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## HYDROPOWER

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### FERC ORDER ON MUNICIPAL PREFERENCE IN HYDROPOWER LICENSING

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FERC recently issued an order that introduces a new geographic restriction on the statutory preference for municipal entities in hydropower licensing. If the decision stands, municipalities may find themselves being denied preliminary permits<sup>1</sup> and licenses for hydroelectric projects that, in the past, they would have been awarded without controversy.

As many of you are aware, the Federal Power Act (“FPA”) provides that FERC “shall give preference to applications [for preliminary permits and original licenses for hydropower development] by States and municipalities,” and has done so since its enactment in 1920.<sup>2</sup> Based on this provision, municipalities<sup>3</sup> that file timely applications for preliminary permits in competition with non-municipal entities have almost always been awarded them.

At its December 19, 2013 meeting, however, FERC issued an order<sup>4</sup> that, if it is not modified and is applied in the future, could significantly limit the scope of the statutory municipal preference. The

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<sup>1</sup> A preliminary permit is “for the sole purpose of maintaining priority of application for a license under the terms of this chapter for such period or periods, not exceeding a total of three years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.” Federal Power Act § 5, 16 U.S.C. § 798 (as amended by the Hydropower Regulatory Efficiency Act of 2013, Pub. L. No. 113-23, § 5, 127 Stat. 493, 495).

<sup>2</sup> FPA § 7(a), 16 U.S.C. § 800(a).

<sup>3</sup> The FPA defines “municipality” as “a city, county, irrigation district, drainage district, or other political subdivision or agency of a State competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.” 16 U.S.C. § 796(7).

<sup>4</sup> *FFP Qualified Hydro 14, LLC*, 145 FERC ¶ 61,255 (2013) (available at <http://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=13421154>).

order ruled on competing preliminary permit applications filed by FFP Qualified Hydro 14, LLC (“FFP”), a non-municipality, and Western Minnesota Municipal Power Agency (“WMMPA”), a municipal corporation that finances the construction and acquisition of the generation and transmission facilities for members of Missouri River Energy Services (“MRES”).<sup>5</sup> Both applications proposed power development at the existing Saylorville Dam and Lake on the Des Moines River, in the City of Johnston, Iowa.

FERC granted the preliminary permit to FFP based on a new interpretation of FPA Section 7(a) that FERC announced in the order. Specifically, FERC looked at the distance between WMMPA’s headquarters (in Ortonville, Minnesota) and the location of the proposed project—some 400 miles—and on that basis, it denied WMMPA municipal preference,<sup>6</sup> finding that

the record reveals no connection, beyond a business development interest, between the proposed project and the applicant. We conclude that granting municipal preference to [WMMPA] in these circumstances would not be in the public interest.

*FFP Qualified Hydro 14*, P 19. In support of this conclusion, FERC stated that Section 7(a) of the FPA “provides us no guidance as to the scope of municipal preference,” and that “[a]ccordingly, we are left to develop a reasonable construction of the statute.” *Id.* P 17. As such:

We conclude that the best reading of the statute is that municipalities should be accorded preference only with respect to the development of water resources that are located in their vicinity. It is appropriate that a municipality be granted preference in developing nearby hydropower sites for the benefit of its citizens. However, it is difficult to discern what public interest is served by giving a municipality a preference with respect to a project that is far from the site of the municipality. To do so would effectively make municipalities super-competitors with respect to all new hydropower developments, regardless of their location. For example, if municipal preference were viewed as absolute, a municipal entity located on the east coast could claim preference over a private entity seeking to develop a project in Hawaii.

*Id.*

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<sup>5</sup> <http://www.mrenergy.com/contents/wmmpa>.

<sup>6</sup> FERC then followed its usual practice when no rule of preference applies in a competitive preliminary permit proceeding: it relied on the results of a random drawing to determine the winner—in this case, FFP Qualified Hydro 14. *FFP Qualified Hydro 14*, PP 7, 9.

The order does not define what it means to be within the “vicinity” of a municipality. It may or may not be something different from the utility’s service territory, or the municipality’s borders. Indeed, in this case FERC based its decision only on the location of the joint action agency’s headquarters and did not consider the location of the MRES members that could be served by the project. Requests for rehearing of the December 19 order are due January 21, 2014.

Although announced in a fact-dependent adjudication involving specific parties rather than in a generic rulemaking, FERC’s new interpretation of the statutory municipal preference has broad implications for all municipalities interested in hydropower development. Please don’t hesitate to contact us with any questions or if you’d like to discuss the order, its implications, and options for municipalities.

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