P 225-231 (2002).

authority of the states or other federal agencies. Construction of a hydrokinetic project could not start without any necessary state and federal authorizations under a conditioned license. For that reason, states and federal agencies will fully retain their authority to take action under relevant federal law.

11. Third, the new procedure is suitable for demonstration projects. The Commission can issue licenses quickly, leaving state and federal agencies that have not yet completed their actions the opportunity to do so, ideally quickly, on their own timetable. While it is not clear whether state and federal resource agencies will complete their actions on hydrokinetic projects in a shortened timeframe, as suggested in the pilot project license proposal drafted by Commission staff, issuance of conditioned licenses would likely give the Commission a greater ability to respond quickly to innovative project proposals. Also, early issuance of a Commission license will improve the ability of project developers to secure financing of demonstration projects.

12. Issuance of a conditioned license will be a final Commission action, as is the case with other licenses that contain reservations of authority. Thus, these licenses will be subject to rehearing, and, once accepted, their terms will be binding on licensees. Licensees will be able, and required, to comply with all license terms that do not involve construction, such as those which may require the development of plans and consultation with stakeholders.

III. Comments

13. Interested persons may submit comments on this Policy Statement. Comments are due on or before December 14, 2007. Comments must refer to Docket No. PL08-1-000, and must include the commenter's name, the organization they represent, if applicable, and their address.

14. Commenters are requested to use appropriate headings and to double space their comments.

15. Comments may be filed on paper or electronically via the eFiling link on the Commission's web site at <http://www.ferc.gov>. The Commission accepts most standard word processing formats and commenters may attach additional files with supporting information in certain other file formats. Commenters filing electronically do not need to make a paper filing. Commenters that are not able to file comments electronically must send an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Office of the Secretary, 888 First Street, NE, Washington, DC 20426.

16. All comments will be placed in the Commission's public files and may be viewed, printed, or downloaded remotely as described in the Document Availability section below. Commenters are not required to serve copies of their comments on other commenters.

IV. Document Availability

17. In addition to publishing the full text of this document in the Federal Register, the Commission provides all interested persons an opportunity to view and/or print the

contents of this document via the Internet through the Commission's Home Page (<http://www.ferc.gov>) and in the Commission's Public Reference Room during normal business hours (8:30 a.m. to 5:00 p.m. Eastern time) at 888 First Street, N.E., Room 2A, Washington D.C. 20426.

18. From the Commission's Home Page on the Internet, this information is available in the Commission's document management system, eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number (excluding the last three digits of the docket number), in the docket number field. User assistance is available for eLibrary and the Commission's website during normal business hours. For assistance, please contact FERC Online Support at (202) 502-6652 (toll-free at 1-866-208-3676) or e-mail at ferconlinesupport@ferc.gov, or the Public Reference Room at (202) 502-8371, TTY (202) 502-8659. E-mail the Public Reference Room at public.referenceroom@ferc.gov.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.