

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Boyce Hydro Power, LLC) **Project No. 10808-047**
10808-053

REQUEST FOR REHEARING OF BOYCE HYDRO POWER, LLC

Pursuant to Section 313(a) of the Federal Power Act (“FPA”)¹ and Rule 713 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure,² Boyce Hydro Power, LLC (“BHPLLC”) respectfully files this Request for Rehearing of the Commission’s November 20, 2017 Order to Cease Generation (“November 20 Order”)³ at the Edenville Project No. 10808 (“Project”). The November 20 Order required BHPLLC to cease generation at the Project by November 27, 2017. BHPLLC has complied with the order.⁴ On December 1, 2017, BHPLLC filed an emergency motion for a stay of the November 20 Order pending rehearing and request for related relief (“Emergency Motion”).⁵ Because the Commission has not acted on the Emergency Motion and has done nothing to indicate when it might act, BHPLLC is this

¹ 16 U.S.C. § 825l(a) (2012).

² 18 C.F.R. § 385.713 (2017).

³ *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 (2017) (“November 20 Order”).

⁴ See Letter from Lee W. Mueller, BHPLLC, to Kimberly Bose, FERC, Project No. 10808-000 (filed Nov. 28, 2017).

⁵ Emergency Motion for Stay Pending Rehearing, Request for Approval of Plan to Fund the Tobacco Auxiliary Spillway, and Request for Extensions of Time, Project No. 10808-000 (filed Dec. 1, 2017) (“Emergency Motion”).

day filing an emergency motion seeking a stay of the November 20 Order in the U.S. Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”).⁶

Although the Commission has broad authority to issue orders to ensure compliance with its licenses, that authority is not unbounded. In particular, nowhere does the FPA grant the Commission authority to force a licensee to shut down a hydroelectric project solely for the purpose of punishing noncompliance, where project shutdown is not necessary to protect public safety or the environment. Even if the Commission did have such authority, the November 20 Order is arbitrary and capricious because it bears no relationship to the Commission’s greatest concern as expressed in the November 20 Order: maintaining dam safety. In fact, the November 20 Order will *prevent* BHPLLC from complying with the Commission’s dam safety requirements by cutting BHPLLC’s gross revenues in half, starving it of the very funds it needs to carry out the Commission’s directives regarding the auxiliary spillways and myriad other requirements imposed on BHPLLC. The draconian nature of the November 20 Order is all the more baffling because the Special Board of Consultants (“BOC”) required by the Commission found that the probability of the Probable Maximum Flood (“PMF”) occurring in the next five to 10 years ranges from 5-10 in one million. Moreover, any sustained halt to generation is likely to force a license surrender application under conditions that will seriously disadvantage BHPLLC, the Commission, and the public interest.

The November 20 Order also is based on incomplete information regarding BHPLLC’s diligent, good faith efforts and progress made to address the matter of greatest concern to the Commission, increasing Project spillway capacity to pass the

⁶ Emergency Motion of Boyce Hydro Power, LLC to Stay Order of the Federal Energy Regulatory Commission Pending Judicial Review, *Boyce Hydro Power, LLC*, D.C. Cir. No. 17-_____ (Dec. 20, 2017).

PMF.⁷ Further, in response to the November 20 Order BHPLLC offered to begin placing into escrow 50 percent of the gross revenues of the Edenville Project in order to fund the Tobacco Auxiliary Spillway, but can only do so if the Commission will allow it to begin generating again and grant reasonable extensions of time to complete outstanding requirements.⁸ If the Commission genuinely desires to encourage license compliance, it will restore BHPLLC's ability to do so by granting rehearing and rescinding the November 20 Order to cease generation.

I. SPECIFICATION OF ERROR

In compliance with Rule 713(c)(1), BHPLLC specifies the following errors in the November 20 Order. The Commission erred by: (1) issuing an unlawful order to cease generation; (2) acting arbitrarily and capriciously by issuing an order which bears no relation to its purported purpose of maintaining dam safety because it will make it impossible for BHPLLC to increase the spillway capacity of the Project; and (3) acting without relevant substantial evidence because the November 20 Order does not take account of the recent and very substantial actions taken by BHPLLC to address the issue of greatest concern to the Commission, increasing the Project's spillway capacity.

⁷ The PMF is the "flood that may be expected from the most severe combination of critical meteorological and hydrologic conditions that is reasonably possible in the drainage basin." November 20 Order at P 4 n.3.

⁸ The same offer was made by BHPLLC in the Emergency Motion. Emergency Motion at 2. The Emergency Motion also requested certain extensions of time to meet various 18 C.F.R. Part 12 requirements and a stay of certain recreation requirements. *Id.* at 10-16. To the extent the Commission might consider it necessary, BHPLLC incorporates those extension requests by reference into this request for rehearing.

II. STATEMENT OF ISSUES

Pursuant to Rule 713(c)(2) of the Commission's regulations,⁹ BHPLLC submits the following statement of issues:

(1) Whether the Commission has authority to require a licensee to cease generation owing to violations of the license or Commission orders, where project shutdown is not necessary to protect public safety or the environment? The Commission's reliance on FPA Section 309¹⁰ is misplaced because the authority thereunder can only be exercised in the context of the intent and purposes of the FPA. Section 31 of the FPA¹¹ specifies several actions the Commission can take in response to noncompliance, including license revocation, but they do not include forcing a licensee to shut down generation while maintaining responsibility for the project. FPA Section 10(c)¹² and 18 C.F.R. Part 12 require a licensee to maintain the project in safe condition, but the Commission's November 20 Order does nothing to enhance public safety. The Commission's remedy if it wishes to force a project to shut down in order to ensure compliance with the FPA and the Commission's regulations is found in FPA Section 314,¹³ under which the Commission may bring an action in federal district court to enjoin acts which violate the FPA, or rules, regulations or orders issued thereunder. The Commission did not follow that procedure in this case, but granted to itself the injunctive relief which the FPA grants solely to the federal district court.

⁹ 18 C.F.R. § 385.713(c)(2).

¹⁰ 16 U.S.C. § 825h.

¹¹ *Id.* § 823b.

¹² *Id.* § 803(c).

¹³ *Id.* § 825m.

(2) Assuming, *arguendo*, the Commission does have authority to require a licensee to cease generation to encourage license compliance, whether it acted arbitrarily and capriciously by issuing an order that will make it impossible for BHPLLC to comply with the license? The Commission acted arbitrarily and capriciously because the November 20 Order bears no relation to its purported purpose of maintaining dam safety; it will have the opposite effect by starving the licensee of the funds needed to increase the Project's capacity to pass flood flows.

(3) Whether the November 20 Order lacked substantial evidence because it did not take account of the recent and very substantial actions taken by BHPLLC to address the issue of greatest concern to the Commission, increasing the Project's spillway capacity?¹⁴ The order is not based on substantial evidence because it does not take such information into account.

III. BACKGROUND

On June 15, 2017, the Commission's Director of the Division of Hydropower Administration and Compliance issued a Compliance Order ("Compliance Order") asserting violations of the Project license and the Commission's regulations with regard to dam and project safety, recreation facilities and public access thereto, acquisition of necessary property rights, and water quality monitoring.¹⁵ The Compliance Order established deadlines for BHPLLC to provide the Commission with specific plans, specifications, reports, and other information.¹⁶ BHPLLC engaged the services Mr. Jerry

¹⁴ 16 U.S.C. § 825l(b).

¹⁵ *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017).

¹⁶ BHPLLC has completed the requirement of Ordering Paragraph (L) to install and connect to the SCADA system reliable water quality monitoring equipment and demonstrate that it is in good working order. BHPLLC has also filed documentation that it possesses the necessary property rights for the

Gomez, PE, of Gomez and Sullivan Engineers, PC (“GSE”), a well-recognized expert in matters concerning dams, dam safety, and hydroelectric projects,¹⁷ to assist BHPLLC with completion of the design package for the Tobacco Auxiliary Spillway.

The November 20 Order requires: (1) documentation that generation has ceased; (2) maintenance of all other license conditions, with specific reference to water quality standards, minimum flows, and reservoir elevation; (3) compliance with the Compliance Order; and (4) compliance with the Regional Engineer’s directives contained in letters issued August 31, 2017 and September 18, 2017.¹⁸

On December 1, 2017, BHPLLC filed the Emergency Motion requesting a stay of the November 20 Order and related relief. The Commission has not acted on the Emergency Motion. Because the Commission has failed to act on the Emergency Motion, and BHPLLC continues to incur severe financial strain as a result of the cessation in generation, BHPLLC is on this day filing a Motion for Emergency Stay of the November 20 Order in the D.C. Circuit.¹⁹

Tobacco and Tittabawassee Auxiliary Spillways as required by Ordering Paragraphs (C) and (E) of the Compliance Order.

¹⁷ Mr. Gomez’ credentials are attached to BHPLLC’s July 14, 2017 request for extensions of time to comply with the Compliance Order. Letter from Lee W. Mueller, BHPLLC, to Kimberly Bose, FERC, Att. A, Project Nos. 10808-044 et al. (filed July 14, 2017).

¹⁸ November 20 Order at Ordering Paragraphs (A) through (D). The August 31, 2017, letter contains the Commission’s comments on the Sixth Consultant’s Safety Inspection Report for the Project. The letter request by October 31, 2017, the Independent Consultant’s recommend schedule for completing his recommendations, an updated Supporting Technical Information Document, and a plan and schedule for addressing the Independent Consultants recommendations and the Commission’s comments. The September 18, 2017, letter from the Regional Engineer directed BHPLLC to file by October 3, 2017, a plan and schedule to evaluate the spillways for the Project and Project Nos. 2785, 10809, and 10810, which are also licensed to BHPLLC, in accordance with his letter of April 28, 2017.

¹⁹ See *supra* note 6.

IV. REQUEST FOR REHEARING

A. The Commission Lacks the Authority under FPA Section 31 to Require a Licensee to Cease Generation of Power.

The November 20 Order should be rescinded because the Commission lacks authority under FPA Section 31²⁰ to require a licensee to cease generation for alleged noncompliance with a FERC license or other Commission order. While the Commission's enforcement powers under Section 31 have expanded since the enactment of the Electric Consumers Protection Act ("ECPA"),²¹ Section 31 specifies the actions the Commission can take in response to noncompliance, which do not include forcing a licensee to shut down generation while maintaining responsibility for a project.

Prior to 1986 and the enactment of ECPA, the Commission's enforcement powers were limited. The Commission could not enforce its license conditions, for example, by revoking or threatening to revoke a license, permit or exemption. Instead, Section 26 of the FPA provided that the Commission must request the Attorney General to "institute proceedings in equity in the district court . . . for the purpose of revoking for violation of its terms any permit or license."²² In addition, the statute gave the court, rather than the Commission, jurisdiction over all such proceedings, and power to compel compliance with FERC orders and regulations, including licenses, permits, and exemptions.

In 1986, Congress enacted ECPA, which amended the FPA by adding Section 31.²³ Section 31 of the FPA substantially increased the Commission's enforcement authority by giving it three specific powers. First, it gave the Commission monitoring

²⁰ 16 U.S.C. § 823b.

²¹ Pub. L. No. 99-495, 100 Stat. 1243 (1986) (codified at 16 U.S.C. § 797(b) *et seq.*).

²² 16 U.S.C. § 820.

²³ 100 Stat. at 1255-57.

and investigation powers and the authority to issue orders necessary to require compliance.²⁴ Second, it gave the Commission power to revoke licenses when the licensee or exemption holder violated a compliance order after having been given a reasonable time in which to comply.²⁵ Third, it granted FERC the power to assess civil penalties against licensees, permittees, and exemption holders who fail or refuse to comply with the terms of the license, permit, exemption, or other FERC orders.²⁶

However, Section 31 does not authorize the Commission to order a licensee to cease generation. The statute is plain on its face, and authorizes only monitoring and investigation, revocation, and civil penalties. The D.C. Circuit has rejected the Commission's prior efforts to argue that FPA Section 31 is ambiguous, instead finding that the statute is clear.²⁷ The Commission's remedy if it wishes to force a project to shut down in order to ensure compliance with the FPA and the Commission's regulations is found in FPA Section 314,²⁸ under which the Commission may bring an action in federal district court to enjoin acts which violate the FPA, or rules, regulations or orders issued thereunder. The Commission did not follow that procedure in this case, but granted to itself the injunctive relief which the FPA grants solely to the federal district court.

Thus, the Commission was not authorized under Section 31(a) to issue the November 20 Order. Section 31(a) authorizes the Commission, after notice and opportunity for public hearing, to "issue such orders as necessary to require compliance

²⁴ 16 U.S.C. § 823b(a).

²⁵ *Id.* § 823b(b).

²⁶ *Id.* § 823b(c); *see also Wolverine Power Co. v. FERC*, 963 F.2d 446, 452 (D.C. Cir. 1992).

²⁷ *Wolverine*, 963 F.2d at 451-53.

²⁸ 16 U.S.C. § 825m.

with the terms and conditions of licenses and permits issued under” the FPA.²⁹ Here, the Commission’s November 20 Order is purely punitive. Further, if the Commission had opted to invoke its authority under FPA Section 31(c)³⁰ to impose a civil penalty on BHPLLC, it would have had to comply with procedural requirements under FPA Sections 31(c) and (d), including notice and opportunity for public hearing, an agency hearing before an administrative law judge, and the opportunity to appeal the assessment in the United States court of appeals.³¹ FERC followed no such procedures here. The Commission has unlawfully expanded its statutory authority under Section 31 by imposing what is, in effect, a monetary penalty without any of the procedural protections Congress provided to licensees under the statute. Moreover, an order to cease generation is worse than a civil penalty because in addition to monetary loss, the Commission has eliminated the very source of revenue which enables the licensee to bear the penalty and fund the license requirements going forward.

Neither did the Commission have authority under Section 309 of the FPA to order BHPLLC to cease generation. Section 309 serves as Congress’ grant to FERC of the authority to “perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of” the FPA.³² The D.C. Circuit has held that Section 309 only authorizes FERC “to use means of regulation not spelled out in detail, provided [FERC’s] action conforms with the purposes and policies of Congress and does not contravene any terms

²⁹ *Id.* § 823b(a).

³⁰ *Id.* § 823b(c).

³¹ *Id.* § 823b(d).

³² *Id.* § 825h.

of the [FPA].”³³ Section 309 “merely augment[s] existing powers conferred upon [FERC] by Congress,” and “do[es] not confer independent authority to act.”³⁴

Furthermore, while such “necessary and appropriate” clauses authorize an agency “to use means of regulation not spelled out in detail,”³⁵ the Commission’s actions thereunder must “conform[] with the purposes and policies of Congress and . . . not contravene any terms of the Act.”³⁶ The Commission’s directive to BHPLLC to cease generation is not consistent with the enforcement purposes and policies of Congress and contravenes the enforcement provisions of the FPA. For these reasons, the Commission should grant rehearing and rescind the November 20 Order.

B. The November 20 Order is Arbitrary and Capricious because it Will Prevent BHPLLC from Addressing the Issue of Greatest Concern to the Commission.

BHPLLC acknowledges that it has had great difficulty in timely fulfilling the Commission’s requirements, including the letter directives and orders issued pursuant to the Commission’s 18 C.F.R. Part 12 dam and project safety regulations. However, as discussed in the affidavit attached to BHPLLC’s Emergency Motion,³⁷ BHPLLC has gone to great expense in its efforts to keep its projects safe and in good working order under very challenging financial conditions.

The November 20 Order is arbitrary and capricious because, by eliminating BHPLLC’s revenues from Project generation, the Commission deprives it of the very

³³ *New England Power Co. v. FPC*, 467 F.2d 425, 430 (D.C. Cir. 1972) (footnote omitted), *aff’d*, 415 U.S. 345 (1974).

³⁴ *Id.* at 430-31.

³⁵ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967).

³⁶ *Id.* (citation omitted).

³⁷ *See* Emergency Motion, Att. A, Affidavit of Lee W. Mueller ¶¶ 4-5.

financial resources necessary to fund expansion of the spillway capacity and otherwise comply with the Commission's dam safety and other license requirements. BHPLLC's four small projects have a total authorized installed capacity of 10.8 megawatts. During the five-year period of 2012-2016, the four projects together produced annual gross average revenue of \$1,992,658, of which the Edenville Project contribution was \$1,082,744, or 54 percent.³⁸ Thus, the Project provides over half of the gross revenues for all four projects. BHPLLC has minimal cash reserves and so relies on a steady stream of revenue from generation to satisfy the Commission's dam safety and other requirements.³⁹ In the affidavit attached to the Emergency Motion, BHPLLC estimated it would lose about \$3,381 per day in gross revenues from ceasing Project generation.⁴⁰ As shown in that affidavit ceasing generation would cut BHPLLC's gross revenues in half, leaving it with insufficient funds to continue to operate the four projects.⁴¹ As it turns out, that estimate was too low. The attached supplemental affidavit⁴² shows that the actual loss of gross revenues for the period from November 27 to December 18 was over \$6,000 per day, for a total of over \$130,000, because the river is experiencing near record December flows. In addition, not running the turbines on a daily basis will require BHPLLC to incur costs for project maintenance that would otherwise not be incurred and force BHPLLC to lay off staff necessary to its compliance efforts, as well as curtail spending for engineering consulting services for increasing spillway capacity, the matter

³⁸ See *id.*, Exhibit 1 – BHPLLC 5-Year Revenues by Plant.

³⁹ See *id.*, Att. A, Affidavit of Lee W. Mueller ¶ 4.

⁴⁰ *Id.* (based on December 2016 production, i.e., 1,514,662 kWh x \$ 06.69/ kWh).

⁴¹ *Id.* ¶ 10.

⁴² A supplement affidavit of Mr. Lee Mueller is appended hereto as Attachment A (“Supplemental Mueller Affidavit”).

of greatest concern to the Commission.⁴³ In sum, the November 20 Order will not have the intended effect of forcing improved compliance, but rather the opposite effect, by destroying the revenue stream necessary for BHPLLC to comply.

The November 20 Order also is arbitrary and capricious because it bears no relation to its purported purpose of improving dam safety by forcing an increase in the capacity of the Project to pass flood flows. This is not a case where operation of the hydroelectric generating facilities poses some kind of public safety threat. The issue is the dam itself. Forcing the licensee to cease generation here does nothing to address the underlying issues.

The November 20 Order's draconian and illogical requirement to cease generating is puzzling in light of the extremely long odds that a PMF event, or anything like it, will occur before the spillway capacity can be increased. The most recent report by the BOC submitted in 2015 stated that constructing the Tobacco Auxiliary Spillway will increase the total discharge capacity of the Project spillways to 35,600 cubic feet per second, which can accommodate a maximum flood with an apparent recurrence interval ranging from 500,000 to 1,000,000 years. The BOC found that the probability of such a flood occurring in the next five to 10 years ranges from 5-10 in one million.⁴⁴

Moreover, any sustained cessation of generation will substantially harm other parties by forcing BHPLLC to surrender the Project license. That will put a halt to BHPLLC's efforts to improve the Project's dam and public safety posture and force closure of the public recreation facilities. With no Project income, there will be

⁴³ Supplemental Mueller Affidavit ¶ 5.

⁴⁴ Edenville Hydroelectric Project No. 10808, Report by the Special Board of Consultants at 6, submitted to Boyce Hydro, Meeting on April 20-21, 2015, submitted to the Chicago Regional Engineer on April 27, 2015.

insufficient income from the remaining small projects to carry out any dam safety improvements at Edenville dam.⁴⁵ It is also not certain if the Commission will grant a surrender application in the absence of improvements in the ability of the dam to pass high flows, which the Commission will have made impossible, leaving the Project in limbo.⁴⁶ The longer the situation continues, the less possible it will be for BHPLLC to make any dam safety improvements, let alone continue to operate and maintain the public recreation facilities. Since the Commission's principal concern is increasing the Project's spillway capacity and the November 20 Order eliminates BHPLLC's ability to do that, the order is self-defeating and thus not the product of reasoned decision making.

C. The November 20 Order Fails to Account for BHPLLC's Recent Efforts to Complete the Tobacco Auxiliary Spillway Design Package.

The November 20 Order also lacks substantial evidence because it does not account for the actions BHPLLC is taking to address the Commission's primary concern, the Project's spillway capacity. As explained above, BHPLLC has engaged the services of Mr. Gomez and his firm to assist in its compliance with the dam safety requirements of the Compliance Order. In its Emergency Motion, BHPLLC explained in detail and supported with affidavits the actions it is taking toward that end. In brief, GSE has done approximately 800 hours of work to date on the Tobacco Spillway Design Package and the only additional information necessary to complete the design package is acquisition of geotechnical data for which BHPLLC has submitted a soil boring plan for Commission approval.

⁴⁵ Emergency Motion, Att. A, Affidavit of Lee W. Mueller ¶ 10.

⁴⁶ *E.g., Rochester Gas & Elec. Corp.*, 99 FERC ¶ 61,012 at p. 61,041, *reh'g denied*, 100 FERC ¶ 61,113 (2002), where the Commission conditioned approval to surrender license on completion of dam maintenance items.

D. BHPLLC has Proposed a Workable Plan to Fund Construction of Tobacco Auxiliary Spillway.

The November 20 Order should also be rescinded because, as described in the Emergency Motion,⁴⁷ BHPLLC is willing to make a tangible commitment of its intent, to the best of its ability, to ensure that the spillway capacity issue at Edenville dam is progressing toward favorable resolution. To that end, if the Commission is willing to allow the Project to resume generating, BHPLLC proposes to place into escrow with BHPLLC's Michigan counsel sufficient funds to construct the Tobacco Auxiliary Spillway. To ensure that it is constructed, BHPLLC will commit to placing into escrow monthly 50 percent of Project gross revenues immediately upon receipt from Consumers Power Company—which presently averages \$1,082,744 per year⁴⁸—until construction is fully funded.⁴⁹ The funds in escrow will not be available for any other purpose. The funds will be taken from escrow and applied to project construction beginning when the Commission authorizes BHPLLC to commence pre-construction ground disturbing activities.

Because it would be deprived of such a large portion of Project income, not to mention the sum total of income from all four BHPLLC projects, BHPLLC's commitment can only be made if the Commission grants it additional extensions of time to complete the requirements of the Compliance Order, several of which are also very

⁴⁷ Emergency Motion at 8-9.

⁴⁸ *See id.*, Att. A, Affidavit of Lee W. Mueller ¶ 3.

⁴⁹ An estimated cost of the auxiliary spillway would be developed once the Commission has approved the design package.

costly. The specific extension requests are also made in the Emergency Motion and are incorporated here by reference.⁵⁰

V. CONCLUSION

For the foregoing reasons, BHPLLC requests that the Commission:

(1) grant rehearing of and rescind the November 20 Order;

(2) issue an order approving BHPLLC's proposal to place into escrow and expend for no other purpose sufficient funds to construct the Tobacco Auxiliary Spillway; and

(3) grant the extension of time requests in the Emergency Motion.

Respectfully submitted,

/s/ Michael A. Swiger

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Attachment

⁵⁰ See Emergency Motion at 10-15.

Attachment A

Supplemental Affidavit of Lee Mueller

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Boyce Hydro Power, LLC

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Project No. P-10808

AFFIDAVIT OF LEE W. MUELLER

1. My name is Lee W. Mueller. I am a Co-Member Manager of Boyce Hydro Power, LLC (BHPLLC), the licensee for the Edenville Project No. 10808 (Edenville Project). My business address is 6000 S. M-30 (P.O. Box 15), Edenville, Michigan, 48620. I have management responsibility over the operations and finances of the Edenville Project as well as the other three hydroelectric projects for which BHPLLC is the Federal Energy Regulatory Commission (“Commission”) licensee: the Secord Project No. 10809, the Smallwood Project No. 10810, and the Sanford Project No. 2785.
2. On November 20, 2017, the Commission issued an “Order to Cease Generation” of the Edenville Project by November 27, 2017. *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 (2017) (“November 20 Order”). The Edenville Project ceased generation on November 27 in compliance with the Commission’s order and remains shut down.
3. I previously executed an affidavit explaining the financial implications for BHPLLC of the November 20 Order which was submitted to the Commission on December 1, 2017, as an attachment to BHPLLC’s Emergency Motion for Stay Pending Rehearing, Request for Approval of Plan to Fund the Tobacco Auxiliary Spillway, and Request for Extension of Time filed in this docket. In that affidavit, I explained, among other things, that: BHPLLC has four small projects, the contribution of the Edenville Project to gross revenues in recent years has been about 54 percent; the four projects had a net loss of income in 2016 of about \$40,000 which is expected to widen to about \$90,000 in 2017; the operating company

affiliated with BHPLLC also lost money in 2016; there has been no positive net revenue in the past several years for either the licensee or the operating company; cash reserves are minimal; and estimated loss of gross revenues from the project was expected to cost BHPLLC about \$ 3,381 per day.

4. Since the Edenville Project ceased generation on November 27, 2017, it has become clear that, at least for this year, the estimated daily gross revenue loss of \$ 3,381 was far too low, because river flows are currently at near record level. As shown on Exhibit 1, the total revenue loss from November 28 to December 18 was \$130,026.00, which is an average daily loss of \$6,192 per day.
5. Complying with the order to cease generation is also having negative operational effects that will force BHPLLC to undertake additional maintenance costs that would not otherwise be incurred. Specifically, when the turbine wicket gates are not operated for extended periods of time, moving mechanisms and mechanical parts, including the steel connector pins, begin to rust and can become frozen in place. Water pipes for the shaft bearing cooling systems become fluidly static because they are not continually flushed out by daily turbine operations. That quickly results in clogging from zebra mussel infestation which will require BHPLCC to conduct additional preventive maintenance.
6. Ceasing generation in the winter months will also require BHPLLC to incur additional expenses to protect the powerhouse from freezing. Under normal operating conditions, the Edenville powerhouse obtains virtually all of its building heat from running turbines and the friction produced by the generators. In the absence of these heat sources it is necessary for BHPLCC to protect the building from sub-freezing temperatures by covering the windows with rigid insulation boards and taking other measures to prevent cold air

infiltration. In addition, BHPLCC will need to employ industrial electric space heaters, which will cost approximately \$2,000, plus as yet undetermined retail electricity costs.

7. The loss of revenue will also require BHPLCC to lay off at least five of the ten staff on-site within the next few weeks. The equipment transportation and maintenance personnel, the construction laborers, and the administrative assistant will have to be released from employment. Only the five operators will remain and will have to manage to perform their duties absent the other support staff. Under these circumstances BHPLCC will do its best to comply with all of the license requirements notwithstanding, but its ability to do so will be in doubt. Likewise, BHPLCC's ability to continue engaging engineering consulting services for auxiliary spillway design will have to be curtailed.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Boyce Hydro Power, LLC

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Project No. 10808

AFFIDAVIT OF LEE W. MUELLER

Lee W. Mueller, being duly sworn, deposes and states that the attached are his sworn affidavit and exhibits and that the statements contained therein are true and correct to the best of his knowledge, information, and belief;


Lee W. Mueller

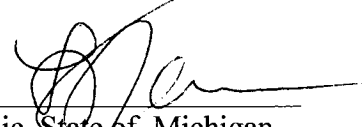
19 December, 2017
Date

State of Michigan
County of midland

Subscribed and sworn to (or affirmed)
before me on this 19th day of
December, 2017, by:

Lee W. Mueller

Proved to me on the basis of satisfactory
Evidence to be the person who appeared
before me.

Signature 
Notary Public, State of Michigan

LJ BEARSON
Notary Public, State of Michigan
County of Gladwin
My Commission Expires Jul. 14, 2024
Acting in the County of midland

Exhibit No. 1

Edenville Lost Income Since Shutdown

1	2	3	4	5	6	7	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
Date	Start	Stop	Hours	Open - Ft.	Head - Ft.	Q (cfs)*	Start	Stop	Hours	Open - Ft.	Head - Ft.	Q (cfs)*	Daily Total Volume, CF	Date	Daily cu ft Volume	Daily cu ft Volume	Turbine Flow Rate - cfs	Run Hours	Run Hours On peak	Run Hours Off peak	Potential Gen. - kWh	Potential Gen. - kWh	Potential Sales
12/9/2017	0	24	24	1.75	7.125	1464	0	0	0	0	0	0	126,526,580	off 12/9/2017	126,526,580	126,526,580	1800	19.53	0.00	19.53	0	107,391	\$6,046
12/10/2017	0	24	24	1.75	7.125	1464	0	0	0	0	0	0	126,526,580	off 12/10/2017	126,526,580	126,526,580	1800	19.53	0.00	19.53	0	107,391	\$6,046
12/11/2017	0	7	7	1.75	7.125	1464	0	0	0	0	0	0	36,903,586	on 12/11/2017	125,569,132	125,569,132	1800	19.38	15.00	4.38	82,500	24,079	\$7,131
	7	12.5	5.5	3.5	6.25	1203							23,821,875										
	12.5	14	1.5	1.75	7.125	1464							7,907,911										
	14	24	10	1	7.5	1582							56,935,760										
12/12/2017	0	24	24	1	7.5	1582	7	15	8	1.5	7.25	454	149,714,263	on 12/12/2017	149,714,263	149,714,263	1800	23.10	15.00	8.10	82,500	44,572	\$8,284
12/13/2017	0	24	24	1	7.5	1582	7	15	8	1	7.5	308	145,507,055	on 12/13/2017	145,507,055	145,507,055	1800	22.45	15.00	7.45	82,500	41,001	\$8,083
12/14/2017	0	24	24	1	7.5	1582	7	14	7	1	7.5	308	144,399,401	on 12/14/2017	144,399,401	144,399,401	1800	22.28	15.00	7.28	82,500	40,061	\$8,030
12/15/2017	0	15	15	1	7.5	1582	7	15	8	2.5	6.75	730	106,419,896	on 12/15/2017	148,595,423	148,595,423	1800	22.93	15.00	7.93	82,500	43,623	\$8,231
	16	24	8	1.75	7.125	1464							42,175,527										
12/16/2017	0	24	24	1.75	7.125	1464	0	0	0	0	0	0	126,526,580	off 12/16/2017	126,526,580	126,526,580	1800	19.53	0.00	19.53	0	107,391	\$6,046
12/17/2017	0	24	24	1.75	7.125	1464	0	0	0	0	0	0	126,526,580	off 12/17/2017	126,526,580	126,526,580	1800	19.53	0.00	19.53	0	107,391	\$6,046
			0		0	0							0										
12/18/2017	0	24	24	1.75	7.125	1464	7	22	15	2	7	594	158,629,442	on 12/18/2017	158,629,442	158,629,442	1800	24.48	15.00	9.00	82,500	49,500	\$8,562
			0		0	0							0										
			0		0	0							0										
			0		0	0							0										
			0		0	0							0										
12/19/2017			0		0	0			0		0	0	0	on 12/19/2017	0	0	2160	0.00		0.00	0	0	\$0
			0		0	0			0		0	0	0										
			0		0	0			0		0	0	0										
			0		0	0			0		0	0	0										
12/20/2017			0		0	0	0	0	0		0	0	0	on 12/20/2017	0	0	2160	0.00	0.00	0	0	0	\$0
			0		0	0			0		0	0	0										
			0		0	0			0		0	0	0										
			0		0	0			0		0	0	0										
12/21/2017			0		0	0	0	0	0		0	0	0	on 12/21/2017	0	0	2160	0.00	0.00	0.00	0	0	\$0
													0										
12/22/2017			0		0	0	0	0	0		0	0	0	on 12/22/2017	0	0	1800	0.00	0.00	0.00	0	0	\$0
													0										

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1	2	3	4	5	6	7	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18		
Date	Start	Stop	Hours	Open - Ft.	Head - Ft.	Q (cfs)*	Start	Stop	Hours	Open - Ft.	Head - Ft.	Q (cfs)*	Daily Total Volume, CF	Date	Daily cu ft Volume	Daily cu ft Volume	Turbine Flow Rate - cfs	Run Hours	Run Hours On peak	Run Hours Off peak	Potential Gen. - kWh	Potential Gen. - kWh	Potential Sales		
12/23/2017			0		0	0	0	0	0		0	0	0	off 12/23/2017			0	1800	0.00	0.00		0	0	\$0	
			0		0	0							0												
12/24/2017			0		0	0	0	0	0		0	0	0	off 12/24/2017			0	1800	0.00	0.00	0.00	0	0	\$0	
			0		0	0							0												
12/25/2017			0		0	0			0		0	0	0	on 12/25/2017	0		1800	0.00		0.00		0	0	\$0	
			0		0	0			0		0	0	0												
12/26/2017			0		0	0			0		0	0	0	on 12/26/2017	0		1800	0.00		0.00		0	0	\$0	
			0		0	0			0		0	0	0												
12/27/2017			0		0	0	0	0	0		0	0	0	on 12/27/2017	0		1800	0.00	0.00	0.00		0	0	\$0	
													0												
12/28/2017			0		0	0	0	0	0		0	0	0	on 12/28/2017	0		1800	0.00	0.00			0	0	\$0	
													0												
12/29/2017			0		0	0	0	0	0		0	0	0	on 12/29/2017	0		1800	0.00	0.00			0	0	\$0	
													0												
12/30/2017			0		0	0	0	0	0		0	0	0	off 12/30/2017			0	1800	0.00	0.00			0	0	\$0
													0												
12/31/2017			0		0	0	0	0	0		0	0	0	off 12/31/2017			0	1800	0.00	0.00			0	0	\$0
													0												

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Total Potential Energy, On, Off KWH 990,000 1,078,611
 Total Potential Sales \$130,026
 # of days 21
 Avg lost revenue per day \$ 6,192

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 20th day of December, 2017.

/s/ Melear Tauch _____
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