

# MUNICIPAL PREFERENCE AND THE PRIVATE HYDROPOWER PROJECT DEVELOPER

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The Federal Power Act (the Act)<sup>1</sup> was enacted in 1920 to "encourag[e] private enterprise and the investment of private capital" in hydropower projects on a basis consistent with the public interest.<sup>2</sup> The Act was designed to provide "a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest."<sup>3</sup> However, the recent efforts of the Federal Energy Regulatory Commission (the Commission) to "protect and preserve" the public interest in preventing the abuse of the Act's "municipal preference" by municipalities which allow private parties to participate in the development of municipal projects, have erected barriers to constrain private parties who want to invest capital in hydropower projects.

Hydropower is one of the oldest sources of electric energy; the first hydro-electric generating plant in the United States was built more than 100 years ago. Regulatory and financial incentives enacted in recent years, however, have led to an unprecedented surge of interest in hydropower development. This, in turn, has generated intense competition for the finite number of hydropower sites which are economically desirable as well as technologically and environmentally feasible. Because of the preemptive nature of federal regulation of hydropower development, this competition has focused on the federal licensing authority under the Federal Power Act. In competing for project development rights under the Federal Power Act, municipalities and other governmental bodies enjoy a decided advantage due to the municipal preference provided under the Act. However, because the initial capital required to develop a hydropower project is substantial, and because private developers often have access to different and more desirable sources of capital, there exists a natural economic impetus for municipalities and private parties to jointly develop such projects. The purpose of this article is to present the current state of the law on joint municipal and private development of hydropower projects.

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1. Federal Power Act, ch. 687, tit. II, § 213, 49 Stat. 863 (1939) (codified as amended at 16 U.S.C. §§ 791(a)-828(c) (1982)).

2. H.R. REP. NO. 61, 66th Cong., 1st Sess. 3 (1919), *cited in* FPC v. Niagara Mohawk Power Corp., 347 U.S. 239, 251 n.15 (1954).

3. Statement of David F. Houston, Secretary of Agriculture, H.R. REP. NO. 61, 66th Cong., 1st Sess. 5 (1919), *id.*

## I. GENERAL REGULATORY SCHEME FOR HYDROPOWER PROJECTS

The Commission is authorized under Section 4(e) of the Act as follows:

To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam . . . .<sup>4</sup>

Section 23(b) requires that, prior to any construction, operation, or maintenance of a hydropower project, a license for such project must first be secured from the Commission under Section 4(e) of the Act. The application for such a license must contain a "plethora of information, including feasibility studies, planned compliance with state laws and other relevant data,"<sup>5</sup> pursuant to Section 9 of the Act<sup>6</sup> and the Commission's Regulations thereunder.<sup>7</sup>

In recognition of the extensive data required to be included in an application for a hydropower project license, and the considerable time and expense necessary to gather and analyze such data, the Act authorizes the Commission to issue preliminary permits.<sup>8</sup> Section 4(f) of the Act provides for the issuance of preliminary permits "for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by Section 9 hereof."<sup>9</sup> Section 5 of the Act makes clear that such preliminary permits are issued:

for the sole purpose of maintaining priority of application for a license under the terms of this Act 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.<sup>10</sup>

Thus, a preliminary permit entitles the holder to maintain the priority of its application for a license so that, for the period of the preliminary permit (which cannot exceed three years), the permit holder's application for a license will be favored over any competing application so long as the permit holder's application is "at least as well adapted . . . to develop, conserve, and utilize in the public interest the water resources of the region, taking into consideration the ability of each applicant to carry out its plans . . . ."<sup>11</sup> In fact, if a competing application discloses plans that are better than those of the permit holder's

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4. 16 U.S.C. § 797(e) (1982).

5. *Delaware River Basin Comm'n v. FERC*, 680 F.2d 16, 17 (3d Cir. 1982).

6. 16 U.S.C. § 802 (1982).

7. 18 C.F.R. §§ 4.1-.202 (1985).

8. *Delaware River Basin Comm'n v. FERC*, 680 F.2d at 17.

9. 16 U.S.C. § 797(f) (1982).

10. 16 U.S.C. § 798 (1982).

11. 18 C.F.R. § 4.33(h)(1) (1985) (implementing Section 7(a) of the Act, 16 U.S.C. § 800(a) (1982)).

"priority application," the permit holder will be given a "reasonable" period of time to "render its plans at least as well adapted as the other plans."<sup>12</sup> If the permit holder's plans are rendered at least as well adapted as the competing applicant's plans within the time allowed, then the Commission will favor the permit holder.<sup>13</sup>

In determining which applicant will be granted a preliminary permit, or a license when no preliminary permit has been issued, the Commission will favor the application best adapted to develop, conserve, and utilize in the public interest the water resources of the region.<sup>14</sup> If both of two applications are equally well adapted, the Commission will favor the "applicant whose application was first accepted for filing."<sup>15</sup> If, however, one of the competing applicants for a preliminary permit, or a license where no preliminary permit has been issued, is a "state or municipality,"<sup>16</sup> the determination of which application is favored turns on the question of the "municipal preference."<sup>17</sup>

### A. *Municipal Preference Defined*

Section 7(a) of the Act requires the Commission to give preference, in issuing preliminary permits or licenses where no preliminary permit has been issued, to applications by states and municipalities, provided "the plans for the same are deemed by the Commission equally well adapted, or shall within a reasonable time to be fixed by the Commission be made equally well adapted, to conserve, and utilize in the public interest the water resources of the region."<sup>18</sup> Thus, the municipal preference entitles a municipality or state to be granted a preliminary permit or license so long as its plans are at least as well adapted as those of competing applicants to develop, conserve and utilize in the public interest the water resources of the region.<sup>19</sup> Further, if the plans of the municipality or state are not as well adapted as the competing applicants, then the municipality or state must be informed of the specific reasons and must be given a reasonable period of time to modify its plans to make them at least as well adapted.<sup>20</sup> If the modification is made within the time limit specified, the application of the municipality or state will be favored over competing applications.<sup>21</sup> Practically speaking then, a municipality will almost always prevail

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12. *Id.* § 4.33(h)(2).

13. *Id.*

14. *Id.* § 4.33(g)(1).

15. *Id.* § 4.33(g)(2). This regulation is often referred to as the "first-in-time rule" and was the subject of a recent *Energy Law Journal* article by Barbara E. Schneider. Schneider, *FERC's First-In-Time Rule: An Impediment to Hydropower Development*, 5 *ENERGY L.J.* 97 (1984) [hereinafter cited as Schneider, *First-In-Time*].

16. Section 3(7) of the Act 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) (1982). Section 3(6) defines "State" to include "a State admitted to the Union, the District of Columbia, and any organized territory of the United States." *Id.* § 796(6).

17. 18 C.F.R. § 4.33(g)(3)-(4) (1985).

18. 16 U.S.C. § 800(a) (1982).

19. 18 C.F.R. § 4.33(g)(3) (1985).

20. *Id.* § 4.33(g)(4).

21. *Id.*

over a private party in competition for a hydropower project.<sup>22</sup>

The impact of the municipal preference on private developers can be devastating. A private developer who is the first to file an application for a preliminary permit or license for a hydropower project will ordinarily receive a preliminary permit or license under the first-in-time rule if none of the competitors for the project are entitled to the municipal preference.<sup>23</sup> However, if a municipality files a competing application after the private developer's application which is as well adapted as the developer's application, the municipality will receive the permit or license because of the municipal preference. If the municipality's application is not as well adapted to develop the project, the municipality must be informed why its application is not as well adapted and must be given time to modify its application to make it as well adapted as the private developer's application. In either event, the municipality will ultimately receive the preliminary permit or license. This significant bias in favor of municipalities has created considerable pressure on private developers to find ways to work with municipalities under the Act.

### B. *The City of Fayetteville Decision and Its Progeny*

Initially, the most direct way for a private developer and a municipality to participate jointly in the development of a hydropower project appeared to be for the two parties to file a joint application for a preliminary permit or license as a "hybrid applicant." However, the Commission, in its landmark *City of Fayetteville Public Works Commission* decision,<sup>24</sup> denied the municipal preference to "hybrid" applications filed jointly by a municipality and a non-municipal entity. In the line of cases that followed, this denial of municipal preference to hybrid applicants evolved into a broad prohibition of other joint municipal and non-municipal arrangements which were considered to represent an abuse of municipal preference.

The *City of Fayetteville* order involved two competing applications for a preliminary permit, one of which was filed by the City of Fayetteville and the second of which was filed jointly by the City of Jefferson and the North Carolina Electric Membership Corporation (NCEMC). Because NCEMC was a non-municipal entity, the latter application was characterized as a "hybrid applicant."<sup>25</sup> After concluding that there were no significant differences between the two plans, and that neither plan was better adapted to utilize the affected resources,<sup>26</sup> the Commission determined that the award of the preliminary permit would turn on which applicant was entitled to municipal preference under

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22. In discussions on the Senate floor just prior to enactment of the Federal Water Power Act, *see supra* note 1, by the 66th Congress on June 10, 1920, Senator Lee commented:

In the development of waterpower by agencies other than the United States, the bill gives preferences to states and municipalities over any other applicant, both in the case of new developments and in case of acquiring properties of another licensee at the end of a license period." *The Economic Regulation of Business and Industry: A Legislative History of U.S. Regulatory Agencies*, Schwarz, Chelsea House, (Vol. III) at 2004.

23. *See* Schneider, *First-In-Time*, *supra* note 15.

24. 16 F.E.R.C. ¶ 61,209 (1981).

25. *Id.* at 61,455.

26. *Id.*

the Act.<sup>27</sup> As a matter of first impression before the Commission, general comments on the issue of the availability of municipal preference to hybrid applicants were solicited in a separate proceeding.<sup>28</sup>

The Commission finally determined in *City of Fayetteville* that under the plain meaning of Section 7(a) of the Act, hybrid applicants are not entitled to municipal preference.<sup>29</sup> The Commission reasoned that Section 7(a) is limited to "States and municipalities," as defined in Sections 3(6) and (7) of the Act, and that hybrid applicants are not included in the definitions of "States" or "municipalities." The Commission was also concerned that if hybrid applications were afforded the municipal preference, a municipality might lend its name to a project without retaining control over the project in order to obtain the statutory preference, possibly at the expense of another municipality which did intend to retain control of the development and operation of the project. Such a result, the Commission reasoned, would "contradict the statutory purpose of encouraging public control of waterpower development."<sup>30</sup> Accordingly, the municipal preference was denied to the hybrid applicant, and the City of Fayetteville was granted the preliminary permit.

In his concurring opinion, Commissioner Hughes expressed the opinion that the *City of Fayetteville* decision did not reach the issue of "whether a hybrid application should be preferred to a completely nonpreference applicant."<sup>31</sup> In his opinion, the denial of municipal preference to hybrid applicants in *City of Fayetteville*, which involved a municipality and a hybrid as competitors, was not dispositive of the availability of municipal preference to a hybrid applicant in a proceeding which involved a hybrid applicant and a totally nonpreference applicant as competitors.

In *City of Fayetteville*, the Commission expressed its concern that hybrid applicants might attempt to "circumvent" the policy of denying municipal pref-

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27. *Id.* Since both applications were equally well adapted and there was, therefore, no basis to conclude that either application was superior to the other, the Commission's first-in-time rule would determine the recipient of the permit if both parties were entitled to the municipal preference. Yet, if only one party was entitled to the municipal preference, that party would receive the preliminary permit. 18 C.F.R. §§ 4.33(g)(1)-(3). In this case, NCEMC filed its application on March 5, 1980, and the City of Fayetteville filed on April 15, 1980. *City of Fayetteville*, at 61,455.

28. On February 13, 1981, the Commission issued a "Notice of Inquiry" in Examination of Policies Relating to Preliminary Permits for Hydropower Projects, Docket No. EL81-9-000, requesting public comments on the issue of whether an application by a hybrid applicant should be entitled to municipal preference.

29. *City of Fayetteville*, 16 F.E.R.C. at 61,456.

30. *Id.*

31. Commissioner Hughes stated:

Portions of the order [*City of Fayetteville*] . . . may be thought to decide a slightly different question: whether a hybrid application should be preferred to a completely nonpreference applicant. Because that precise fact situation is not presented in this case, our decision today is not dispositive of that issue and is not binding as a matter of law on cases involving that fact issue. Those portions of the order, therefore, must be labelled as dicta. Thus, for instance, I do not think that persons with an interest in hybrid/nonpreference issue may seek rehearing of this order.

Those who follow our orders may, of course, interpret our dicta herein as they will and are free to act on their interpretation. I am confident that a case involving hybrid and nonpreference competitors will come before us soon enough, and today's dicta will either be confirmed or rejected definitively at that time.

*City of Fayetteville*, 16 F.E.R.C. at 61,459.

erence to hybrid applicants by filing a "hidden hybrid" application in which the private party is not named and the application is filed in the municipality's name only.<sup>32</sup> However, the Commission noted that such attempts would be "self-defeating," since the Act requires the licensee to hold all property rights necessary to develop and operate the proposed project.<sup>33</sup> Thus, if the preliminary permit holder intends to hold the requisite property rights jointly with another party, the permit holder must file a joint license application with that party, and its license application will not be eligible for any permit-based preference or priority.<sup>34</sup>

Despite its denial of municipal preference to hybrid applicants, the *City of Fayetteville* order indicated that not all participation by private parties in municipal-owned projects is prohibited. The Commission specifically noted that a municipality could retain its municipal preference and yet enter into contracts with a private party for "assistance in financing, studying, constructing or operating [sic] a project" so long as the municipality retains the "requisite control over the operation of the project and [does not] relinquish any property or other

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32. The Commission reasoned:

In the face of a Commission policy denying preference to hybrid applications, it can be expected that hybrid joint ventures may attempt to circumvent the policy by concealing the existence of the non-municipal partner and filing applications in the municipality's name only. This maneuver is however self-defeating, in light of existing and fundamental licensing requirements.

*Id.* at 61,459.

33. Specifically, the Commission said:

Licensees under Part I of the Federal Power Act must hold all property and other rights necessary for the construction, maintenance, and operation of the project. The numerous responsibilities of a license under Part I of the Act inherently require the licensee to possess sufficient proprietary rights to carry out those duties. An applicant for license, is therefore, required to hold or intend to acquire those rights, or it must file as a joint applicant with any other parties that will, during the term of the license, hold rights necessary for project purposes.

*Id.* at 61,456-57 (footnotes omitted).

34. On this point, the Commission noted:

Similarly, an applicant for preliminary permit is presenting itself as the entity which, assuming the project proves feasible, will seek to become the licensee and itself hold those rights necessary for project purposes. If, however, a preliminary permit applicant intends to hold the necessary rights jointly with another party, those parties should file as joint applicants at the preliminary permit stage. Should any of the interested parties fail to do so, then the subsequent license application of the joint applicants will not be eligible for any permit-based preference or priority.

*Id.* at 61,457 (footnotes omitted).

In later orders issuing preliminary permits, the Commission has utilized the following boiler-plate language regarding the effects of a preliminary permit:

The named Permittee is the only party entitled to the preference and priority of application for license afforded by this preliminary permit. In order to invoke this permit-based priority and preference in any subsequent licensing competition, the named Permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and hold all proprietary rights necessary for the construction, operation and maintenance of the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance where parties other than the Permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based preference or priority. *City of Fayetteville Public Works Commission*, Project No. 3137, *et al.*, "Order Determining Preference, Issuing Preliminary Permit and Denying Competing Application" (16 FERC ¶ 61,209).

*Burlington Energy Dev. Assocs.*, 31 F.E.R.C. ¶ 62,285 (1985).

rights necessary for project purposes."<sup>35</sup> Nevertheless, as will be demonstrated later, this denial of municipal preference has effectively foreclosed many municipalities from financing their hydropower projects.

In the subsequent cases of *Pennsylvania Renewable Resources, Inc.*, and *City of Summersville*, the Commission determined that, in making its decision on a preliminary permit, it need not investigate whether the applicant is a hidden hybrid applicant. The Commission indicated that the question of whether the municipality had ceded control of the hydropower project to a private developer would be determined at the licensing stage of the Commission's investigation.<sup>36</sup> The Commission repeated that, under the policy of *City of Fayetteville*, if the permit holder did not intend to acquire and hold all of the necessary proprietary rights, it would forfeit its permit based priority at the licensing stage.<sup>37</sup>

Since its issuance, the *City of Fayetteville* order has come to symbolize the full range of the Commission's concerns regarding the potential for abuse when private parties participate in municipal projects. For example, in *Vermont Electric Cooperative*, Vermont Electric Cooperative (VEC), a non-municipal entity, sought to transfer its license for an unconstructed hydropower project to Vermont Electric Generation and Transmission Cooperative, Inc. (VEG&T), another non-municipal entity formed by VEC to qualify the project for more favorable financing.<sup>38</sup> The license transfer was approved, but the Commission, citing *City of Fayetteville*, indicated that if a municipality is involved in a license transfer, it would act to prevent the attempted use of a license transfer under Section 8 of the Act to circumvent the Commission's policy of denying municipal preference to hybrid applicants.<sup>39</sup> The Commission indicated that

35. 16 F.E.R.C. at 61,456.

36. *Pennsylvania Renewable Resources*, 17 F.E.R.C. ¶ 61,031, (1981), *reh'g denied*, 19 F.E.R.C. ¶ 61,033 (1982) *aff'd sub nom.* *City of Bedford v. FERC*, 718 F.2d 1164 (D.C. Cir. 1983); *City of Summersville*, 17 F.E.R.C. ¶ 61,030 (1981), *reh'g denied*, 19 F.E.R.C. ¶ 61,032 (1982), *aff'd sub nom.* *City of Bedford v. FERC*, 718 F.2d 1164 (D.C. Cir. 1983).

37. The Commission stated the law as follows:

The preliminary permit issued to the Town of Clintwood is not transferable. The eventual licensee of a project must hold all property and other rights necessary for the construction, maintenance, and operation of the project. To the extent that any party other than the named permittee holds requisite rights, either the named permittee must acquire those rights or the other party holding those rights must be made a joint applicant for license. In the latter event, the permittee will lose its priority of application for license . . . . Lack of candor or inability to acquire the requisite rights will mean forfeiting of permittee priority.

*Pennsylvania Renewable Resources*, 17 F.E.R.C. at 61,066.

38. *Vermont Elec. Coop.*, 23 FERC ¶ 61,174 (1983).

39. *Id.* The Commission stated:

In *Fayetteville*, the Commission acknowledged the possibility that some hybrid joint ventures might attempt to circumvent its policy of denying preference to hybrid applications. It is possible that some parties might view Section 8 of the Act as a vehicle for achieving such an end. For example, a municipality, which in reality is a hidden hybrid, could obtain a license in the name of the municipality and subsequently attempt to transfer the license to the previously hidden non-municipal party. The facts presented here, however, do not give rise to such a potential. VEC is a private entity requesting transfer of its license to VEG&T, another private entity. No preference was involved initially, so *Fayetteville* does not come into play.

*Id.* at 61,379 (footnotes omitted).

such a transfer could indicate the presence of a potential "hidden hybrid."<sup>40</sup> Similarly, in *Boot Mills*,<sup>41</sup> the Commission approved a license transfer for financing purposes between two non-municipal entities, but warned that such a license transfer by a municipality would be subject to scrutiny as a "potential abuse of municipal preference."<sup>42</sup>

### C. *Gregory Wilcox (Uncompahgre)*

In *Gregory Wilcox*,<sup>43</sup> the Commission went still further in its efforts to prevent the abuse of the municipal preference by creating a rebuttable presumption requiring dismissal of the offending license application. In that case, two non-municipal applicants, Energenics Systems, Inc. and Gregory Wilcox, were the first to file for a preliminary permit. The Uncompahgre Valley Water Users Association (Uncompahgre), also a non-municipal entity, subsequently filed for a preliminary permit. Uncompahgre then withdrew its application and immediately thereafter a municipality, the City of Montrose, filed a permit application. Pursuant to the municipal preference, the preliminary permit was issued to the City of Montrose. Six months later, the City of Montrose surrendered its permit, and on the day that the surrender was accepted by the Commission, Uncompahgre filed an application for a license. Subsequently, Gregory Wilcox filed a second permit application. Ordinarily, under Section 4.33(f) of the Commission's regulations, an application for a license is favored over an application for a preliminary permit when both are pending before the Commission with respect to the same hydropower project.<sup>44</sup> Accordingly, the Commission rejected Gregory Wilcox's permit application and accepted Uncompahgre's license application.<sup>45</sup>

Upon completion of its examination of Uncompahgre's license application, the Commission acknowledged that, although this proceeding did not involve a typical hidden hybrid, Uncompahgre had obtained an unjustifiable competitive advantage over other applicants through working in concert with the municipality.<sup>46</sup> In order to establish a means to determine whether there had been an

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40. *Id.*

41. *Boot Mills*, 25 F.E.R.C. ¶ 61,386 (1983).

42. *Id.* at 61,851 n.9. The Commission noted that:

Unlike the application before us now, a municipal licensee's application proposing such a transfer would raise a variety of issues with respect to a potential abuse of municipal preference under Section 7(a) of the Act. See *Vermont Electric Cooperative, Inc., et al.*, 23 FERC ¶ 61,176 (1983); *City of Fayetteville Public Works Commission, et al.*, 16 FERC ¶ 61,209 (1981).

*Id.*

43. *Gregory Wilcox*, 24 F.E.R.C. ¶ 61,317 (1983), *reconsideration denied*, 26 F.E.R.C. ¶ 61,113, *reh'g denied*, 27 F.E.R.C. ¶ 61,403 (1984).

44. 18 C.F.R. § 4.33(f) (1985).

45. *Gregory Wilcox*, 24 F.E.R.C. at 61,681.

46. The Commission explained:

We recognize that this fact scenario does not represent a hidden hybrid in the sense that a municipality is applying for a license and concealing a non-municipal partner. Uncompahgre, as a non-municipal license applicant, does not claim the City's permit[-]based priority, or municipal preference. However, by apparently using the City as a proxy to obtain the permit, Uncompahgre did preclude Energenics and Wilcox, the first-to-file applicants, from receiving the permits that they presumably would otherwise have received. Furthermore, Uncompahgre was apparently able to



abuse of municipal preference in this proceeding, and in similar proceedings in the future, the Commission created a rebuttable presumption that municipal preference has been abused if a municipality obtains and surrenders a permit, and within ninety days of the effective date of the surrender, a non-municipality, in apparent coordination with the municipality, submits a license application for the same site.<sup>47</sup> Uncompahgre was ultimately unable to rebut the presumption.

In fashioning the remedy for Uncompahgre's actions, the Commission recognized that the remedy imposed in *City of Fayetteville*, of denying any preference or priority to the offending hybrid applicant, would be ineffective since Uncompahgre did not claim any preference or priority.<sup>48</sup> Accordingly, the Commission established a new remedy, dismissed Uncompahgre's license application, and forbade its refiling the application or competing in any way for the project for one year from the date of the order.<sup>49</sup> The Commission justified its apparently harsh actions on the ground that *City of Fayetteville* had put all applicants on notice that the "benefits of municipal preference are intended for municipalities *alone*."<sup>50</sup>

The Commission has applied the rule established in *Gregory Wilcox* in several subsequent proceedings in which it has held that a variety of transactions involving coordinated action between a municipal permit holder and a non-municipal entity constitute an abuse of municipal preference. For example, in *Orofino Falls Hydro Limited Partnership*,<sup>51</sup> an abuse of municipal prefer-

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control the timing of when it filed the license applications: after it was assured that it had acquired the requisite information to prepare acceptable license applications. As a result, it appears that Uncompahgre obtained an unjustifiable competitive advantage over other applicants.

*Id.* at 61,682.

47. The Commission established the following procedures to implement the rebuttable presumption: Where a particular proceeding reveals this pattern, the Commission will issue an order putting the applicant on notice that the rebuttable presumption rule will be applied, resulting in the dismissal of the non-municipal applicant's license application, unless, within 30 days of the Commission's order, the non-municipal applicant demonstrates the absence of concerted action with the municipality. If the applicant fails to rebut the presumption, the Commission will then dismiss the license application and will not accept any application by the non-municipal applicant for that same project for a period of one year.

*Id.* at 61,683.

48. *Id.* at 61,682.

49. In deciding to forbid competition by Uncompahgre for the same site for a period of one year, the Commission reasoned that:

This period of time should be sufficient for other potential applicants to file for authorization to study or develop the project. Should no such filings be made, we will at the end of one year entertain an application from the previously disqualified non-municipal applicant. By this procedure we can adequately preserve the integrity of our competitive process without precluding the development of new generating capacity if no other applicant is forthcoming.

*Id.*

50. The Commission, explained further:

Whether a non-municipality seeks to gain the benefits of municipal preference by acting as the concealed partner in a hidden hybrid license application or coordinates the surrender of its municipal partner's permit with the filing of its license application, it is clear that municipal preference is being impermissibly employed for the benefit of a non-municipality and to the detriment of other competing applicants and potential competitors.

*Id.*

51. 26 F.E.R.C. ¶ 61,245 (1984) (Order on Abuse of Municipal Preference).

ence was found where the non-municipal entity filed its license application the day after the municipality's permit expired. The Commission had issued a preliminary permit to the City of Orofino, a municipality, on August 27, 1981. On August 26, 1982, the City of Orofino executed an agreement with Idaho Hydro Inc. (IHI) providing that IHI would develop, maintain, and operate the proposed project for the "joint and mutual financial benefit of the City and IHI."<sup>52</sup> The agreement also provided that the City of Orofino would surrender its permit immediately preceding the filing of IHI's license application. On April 1, 1983, one day after the City of Orofino's permit expired, the Orofino Falls Hydro Limited Partnership (Partnership)<sup>53</sup> filed a license application for the project. Citing *Gregory Wilcox*, the Commission determined that the license application "appears to be the result of an abuse of municipal preference through the concerted actions of the City and IHI, and the Partnership."<sup>54</sup> Applying the procedures established in *Gregory Wilcox*, the Partnership was given thirty days to demonstrate that the filing of its application was not the result of concerted action constituting an abuse of municipal preference.<sup>55</sup> The Partnership failed to do so demonstrate, and its license application was dismissed on June 21, 1984.<sup>56</sup>

Similarly, in *Friends of Keeseville, Inc.*<sup>57</sup> the remedy fashioned in *Gregory Wilcox* was again applied, and the parties were given thirty days to show that an exemption application filed immediately after the municipality's permit expired did not constitute an abuse of municipal preference.<sup>58</sup> In this order, the Village of Keeseville, a municipality, obtained a preliminary permit and immediately began working with the Friends of Keeseville, a non-municipal entity, to develop the project. The Village and the Friends of Keeseville executed an agreement giving the Friends of Keeseville the exclusive right to file an application for an exemption for the project on behalf of the Village, and in fact transferred to the Friends of Keeseville exclusive rights to the permit. On the final

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52. *Id.* at 61,544.

53. The Orofino Falls Hydro Limited Partnership consisted of IHI, Eagle Construction Corporation, and Energy Associates, Inc. *Id.*

54. *Id.* The Commission reasoned as follows:

In this proceeding, it appears that the Partnership obtained an unjustifiable competitive advantage over other potential competitors by using the City as a proxy to continue to hold a preliminary permit while it prepared its license application. One year prior to the expiration of the permit, the City and IHI, a general partner in the Partnership, entered into an agreement which provided that IHI would file a license application immediately after the City surrendered its permit. Although the City did not surrender its permit, the Partnership was nonetheless positioned to file the first license application when the permit expired. We see no meaningful distinction to be drawn between instances where a non-municipality files a license application after the expiration, as opposed to the surrender, of the municipality's permit; provided that the action was the result of cooperation between the municipal permittee and the non-municipal license applicant. In either instance, municipal preference has clearly been abused in placing the non-municipal applicant in a competitively advantageous (first-to-file) position.

*Id.* at 61,545.

55. *Id.*

56. See Orofino Falls Hydro Ltd. Partnership, 27 F.E.R.C. ¶ 61,434 (1984) (Order Dismissing License Application).

57. 28 F.E.R.C. ¶ 61,158 (1984).

58. *Id.* at 61,298.

day of the Village's permit, the Friends of Keeseville filed its exemption application.<sup>59</sup> Citing *Gregory Wilcox* and *Orofino Falls*, the Commission determined that the Friends of Keeseville appeared to have obtained an unjustifiable advantage over potential competitors by using the Village as a proxy to continue to hold the permit while the exemption application was being prepared.<sup>60</sup>

A somewhat different situation arose in *Energeology and Lower Power River Irrigation District*,<sup>61</sup> in which the Lower Power River Irrigation District (District), a municipality, filed for and received a preliminary permit, and subsequently entered into an agreement with Energeology, Inc., to construct, operate, and maintain the project. On the last day of the permit period, Energeology and the District filed a joint license application.<sup>62</sup> The Commission found no difference between the preceding line of cases in which a non-municipality filed a license application, and the instant proceeding in which a municipality and a non-municipal entity filed jointly.<sup>63</sup> Accordingly, the parties were given thirty days to demonstrate that there had been no abuse of municipal preference.<sup>64</sup>

The regulatory scheme regarding municipal preference established by *City of Fayetteville*, *Gregory Wilcox*, and their progeny can be summarized as follows:

1. A licensee for a hydropower project must own all property and other rights necessary for project purposes;<sup>65</sup>

59. The Commission did not speak to, but *Friends of Keeseville* raises, the question of preventing such an abuse if the Village of Keeseville had itself filed for an exemption and then transferred the project to the Friends of Keeseville. In such an instance, since the Commission effectively ends its investigation of a project once an exemption is granted, the abuse of municipal preference penalized in *Friends of Keeseville* would probably have gone undetected. *Id.*

60. The Commission explained:

When a municipality obtains a permit, its actions are strictly limited to those involving development of the project by the municipality itself. Once a municipal permittee determines that it will not file for a license or exemption application itself, our strict interpretation of municipal preference precludes the municipal permittee from taking any action as permittee to assist any other entity in obtaining a competitive advantage for the development of its abandoned project. To do otherwise would in essence allow municipal permittees rather than the Commission to select non-municipal licensees or exemptees for the projects under permit. This misuse of municipal preference not only obstructs the Commission's duty to select licensees or exemptees whose plans are best adapted but also prejudices other parties who, in light of the permittee's decision not to develop the project, are entitled to a fair opportunity to compete to develop the project.

*Id.* at 61,297.

61. 28 F.E.R.C. ¶ 61,159 (1984).

62. *Id.* at 61,299.

63. The Commission stated:

We do not see any difference between these situations. A hybrid applicant is not entitled to municipal preference. Therefore, in both cases, the preference entity is holding the permit to give an advantage to a non-preference entity. Whether applying alone or as a hybrid, the non-municipality obtains an unjustifiable competitive advantage if it is positioned to file the first license application as a result of using the municipality as essentially a proxy to continue holding the permit while it, in coordination with the municipal permittee, prepares and files a license application.

*Id.* at 61,299 (footnotes omitted).

64. *Id.* at 61,300.

65. *City of Fayetteville*, 16 F.E.R.C. ¶ 61,209 (1981); see *New York State Elec. & Gas Corp.*, 16 F.E.R.C. ¶ 61,176 (1981) (discussion of rights a licensee under Part I of the Act must hold for project purposes).

2. A municipal applicant for a preliminary permit or license is entitled to a preference over non-municipal entities, so long as it intends to hold all property and other rights necessary for project purposes once the license is granted.<sup>66</sup>
3. Concealment of a non-municipal partner at the permit stage may result in the loss of any preference or priority rights of the applicant;<sup>67</sup> and
4. The coordination of the surrender or expiration of a permit by a municipality with the filing of a license or exemption application by a non-municipal entity or a hybrid will result in dismissal of the application and prohibition of that entity from competing or filing for that same project for one year.<sup>68</sup>

## II. VARIANTS FROM THE ESTABLISHED POLICY

Although *City of Fayetteville*, *Gregory Wilcox*, and their progeny appear to have erected an impenetrable barrier between municipal and private development, municipalities and private parties have nevertheless found ways to participate jointly in what were initially municipal projects. This participation has taken place through financing schemes which do not involve the acquisition of sufficient property rights by the private party to require a license transfer, or by adding private parties to municipal licenses following competitive or non-competitive license transfer proceedings.

### A. Non-Transfer Financing

In *El Dorado Irrigation District*,<sup>69</sup> the municipality and the private developer effectively utilized the limited contractual arrangements between a municipality and a non-municipal entity allowed by *City of Fayetteville*. In *City of Fayetteville*, the Commission indicated that the denial of municipal preference to hybrid applicants was not intended to jeopardize the municipal preference of a municipality which enters into contractual arrangements with non-municipal entities for financing, studying, constructing or operating a project, so long as the municipality retains the "requisite control over the operation of the project and [does] not relinquish any property or other rights necessary for project purposes."<sup>70</sup> *El Dorado Irrigation District* (*El Dorado*), a municipality, proposed to finance its Upper Mountain hydropower project through an arrangement with a private investor group, whereby the private investor group would finance the entire project by means of debt, and equity raised in exchange for future tax benefits. *El Dorado's* co-applicant, the *El Dorado County Water Agency*, would make payments to *El Dorado* of up to four mills per kilowatt hour produced. All revenues from the sale of any and all excess power to the local utility, as well as the payments of four mills per kilowatt hour from the *El Dorado County Water Agency*, would be handled by the private investor group and would be disbursed first to operate and maintain the project, second

66. *Id.*

67. *City of Fayetteville*, 16 F.E.R.C. ¶ 61,209 (1981); *Vermont Elec. Coop.*, 23 F.E.R.C. ¶ 61,174 (1983).

68. *Energeology & Lower Power River Irrigation Dist.*, 28 F.E.R.C. ¶ 61,159 (1984); *Friends of Keeseville*, 28 F.E.R.C. ¶ 61,158 (1984); *Orofino Falls Hydro Ltd. Partnership*, 26 F.E.R.C. ¶ 61,245 (1984); *Gregory Wilcox*, 24 F.E.R.C. ¶ 61,317 (1983).

69. *El Dorado Irrigation Dist. & El Dorado County Water Agency*, 29 F.E.R.C. ¶ 61,375 (1984).

70. *City of Fayetteville*, 16 F.E.R.C. at 61,456.

to make payments on the debt portion of the investment, third to El Dorado for its payment of up to four mills per kilowatt hour, and fourth, any balance to the equity investors. The Commission approved the license, concluding that because El Dorado would continue to hold all of the necessary property rights, the joint venture would not jeopardize the municipal status of the applicant.<sup>71</sup> Since the participation of the private developers did not alter El Dorado's municipal status, the *El Dorado* decision represents an acceptable form of private party involvement in a municipally-owned hydropower project.

Regrettably, many of the details of the financial arrangements between El Dorado and the private investor group do not appear on the face of the record in the *El Dorado* proceeding. On this basis, some observers in the industry have questioned whether the arrangements in *El Dorado*, if fully disclosed, would in fact achieve the desired results either from a regulatory or a tax and economic perspective. Nevertheless, *El Dorado*, and the similar order in *City of New Martinsville*,<sup>72</sup> demonstrate that the barrier between municipal and private development is not completely impenetrable, and that some non-municipal involvement in a municipally-owned project may be consistent with the licensee's municipal status.<sup>73</sup>

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71. The Commission explained the congruence of the financing arrangement with existing policy on municipal preference by the following:

We have examined the proposed financing arrangements and find them acceptable. Although the license applicant is a municipality and the financing is being provided by non-municipal entities, this joint venture does not jeopardize the municipal status of the applicant. Consistent with our longstanding requirements in this regard, full ownership of project lands and facilities will rest in the named municipal licensee. The fact that non-municipal investors will receive a share of project revenues does not by itself create an impermissible hybrid venture.

29 F.E.R.C. at 61,789 (footnotes omitted).

72. 27 F.E.R.C. ¶ 61,359 (1984).

73. In *Linweave, Inc.*, 23 F.E.R.C. ¶ 61,391 (1983), the Commission approved a transfer of property (exclusive of any power generating equipment) from Linweave, the license holder, for eight minor hydro-power projects to an affiliated corporation, Taro Realty Corp. (Taro), which then leased all necessary project property back to Linweave. *Id.* at 61,829. The Commission noted that permitting Taro to own the properties provided a means of improving the company's financing abilities. *Id.* at 61,831. The Commission determined initially that if the property rights to be transferred to Taro are necessary for project purposes then the transfer must be denied or Taro, the transferee, must be made a licensee. *Id.* at 61,830. Regarding the change from fee title ownership to a leasehold type of ownership of project property, the Commission specified that deviation from the form of ownership required under standard Article 5 (holding fee title to all necessary real property) must be supported by good cause. *Id.* at 61,830. The Commission did specify that this question of deviation from fee title ownership would involve additional issues for a major project since Sections 14 and 15 of the Act, regarding takeover by the federal government and relicensing, are not waived for major projects as they are for minor projects. *Id.* at 61,831. Nevertheless, the Commission found that the terms of the lease provided sufficient rights for Linweave to conduct its responsibilities with respect to the generation of power and other responsibilities required of it as a minor project licensee. The twenty year initial term of the lease, plus an agreement to lease in the future to any successor to the project license, was found to be sufficient. *Id.* at 61,831.

The Commission declared in *Linweave* that the approval of a transfer of property rights necessary for project purposes from a municipal licensee to a non-municipal entity could violate the *City of Fayetteville* decision. *Id.* at 61,831 n.1. However, it appears that under the rationale of the *Linweave* order, if the property rights are such that the license holder would retain the leasehold rights to all necessary property, the transfer of such property from a municipal licensee to a private developer would be approved.

### B. License Transfer Proceedings

In *Paterson Municipal Utilities Authority*,<sup>74</sup> a municipality which received its license prior to the Commission's issuance of the *City of Fayetteville* decision on September 16, 1981, requested permission to transfer a partial interest in the license to a private investor for financing purposes.<sup>75</sup> Under the terms of the proposed license transfer, the private entity would only own the new improvements at the project site in order to enable its investors to claim tax benefits with respect to these improvements;<sup>76</sup> Paterson would continue to own all existing project works.<sup>77</sup> The Commission held that since Paterson had received its license prior to the issuance of the *City of Fayetteville* order, it had no notice of the consequences of transferring its license to a non-municipal entity and, consequently, its proposed partial license transfer would not be barred pursuant to *City of Fayetteville*.<sup>78</sup>

On its face, *Paterson* appears to be based on a conclusion by the Commission that municipalities whose licenses were issued prior to September 16, 1981, the date of issuance of the *City of Fayetteville* order, will not be held to the strict rules regarding abuse of municipal preference which apply to municipalities whose licenses were issued after that date. However, it is not clear whether this conclusion is in fact consistent with the Commission's *City of Fayetteville* order. In *City of Fayetteville*, the Commission determined the issue of whether hybrid applicants were entitled to municipal preference by analyzing Section 7(a) of the Act, the definitions of "State" and "municipality" under Sections 3(6) and (7) of the Act, and the legislative history of the Act.<sup>79</sup> Since the *City of Fayetteville* order did not purport to change the state of the law on municipal preference, but only to interpret the existing law, it would seem that the rules of which an applicant had notice were the same before and after the *City of Fayetteville* order was issued. However, while the Commission's stated rationale may not actually justify its action, that action is not wholly unsupportable. In *Paterson Municipal Utilities Authority*, the Commission took careful notice of the diligent efforts taken by the municipality to finance the project, the funds it had already spent, and the benefits to the public at large of the

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74. *Paterson Mun. Utils. Auth. & Great Falls Hydroelectric Co.*, 27 F.E.R.C. ¶ 61,323 (1984).

75. *Id.* at 61,609.

76. *Id.*

77. *Id.* at 61,608.

78. The Commission reasoned as follows:

In *Fayetteville* we put all existing or potential applicants and permittees on notice of the consequences of their pursuing applications as municipalities, hybrids, or non-municipal entities. The Commission made it clear that when a municipal license applicant filed for and subsequently received a license, it was expected to itself hold all property and other rights necessary for project purposes. Having put them on notice, we will not allow that policy to be circumvented by the concealment of a non-municipal partner, the coordination of the surrender of a permit with the filing of a license application, or the transfer of a license. It cannot, however, be said that municipalities who had already received licenses were similarly put on notice at a time when they could have taken steps to comply with *Fayetteville's* requirement, short of surrendering their licenses. Out of fairness to this distinct category of licensee, we shall not hold them to strict compliance with the *Fayetteville* mandate.

*Id.* at 61,609.

79. 16 F.E.R.C. at 61,456.

municipality's retaining substantial control over the project site for recreational purposes.<sup>80</sup> Thus, the public interest was clearly promoted by the proposed partial license transfer, and it may be that the purported distinction between pre-*City of Fayetteville* licenses and post-*City of Fayetteville* licenses was not as relevant to the Commission's decision as was the requirement that the Commission act in the public interest.<sup>81</sup> The issuance of the license to Paterson prior to issuance of the *City of Fayetteville* decision may merely have provided the Commission an excuse to comply with public interest demand.

In *City of Vidalia*,<sup>82</sup> the Commission was faced with an application for a partial transfer of a license from a municipality to the joint possession of the municipality and a non-municipal entity in order to finance the construction of a hydropower project.<sup>83</sup> On January 27, 1982, the City of Vidalia received a license under which it was required to commence construction within two years of the effective date. Vidalia spent several hundred thousand dollars pursuing its license and attempting to finance the project through issuance of municipal bonds, but found that due to various circumstances it was unable to finance the project. On October 20, 1983, Vidalia sought a two year extension of the construction deadline which it received on December 6, 1983. On July 23, 1984, Vidalia filed an application to transfer its license to the joint possession of Vidalia and a non-municipal entity, the Catalyst Old River Hydroelectric Limited Partnership (Catalyst). Vidalia stated that Catalyst first became involved with the project in December, 1983. Citing *City of Fayetteville* and *Vermont Electric Cooperative*, the Commission held that the transfer would be an abuse of municipal preference and denied the application for a transfer.<sup>84</sup> However, rather than force Vidalia to abandon its license for lack of financing and failure to commence construction within the specified time period, the Commission offered a novel alternative: Vidalia could refile its transfer application, and public notice of the application would be issued soliciting competitive applications from anyone wishing to be the transferee of Vidalia's license.<sup>85</sup> The Commission offered this alternative to allow "potential competitors an opportunity to develop this project," to "obviate the need for repeating the costly and time-

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80. 27 F.E.R.C. at 61,610.

81. Section 4 of the Act, 16 U.S.C. § 797 (1985).

82. 28 F.E.R.C. ¶ 61,328 (1984).

83. *Id.* at 61,608.

84. *Id.* at 61,608-09. The Commission's holding followed existing precedent as the Commission explained:

To simply approve Vidalia's proposed transfer at this time would impermissibly extend the benefits of municipal preference to Catalyst, Vidalia's non-municipal partner in this hybrid joint venture. Such action would be unfair to competitors who would have filed an application to develop this project, but for the fact that Vidalia, a municipality armed with the preference under Section 7(a) of the Act, had filed an application. Our concern for preserving the integrity of our competitive process is especially strong in a situation such as this where a municipal licensee, who has neither operated its project for a period of time nor commenced construction, proposes a transfer of license. Such a transfer is, in essence, a second phase of initial licensing, and the municipal transferor should not be allowed to avoid the competitive procedures it would have confronted had it proposed this joint venture initially. This is true regardless of whether the municipal licensee did or did not intend to manipulate the Commission's competitive procedures.

*Id.* at 61,609 (footnotes omitted).

85. *Id.*

consuming initial licensing process," and to "still abide by the fundamental policies set forth in *Fayetteville*."<sup>86</sup>

Vidalia accepted the Commission's offer to submit its transfer application to open competition, and notice of such competition was issued by the Commission on October 31, 1984.<sup>87</sup> On May 30, 1985, the Commission issued its decision in *City of Vidalia* (Part II)<sup>88</sup> indicating that competing applications were filed by two non-municipal entities, Independence Electric Corporation (IEC) and Combustion Engineering Applicants (CE). The Commission compared the competing applications and found that "there is little to distinguish these applications from a technical perspective."<sup>89</sup> IEC's application was rejected, however, for insufficiency in details regarding project financing and construction schedules relative to the other two applications.

On these issues, CE's application was sufficient and a comparative analysis was performed comparing CE's application to the one filed by Vidalia/Catalyst. While both applicants proposed private financing through a limited partnership in order to take advantage of various tax benefits which require facility ownership, Vidalia/Catalyst's financing had progressed so far that Commission approval of the partial transfer was the "only impediment" to completing their project financing.<sup>90</sup> CE's financing plans involved a somewhat novel approach which had no clear Commission precedential support, and, therefore, the Commission favored Vidalia/Catalyst. Regarding power purchase arrangements, Vidalia/Catalyst had already negotiated a long-term contract for the sale of power to the local utility and was awaiting state commission approval. CE had obtained a form letter from the local utility indicating its willingness to negotiate a power purchase contract. Again, the Commission favored the "in place long-term arrangement" negotiated by Vidalia/Catalyst.<sup>91</sup> Finally, Vidalia/Catalyst had already spent eight million dollars to get the project into a "ready to be constructed status."<sup>92</sup> Thus, the Commission determined that the "Vidalia/Catalyst team [was] further along in the technical details of the project."<sup>93</sup>

The Commission also agreed with Vidalia's arguments that its municipal status in the hybrid team of Vidalia/Catalyst furthered the public interest.

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86. *Id.*

87. 49 Fed. Reg. 43,760 (1984).

88. 31 F.E.R.C. ¶ 61,237 (1985).

89. *Id.* at 61,465.

90. *Id.*

91. *Id.* at 61,466.

92. *Id.* at 61,467.

93. The Commission concluded:

The Vidalia/Catalyst team is further along in the technical details of the project. They have conducted a variety of model tests, they have met with the Corps of Engineers, with whom the project must be very closely coordinated, they have acquired an option on the non-federal lands associated with the project, and they have more fully consulted with the agencies on a recreation plan. Vidalia has diligently pursued development of the project and responded vigorously, and in detail, to the competitive challenge we imposed by this proceeding. The definitiveness of the Vidalia power purchase contracts as well as their financing proposal compare more favorably than that of the C-E proposal which is of a more uncertain nature.

*Id.* at 61,466-67.



Fifteen percent of Vidalia/Catalyst's power output would be utilized by the City of Vidalia, and eighty-five percent sold to the local utility. In contrast, 100% of CE's output would be sold to the local utility with "no comparable, however small, benefit to anyone other than itself."<sup>94</sup> Similarly, the Commission "agreed that ultimate municipal ownership in this hybrid venture is desirable and is a factor to be weighed in this competitive license transfer proceeding."<sup>95</sup> Since Vidalia, a municipality, would ultimately be the owner of the entire project under the Vidalia/Catalyst plan, the Commission again favored Vidalia/Catalyst over CE.

The Commission approved the license transfer to Vidalia/Catalyst and concluded that since there had been no "intentional concealment or misrepresentation constituting abuse of municipal preference," and since Vidalia had "faced the competition" and shown its proposal to be superior, Vidalia would not be penalized by the Commission's policy of "limiting the enjoyment of the benefits of municipal preference."<sup>96</sup>

### III. EFFECT OF CITY OF FAYETTEVILLE AND UNCOMPAHGRE AFTER CITY OF VIDALIA

As explained by the Commission in subsequent proceedings, *City of Fayetteville* and its progeny hold that the benefits of municipal preference under the Act are available only to municipalities. Moreover, any efforts to circumvent that policy by the "concealment of a non-municipal partner, the coordination of the surrender of a permit with the filing of a license application, or the transfer of a license" will not be allowed.<sup>97</sup> Simply, municipal preference for hybrid applicants is forbidden.

*City of Vidalia* involved a partial license transfer from a municipality which was deemed to have utilized the benefits of municipal preference in securing its license to the joint possession of a municipality, Vidalia, and a non-municipal entity, Catalyst.<sup>98</sup> As discussed in the *City of Vidalia* order, Catalyst became involved with Vidalia's hydropower project in December, 1983, and at a very early stage was negotiating financing agreements and a power purchase agreement with a local utility, as well as generally advancing the project with

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94. *Id.*

95. *Id.*

96. The Commission attempted to harmonize its decision in *City of Vidalia* with *City of Fayetteville*: On balance we conclude that the equitable and legal considerations favor the proposal by Vidalia/Catalyst. There has been no intentional concealment or misrepresentation constituting abuse of municipal preference in this case. Vidalia has faced the competition and shown that their proposal is superior. Our legitimate concerns in limiting the enjoyment of the benefits of municipal preference do not require that we, under these circumstance, penalize a municipal licensee such as Vidalia. They should be allowed to protect their investment to date and develop the project they have long been pursuing. In light of the inherent advantage to prompt and successful project development through the continued presence of Vidalia as colicensee, we can see no benefit at this time in ordering the inherently disruptive process of changing licensees.

*Id.*

97. Paterson Mun. Utils. Auth., 27 F.E.R.C. at 61,609.

98. *Id.* at 61,609; see also Orofino Falls Hydro Ltd. Partnership, 26 F.E.R.C. ¶ 61,245, 61,544 (1984) and Gregory Wilcox, 24 F.E.R.C. at 61,683 n.9.

the expectation of becoming a co-owner with Vidalia.<sup>99</sup> Thus, *City of Vidalia* presented a classic confrontation with the Commission's policy on municipal preference, as expressed in *City of Fayetteville* and *Uncompahgre*.

In the *City of Vidalia*,<sup>100</sup> the Commission denied the requested partial license transfer as inconsistent with the policy expressed in *City of Fayetteville*. However, rather than force abandonment of the project, the Commission opened the transfer of Vidalia's license to competition from interested parties. The Commission indicated that this action was designed to preserve the integrity of municipal preference under the Act by ensuring that Vidalia/Catalyst had no competitive advantage over any third party applicants as a result of the prior utilization of municipal preference by Vidalia.<sup>101</sup>

The implementation of this competitive procedure in *City of Vidalia* (Part II), however, did just the opposite: it gave Vidalia/Catalyst the practical, if not the legal, benefit of municipal preference, and a decided advantage over its competitors. The Commission based its approval of the license transfer to Vidalia/Catalyst almost completely on the basis of advantages which Vidalia/Catalyst enjoyed over the other applicants as a result of their joint efforts while Vidalia held a license that it had obtained through the exercise of municipal preference. Vidalia/Catalyst was further along in its development of the project in terms of detailed financing arrangements, advanced construction schedule, and an executed power purchase contract because Vidalia had first secured a license for the project to the derogation of other potential applicants through the exercise of its municipal preference. Moreover, although the license was being transferred to a hybrid, which the Commission found in *City of Fayetteville* to be excluded from the Act's definition of "municipality," the Commission in *City of Vidalia* (Part II) gave great weight to the benefits gained from ownership and control of the project by a partial-municipal entity relative to ownership by a totally non-municipal entity. Thus, not only did Vidalia/Catalyst receive the benefit of its predecessor's utilization of municipal preference to initially obtain the license, it also benefitted from its status as a partial-municipal entity. Under the Commission's rationale, no other potential competitor could have presented a plan of development as well adapted as that submitted by the Vidalia/Catalyst hybrid applicant unless the third party competitor itself had also joined with a municipality.

If, in fact, the Commission follows its *City of Vidalia* reasoning in subsequent proceedings, a hybrid desiring to be assigned a municipality's license may have to follow some protracted procedures and expose itself to nominal competition, but it has a very good practical chance of ultimately being given a license, and thus ultimately receiving the full benefit of its predecessor's utilization of municipal preference under the Act. In that event, the import of the Commission's warnings in *Vermont Electric Cooperative* and *Boot Mills* against license transfers from a municipality to a non-municipal entity would be substantially diminished, so long as the municipality transferred its license to

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99. *City of Vidalia*, 28 F.E.R.C. at 61,608.

100. *Id.* at 61,609.

101. *City of Vidalia*, 28 F.E.R.C. ¶ 61,328 at 61,609 (1984) (Part I); 31 F.E.R.C. ¶ 61,237 at 61,466 (1985) (Part II).

a hybrid under *City of Vidalia*. Further, the import of *Uncompahgre* (*Gregory Wilcox*) would also be significantly diminished since a private party could obtain the benefit of working with a municipality under cover of the municipality's preference if, instead of coordinating the municipality's surrender of its permit with the non-municipal entity's filing of a license application, the non-municipal entity merely awaited the receipt of a license by the municipality and then filed for a license transfer under *City of Vidalia*.

There are some questions left unanswered as a result of *City of Vidalia*, such as: (1) Which party would have prevailed if one of the competing applications for a transfer of Vidalia's license had been another municipality or another hybrid?, and (2) What significance will the practical preference allowed in *City of Vidalia* have on other proceedings involving hybrids (partial-municipal entities) and non-municipal entities? In *City of Vidalia*, the Commission was confronted with the unresolved issue identified by Commissioner Hughes in his concurring opinion in *City of Fayetteville*. The Commission granted the hybrid application of Vidalia/Catalyst over the competing application of an entirely non-municipal applicant. Limited to that factual situation, the *City of Vidalia* decisions may not be inconsistent with the decision in *City of Fayetteville*, and may simply decide the one issue specifically left unresolved by *City of Fayetteville*. However, if the competing application in *City of Vidalia* had been filed by another hybrid or a pure municipality, the Commission's rationale could nonetheless have led to the award of the license to Vidalia/Catalyst. Given that possibility, what will become of *City of Fayetteville*? The answer to this question must await further orders from the Commission.

### CONCLUSION

Depending upon how the Commission chooses to develop the "novel" procedures it established in *City of Vidalia*, and whether it subsequently reaffirms the substantive rights created in *City of Vidalia*, hybrid entities may be entitled to a form of preference over entirely non-municipal entities under the Act. For the moment, at least, it seems that *City of Vidalia* has created an exception to the previously unassailable rule that no party other than a pure municipality could enjoy any of the benefits of municipal preference. Whether that exception survives depends upon how the Commission rules in future proceedings.

