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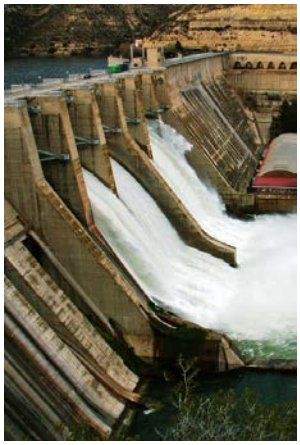

D.C. Circuit Overrules FERC's Effort to Narrow Section 7 Municipal Preference

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On November 20, 2015, the D.C. Circuit rejected the Federal Energy Regulatory Commission's (FERC) holding that Federal Power Act (FPA) Section 7(a) limits the municipal preference in original licensing for hydroelectric projects to municipalities located nearby or in the vicinity of the project site. *Western Minnesota Municipal Power Agency, et al., v. FERC,* No. 14-1153 (D.C. Circuit November 20, 2015). The underlying FERC orders reversed many decades of precedent in which FERC applied the municipal preference to all municipalities without regard to their geographic proximity to the project site. The Court granted Western Minnesota's petition for review, vacated FERC's orders, and remanded the matter to FERC for further proceedings.

BACKGROUND

The case began in 2013, when Western Minnesota Municipal Power Agency (Western Minnesota), which is a municipality as defined in the FPA, and a non-municipal entity filed competing preliminary permit applications to study development of a project to be located at the same site in Iowa. A permittee has an exclusive right during the permit term to file a license application and, if it does so, will have preference over any competing license application.

FPA Section 7(a) requires FERC to give preference to the preliminary permit applications of States and municipalities over those of competitors provided the State or municipal application is equally well adapted to a comprehensive plan for development of the region's water resources, and to afford States and municipalities an opportunity to make their plan of development as well adapted as that of any competitor. Following its consistent practice of holding that a better adapted finding is possible at the preliminary permit stage only in extraordinary circumstances, FERC found that Western Minnesota's and the non-municipality's applications were equally well adapted. However, instead of awarding the permit to Western Minnesota based on municipal preference, FERC held a random drawing to choose which applicant would receive the permit. The non-municipality won.

In its order granting the permit to the non-municipality and denying municipal preference to Western Minnesota and its order denying rehearing FERC significantly limited the scope of the preference it has applied since the passage of the FPA in 1920 by holding that the preference applies only to municipalities developing hydropower projects that are located "in the vicinity" of the municipality. Western Minnesota's headquarters are approximately 400 miles from the project site, which FERC determined to be too far. Western Minnesota, the American Public Power Association, and the Public Power Council appealed.

THE COURT'S DECISION

The Court held that Section 7(a) unambiguously requires FERC to give preference to States and municipalities, subject to the equally well adapted requirement, and that FERC's holding that the section provides no guidance with regard to the scope of the preference was a "manufactured ambiguity" put forth to support FERC's policy conclusion that it could not discern how the public interest is served by applying the preference to a municipality located distant from the site. The Court also rejected FERC's inference from Congress' silence regarding proximity to the project site that Congress had delegated to FERC authority to "pick and choose favored municipalities to advance the Commission's policy." The Court also held that the examples FERC cited of purportedly absurd or mischievous consequences that would result from distant municipalities having the preference failed to meet the high standard for invoking the absurdity doctrine; that is, a demonstration that the plain meaning of the statutory text defies rationality by rendering the statutory text nonsensical and superfluous.

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Finally, the Court suggested that if FERC is concerned that granting the preference to a distant municipality would have undesirable consequences, it may address that through the "equally well adapted" provision of Section 7(a). However, FERC precedent rejects proximity to the project site as a factor in determining whether a proposal is as well adapted as that of a competitor.

IMPLICATIONS

How FERC will respond to the Court's decision is not clear. The Court made it clear that if FERC wishes to continue efforts to limit the scope of municipal preference the only available approach is through application of the "equally well adapted" requirement. That suggests that FERC would have to make case-by-case determinations that one or another competing preliminary permit application is better adapted to the public interest, something FERC has stressed is possible only in extraordinary circumstances, and has done only twice in the past thirty years.

For more information

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