

FEDERAL ENERGY REGULATORY COMMISSION  
Washington, D. C. 20426

OFFICE OF ENERGY PROJECTS

Project No. 2785-078--Michigan  
Sanford Project  
Boyce Hydro Power, LLC

AUG 12 2010

Mr. Lee Mueller  
Boyce Hydro Power, LLC  
4132 S. Rainbow Blvd #247  
Las Vegas, Nevada 89103

Dear Mr. Mueller

This is in response to your August 9, 2010, filing regarding the control of all project works pursuant to the license for the Sanford Project license (FERC No. 2785). You state that on March 31, 2010, voluntary ownership of 17 land parcels was relinquished to the Midland County government. Many, if not all of these parcels include the Sanford Project reservoir. In addition, you state the desire for the licensee, Boyce Hydro Power, LLC (Boyce), to have the Midland County government agree to a lease or easement for the right to flow water across the submerged tax parcels. This request is currently under consideration by the Midland Board of Supervisors, and you expect further discussions to take place within the next sixty days.

We appreciate your advising us of the status of land rights for all project works, and that you are taking steps to bring the project back into compliance with the license. Standard Article 5, which we include in all project licenses, requires licensees to acquire and retain sufficient interests in all non-federal lands and other property necessary or appropriate to carry out project purposes.<sup>1</sup> The licensee may

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<sup>1</sup> Standard Article 5 appears in what are called "L-Forms," which are published at 54 FPC 1792-1928 (1975) and are incorporated into project licenses by an ordering paragraph. *See* 18 C.F.R. § 2.9 (2010). Article 5 states in pertinent part:

The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the

obtain these property interests by contract or, if necessary, by means of federal eminent domain pursuant to FPA section 21.<sup>2</sup> Sufficient property rights, as the term is used in Article 5, may be either ownership of property or the right to use it in perpetuity. A licensee's property interest can range from fee simple to perpetual or renewable leases, easements and rights-of-way.<sup>3</sup> The point is that a licensee must have sufficient control over project lands and works to enable the Commission, through the licensee, to carry out regulatory responsibilities with respect to the project.<sup>4</sup>

In order for leases, easements, or agreements to constitute an acceptable deviation from the strict project ownership requirements of standard license Article 5, they must vest in Boyce Hydro Power, LLC sufficient rights to accomplish all project purposes; secure the Commission's ability to carry out its regulatory functions; and vest control that is perpetual and transferable. Therefore, the document must include a provision that make it transferable by Boyce without the consent of Midland County,<sup>5</sup> and, to serve to ensure that Midland County cannot encumber Boyce's compliance with license requirements with respect to Midland County-owned licensed project features. The document must include a so-called Linweave clause, which states that notwithstanding any other of the

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project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. . . .

<sup>2</sup> 16 U.S.C. § 814 (2006).

<sup>3</sup> *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, *supra*, 116 FERC ¶ 61,270 at P 30 (2006). *See, e.g., Wisconsin Public Service Corporation*, 104 FERC ¶ 61,295 (2003).

<sup>4</sup> *See City of Fayetteville Public Works Commission*, 16 FERC ¶ 61,209 (1981).

<sup>5</sup> *See, e.g., Menominee*, *supra*, 74 FERC ¶ 61,023 at 64,115 (1996).

respective agreement's provisions, Boyce shall have the right to perform any and all acts ordered by the Commission.<sup>6</sup>

If the lease or easement does not include the Linweave clause voluntarily, then either the licensee must condemn sufficient rights in the Sanford property subject to the lease or easement under the eminent domain provisions of section 21 of the Federal Power Act to fulfill the requirements of license Article 5, or Midland County must become a co-licensee for Project No. 2785, to enable the licensee to fulfill its obligations under its license and enable the Commission to fulfill its statutory obligations to regulate the project.<sup>7</sup>

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<sup>6</sup> See *Linweave, Inc.*, 23 FERC ¶ 61,391 (1983), where the Commission first used the provision to modify a long-term lease of project property to prevent the nonlicensee/lessor from controlling rights necessary to accomplish project purposes and to ensure that the licensee/lessee would possess all such rights. The provision reads as follows:

Notwithstanding any provision contained herein, [the licensee, as it is designated in the document] their successors and assigns, have the right to perform any and all acts required by an order of the Federal Energy Regulatory Commission or its successor affecting the [the projects, as they are designated in the document], without the prior approval of any party to this document or any other person.

See also *Trafalgar Power Inc.*, 87 FERC ¶ 61,207 at 61,796 (1999), *Duke Energy Corporation, et al.*, 97 FERC ¶ 61,177, *supra*, at 61,825 (2001), and the orders cited therein describing the Commission's use of the provision.

<sup>7</sup> See, e.g., *New York Irrigation District, Nampa & Meridian Irrigation District, Boise-Kuna Irrigation District, Wilder Irrigation District, Big Bend Irrigation District*, 58 FERC ¶ 61,271, (1992), where the Commission required a power purchase agreement to include a Linweave clause, finding that:

every licensee must retain sufficient control over its project to be able to comply promptly and fully with the Commission's rules and orders under the license and the FPA. Such compliance cannot be subject to possible delay, alteration, or veto by a third party over which the Commission has no direct authority. We therefore cannot, and will not, subordinate the Commission's regulatory control over a licensed project to the terms of private contracts. To do so would be to

This information is provided to assist you and the Midland County Board of Supervisors in drafting an agreement that will meet the requirements of license Article 5. If you have any questions regarding this letter or the actions and information required from you, please call Steven Sachs at (202) 502-8666 or by e-mail at [Steven.Sachs@ferc.gov](mailto:Steven.Sachs@ferc.gov).

Sincerely,



**William Guey-Lee**  
Chief, Engineering and Jurisdiction Branch  
Division of Hydropower Administration and  
Compliance

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abrogate our responsibility under the FPA to ensure that the project is constructed, maintained, and operated in the public interest. Consequently, the Linweave clause must be included in the power purchase agreement... . [Footnotes omitted.]