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January 14, 2013

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Re: Boyce Hydro Power LLC
Sanford Project No. 2785

Supplemental Comments of Boyce Hydro Power LLC

Dear Secretary Bose:

This letter is a follow-up to the January 10, 2013, teleconference among Boyce Hydro Power LLC (Boyce), licensee for the referenced Project, the staff of the Federal Energy Regulatory Commission (Commission), and representatives of the Michigan Department of Natural Resources (MDNR) and U.S. Fish and Wildlife Service.

The teleconference pertained to the application filed by Boyce on September 11, 2012, for a non-capacity amendment to the license for this small project. The application seeks approval to replace the existing 1923 vintage turbine with a new, more efficient turbine that will enable Boyce to meet the minimum flow requirements of the license with the same hydraulic throughput, but generate more electricity for sale. There will be no change in the hydraulic regime. Water will enter the turbine and be discharged at the same locations as the present design.

Comments were filed in response to Boyce's application by MDNR[1] and FWS.[2] MDNR states that the Commission should respond to this efficiency upgrade application by reopening the license's minimum flow requirements, including prepare a new analysis of project economics. In support, MDNR cites discussion from the 1998 order on

[1] Letter from Kyle Kruger, Michigan Department of Natural Resources, to Commission Secretary Bose, filed September 21, 2012.

[2] Letter from Scott Hicks, U.S. Fish and Wildlife Service, to Commission Secretary Bose, filed October 12, 2012.

rehearing of the license order, in which the Commission established the required minimum flows based on consideration of the biological benefits and economic impacts of the licensee's and MDNR's proposals.[3] The relevant order gives no indication of any intention on the part of the Commission to reopen the license should the licensee propose an efficiency upgrade at some point in the future. Nor does the license order, which includes only the standard fish and wildlife reopener provision.[4] Notwithstanding, MDNR asserts that the Boyce's efficiency upgrade application "mandates"[5] reopening of the license's minimum flow requirements because the efficiency upgrade will alter the project's economics.[6] FWS supports MDNR's position.

MDNR's request to reopen the license is completely at odds with Commission policy. The Commission's well-established policy is that reopening a license's environmental requirements is appropriate "[i]f, with the passage of time, a project is found to have unanticipated, serious impacts on … fishery resources."[7] Similarly, the Commission has stated that "[i]n a reopener proceeding, the petitioner must show that the terms of the license are no longer adequate to deal with current conditions."[8] MDNR does not allege, let alone demonstrate, any facts that would suffice to meet these standards. Instead, it makes the general and, as shown below, incorrect assertion referenced above.

Even a cursory review of recent Commission precedent clearly shows that the statements of policy cited above are adhered to in practice. Where an efficiency upgrade does not result in a change in the hydraulic capacity of the project, the Commission does not reexamine the flow requirements.[9] In contrast, where replacement or upgrading of

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[3] MDNR Comments at pp. 1-3. *See Wolverine Power Corp*., 85 FERC ¶ 61,066 at pp. 61,237-8 (1998).

[4] *See Wolverine Power Corp*., 41 FERC ¶ 62,192, Ordering Paragraph (D) (1987), incorporating Form L-3, 54 FPC 1817, Standard Article 15 at 1822..

[5] MDNR Comments at p. 3.

[6] *Id*. at pp. 3-4.

[7] *PacifiCorp*, 126 FERC ¶ 61,236 at P 14 (2009), *citing Ohio Power Co.*, 71 FERC ¶ 61,092 at p. 61,14 n. 43 (1995).

[8] *County of Butte v. California Dept. of Water Res.*, 128 FERC ¶ 61,068 at P 25 (citing *PacifiCorp*), *reh. denied*, 129 FERC ¶ 61,133 (2009), *aff'd*, *County of Butte, Cal. v. FERC*, 445 Fed.Appx. 928 (9th Cir. 2011).

[9] *See*, *e.g.*, *PPL Montana, LLC*, 136 FERC 62,246 (2011) (replacement of 1923 turbine with newer, more efficient turbine with the same hydraulic capacity): *T&G Hydro*, 135 FERC ¶ 62,173 (2011) (replacement of turbine-generator with new, more efficient unit; no change in hydraulic capacity); *FPL Energy Maine Hydro LLC*, 121 ¶ 62,144 (2007) (generator rewind and replacement of turbine runner; no increase in hydraulic capacity); *Quinebaug Assoc., LLC*, 116

generating equipment is accompanied by an increase in hydraulic capacity, the Commission determines if the increase will have resource impacts.[10] Boyce is aware of no case in which the Commission has reopened the minimum flow requirements, or indeed any environmental requirements, merely because a resource agency is dissatisfied with the outcome of a licensing proceeding that is administratively and judicially final.

Finally, Boyce notes that its efficiency upgrade application is prompted by the opportunity to take advantage of the investment tax credit provisions of the American Reconstruction and Recovery Act, which were recently extended by the American Taxpayer Relief Act of 2012.[11] In order to do so, Boyce must begin construction no later than December 31, 2013. As noted in Boyce's application, installation of the new turbine will require significant lead time. Thus, Boyce requests that the Commission: (1) reject MDNR's and FWS' invitation to transform a routine efficiency upgrade application into a license reopener proceeding; and (2) act expeditiously on Boyce's application.

Respectfully submitted,

/s/ John Clements
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Counsel to Boyce Hydro Power LLC

cc: Lee W. Mueller
Steven Hocking, FERC
Kyle Kruger, MDNR
Scott Hicks, FWS

FERC ¶ 62141 (2006) (replacement of existing turbine-generator with new, more efficient unit; no change in hydraulic capacity), *FPL Energy Maine Hydro LLC*, 95 FERC ¶ 62,282 (2001) (rebuild of turbine-generator to increase generating capacity with no change in hydraulic capacity).

[10] *E.g.*, *Consumers Energy Co. and Detroit Edison Co.*, 139 FERC ¶ 62,101 (2012) (upgrade and overhaul of six pump-turbine generating units increasing capacity 127 MW and increasing hydraulic capacity 14.5%, or 9,690 cfs; MDNR commented that the increase would have minimal effects on fish populations (see p. 10)) (*Consumers*); *Turnbull Hydro, LLC*, 132 FERC ¶ 62,091 (2010) (install new turbines and increase hydraulic capacity from 600 to 750 cfs); *Rumford Falls Hydro, LLC*, 132 FERC ¶ 62,076 (2010) (repairs and maintenance resulting in 244 cfs collective increase in hydraulic capacity of three units).

[11] Pub. L. No. 112-240, 126 Stat. 2313, 2340 (2013), Section 407, Extension and Modification of Credits with Respect to Facilities Producing Energy from Certain Renewable Resources.