

Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE Washington, DC 20426

December 15, 2017

Re: Motion to Stay Cease Generation Order, etc. for Project No. 10808, Edenville, Michigan

I represent Wixom Lake Association, an organization that speaks on behalf of property owners around and recreational users of Wixom Lake, the impoundment created by Project No. 10808, the Edenville (Michigan) Project. Wixom Lake Association wishes to preserve Wixom Lake for the enjoyment of these same shoreline property owners and recreational users.

The Commission issued a Compliance Order to Boyce Hydro Power, LLC (Licensee of Project No. P-10808) on June 15, 2017 (Accession Number 20170615-3024) and subsequently issued an Order To Cease Generation at P-10808 on Nov. 20, 2017 (Accession Number 20171120-3023). Licensee responded to the Order To Cease Generation on Dec. 1, 2017 with a letter containing an “Emergency Motion for Stay Pending Rehearing, Request for Approval of Plan to Fund the Tobacco Auxiliary Spillway, and Request for Extensions of Time” (Accession Number 20171201-5347).

Executive Summary of Wixom Lake Association Position

Licensee has requested the Cease Generation Order be stayed. We believe the Commission has given Licensee generous amounts of time to comply with the Commission’s orders and ample warning of consequences for failure to comply. Such a patient regulatory approach has yielded little in the way of results at P-10808. We believe that stronger measures are needed to motivate Licensee.

Licensee has offered a plan to fund construction of the Tobacco Auxiliary Spillway. The Commission was offered a similar plan in 2008 to fund P-10808 spillway capacity improvements. It appears the 2008 plan was never followed and we are skeptical that Licensee would follow this newer plan. We believe the newer plan has inadequate safeguards to ensure money will actually be sequestered and used for P-10808 spillway improvements. It also appears the newer plan could delay critically needed rehabilitation of the original 90+ year old spillways. This funding plan should not be allowed to serve as an excuse for delaying spillway work on P-10808.

Licensee has requested extensions of time to complete certain tasks. Licensee has already twice been granted deadline extensions on deliverables in the Compliance Order. The second set of extension requests were granted in part, on the basis of a licensed engineer’s proposed timeline to finish these tasks (see Accession Number 20170727-5074). It is unclear why the Required Submittals have not already been delivered or why such extensive further delays have been proposed.

Summary. We ask the Commission to deny the Motion to Stay the Order To Cease Generation, view with great skepticism the proposal to fund construction of the Tobacco Auxiliary Spillway, reject the proposed changes to deadlines and insist that the June 2017 Compliance Order be complied with in full and in a timely manner. We also ask that the Commission require Licensee to complete all necessary rehabilitation of the original spillway structures while engineering, review, and permitting of the new auxiliary spillways is ongoing.

Our comments above are more fully explained in the following text.

Wixom Lake Association supports maintenance, rehabilitation and improvement of the Edenville Dam.

Our Association lobbied with Michigan State Legislators to achieve a January, 2014 increase in the rate Licensee was paid for power generated at all four (4) hydropower dams on the Tittabawassee River. We did this to help Licensee pay for P-10808 spillway improvements. We are disappointed that there have been no subsequent improvements in spillway capacity at P-10808 and only token repairs to the original spillways. We do not wish to see the dam abandoned nor do we wish to watch Licensee unnecessarily delay work on the Edenville Dam.

Request for Stay Pending Rehearing

The Commission's own records amply document Licensee's behavior in the absence of financial penalties for repeated failure to comply with Commission orders and rules. This is well summarized in the Compliance Order issued to Licensee. It is our belief that Licensee will be motivated to timely performance of work outlined in the Compliance Order if completion is the only way Licensee will regain cash flow lost due to the Cease Generation Order.

Plan to Fund Tobacco Auxiliary Spillway

We are skeptical of any promise by Licensee to put aside money for spillway work on P-10808. In a letter dated November 26, 2008 (Accession Number 20081126-5172), Attorney John Clements, representing Licensee, addressed Licensee's plans to increase spillway capacity at the Edenville Project. The 2008 letter included the following statements, (our emphasis added):

*“The average gross annual revenue for all four projects under the existing contract with Consumers Energy is about \$1.7 million, based on 32.5 million kWh and a 72/25 peak/off peak. generation split. Operating expenses for the past year have been about \$610,000, rent is \$300,000, and debt service is approximately \$480,000.¹ **This leaves annual net income available for facility upgrades of approximately \$310,000.**”* (Ed Note- this statement does not mention Licensee's revenue from sale of renewable energy credits, which we understand were being purchased by Detroit Edison in 2008.)

*“**Between now and April 2010, Boyce would accumulate funds from the Projects' net income in an account designated for the Edenville spillway repair. By June 2010, Boyce should have sufficient capital on hand to commence work on the first gate. It would also apply for a bank loan sufficient, with the accumulated reserve, to fund the remainder of the work. Boyce proposes to provide the Commission with a semi-annual report of the status of the reserved fund account beginning on June 1, 2009, in order that the Commission may be assured that the reserve fund is being accumulated. A more detailed statement of the proposed plan and schedule is attached.**”*

*“Finally, please be assured that Boyce shares the Commission's concerns about the delays in addressing the need for improvements at Edenville and would not seek this extension of time if it had any choice. **Boyce is essentially pledging the entire income of all four projects to this effort for several years to come.**”*

The above quotes represent a voluntary promise by Licensee to fund an account at an approximate annual amount of \$300,000, in order to pay for P-10808 spillway improvements. In personal conversation with Mr. Lee Mueller, we were advised in 2013 that there was no money in that account. Our search of the FERC eLibrary found no semi-annual report to the Commission on, about or since June 1, 2009 regarding status of the reserved fund account. As a result, we are of the opinion that the promise, quoted above from Mr. Clement's letter, has not been kept. Nine years later, similar promises are again offered to fund construction of the Tobacco Auxiliary Spillway at some indeterminate time in the future. We give no weight to the Affidavit signed by Mr. Mueller and included in the Dec. 1, 2017 Motion letter. We suggest the Commission should be skeptical of these promises.

Mr. Clements has offered information on Licensee's revenue and expenses. As pointed out in Mr. Clements' letter and as the Commission was no doubt aware, Project No. P-10808 is owned and/or operated by several Limited Liability Corporations (LLCs). To the best of our knowledge, the accounts of these LLCs' are not subject to public scrutiny. For that reason, it is not feasible to verify the past revenue and expenses described in Mr. Clements' letters or to predict future revenue and expenses. Further, the Commission should consider that Licensee's revenue at P-10808 includes both payments for power generated and sale of renewable energy credits. Revenue from sale of renewable energy credits has not been explicitly mentioned in the Motion or accompanying documents, nor was it mentioned in the 2008 communication referenced above. We believe that it would be possible to estimate the revenues from P-10808 operations by communications with Consumers Energy (power generation revenue), Detroit Edison Corporation (purchase of renewable energy credits) and/or the Michigan Public Service Commission.

We recognize that Licensee needs funds to perform the work in the Compliance Order. Licensee has asked for a temporary stay of the Order To Cease Generation to allow Licensee to accumulate funds pending a rehearing on the Order. We object to staying the Order to Cease Generation until the rehearing results are known, as the Order To Cease Generation appears to have finally motivated Licensee to more timely delivery of some Commission-ordered work. If the Order To Cease Generation is lifted, either temporarily or permanently, we propose that revenue from power generated at P-10808 be separated entirely from control by Boyce or Boyce representatives. We believe Mr. Mueller's Affidavit is currently of little value in ensuring money will be sequestered exclusively for construction of an auxiliary spillway or other important spillway repairs at the P-10808. If the Commission is able to obtain a Court Order requiring Mr. Mueller to sequester money for said purpose, we would be somewhat reassured, particularly if a fully independent fiduciary were ordered and all transactions in this account were documented and open to public inspection.

We offer analysis of Boyce's offer to fund construction of the Tobacco Auxiliary Spillway. In round numbers, the offer is to fund an escrow account in the amount of approximately \$500,000 annually, with those funds exclusively dedicated to funding the Tobacco Auxiliary Spillway project. Boyce's license expires in 2028, leaving 10 years to accumulate funds amounting to \$5 million, plus results of fund investment, by 2028. It is unclear when accumulated funds would be sufficient to begin construction of the Tobacco Auxiliary Spillway. It is clear that money will be required to pay for needed maintenance and repairs to the existing Tobacco and Edenville spillways, plus construct an Tittabawassee Auxiliary Spillway (as ordered by Commission). The Mueller Affidavit is silent on the accumulation of funds to pay for anything other than the Tobacco Auxiliary Spillway.

The license for Project No. P-10808 expires in 2028. Even if both auxiliary spillways are built and both existing spillways rehabilitated by 2028, the dam still will not meet the Commission's safety

standards for spillway capacity. If the Commission chooses to entertain Licensee’s plan for funding auxiliary spillway construction, we propose that the Commission require a minimum of 75% of P-10808 gross revenue, both from power generation and renewable energy credits, be placed in an escrow account outside Licensee’s control. Otherwise, the Commission may find itself receiving another application for license extension for P-10808, at which time there will still not have been any construction of increased spillway capacity, despite the Commission's efforts. At that time, there will still be a large pending expense to meet current safety regulations and possibly continued claims of financial hardship by Licensee.

Requests for Extensions of Time

Mr. Clements’ letter contains requests for substantial extensions of time to deliver some materials required by the Compliance Order and asks that the deadlines for other materials and actions be eliminated altogether. We question the request for additional delays and object to the notion of eliminating any of the ordered work. We also object to any hint that work on rehabilitation of the existing spillways would be delayed until after auxiliary spillways are constructed. The existing spillways are in a condition that we view as “dilapidated”, with major breaks in training walls and concrete eroded to the point of exposed steel reinforcing rods. With or without the proposed auxiliary spillways, the original 90+ year old spillways will still provide the majority of P-10808 spillway capacity and that capacity needs to be protected by performing long overdue maintenance.

On June 15, 2017, the Commission issued a Compliance Order that required Licensee to correct certain violations of the terms and conditions of its license and of the Commission’s regulations. On July 14, 2017, the licensee requested an additional 30 days to comply with certain requirements of the Compliance Order. Given the short extension request, the Commission approved the request in its July 25, 2017 order. On July 27, 2017, Licensee filed another request to further extend the due dates in the Compliance Order. In the July 27 filing, Licensee claims it inadvertently filed a draft version of its first request that does not reflect the actual amount of time its consulting engineer needs to evaluate and respond to the filing requirements in the Compliance Order. The July 27, 2017 request was granted, in part (Accession Number 20170815-3039). This was the proposed timeline:

| Ordering Paragraph Required Submittal | Current Date | Proposed Date |
|---|---------------------|----------------------|
| (B) Tobacco Auxiliary Spillway Design Package | July 17, 2017 | September 18, 2017 |
| (G) Left and Right Tobacco Abutment Spillway Wall Repairs | July 31, 2017 | September 30, 2017 |
| (D) Tittabawassee Auxiliary Spillway Plans and Specifications | August 14, 2017 | November 14, 2017 |
| (F) Plan and Schedule for Modifications to Meet the PMF | October 13, 2017 | December 15, 2017 |

A Nov. 22, 2017 status report from the engineer is included in the Motion. It indicates the design package for the Tobacco Auxiliary Spillway is approx. 60% complete. It is unclear why there is such a large difference between the proposed time required to deliver these submittals and the actual progress which has been reported.

We can understand that Licensee may have initially underestimated the time required to deliver on the Compliance Order requirements. However, we believe that an engineer experienced in hydroelectric dam operations would have understood the time required to prepare plans and schedules for construction work on a hydroelectric dam. That understanding should have been reflected in the July

27, 2017 request for extension of due dates. We object to Licensee's entire schedule as shown on p. 11 of the Motion. It allows far too much time for submission of materials that, according to Licensee's engineer, should already be in the Commission's hands. It serializes work that could be done in parallel. It appears to ignore that, in 2015, Licensee provided preliminary plans and schedules for Tobacco Auxiliary Spillway construction to the Commission. If the Tobacco Auxiliary Spillway is eventually estimated to cost in the area of \$5,000,000, that construction project might not even be started when the Project's license comes up for renewal in 2028.

Licensee included requests to stay some of the requirements in the Compliance Order, including:

- *Provide and document reasonable access to project lands and waters for public recreation, including open gates to parking and fishing areas and removal of fencing blocking access to recreation features...*
- *Complete design package for construction of all recreation facilities required by approved Recreation Plan...*

Lack of acceptable public access and compliance with the approved Recreation Plan has long been a source of complaint by the Michigan Department of Natural Resources. Neither of the items above is a capital-intensive project and the first can be accomplished quite simply by removal of barriers put in place by Licensee, apparently without Order or Approval by the Commission. There is no reason to accept delay in giving the public recreational access to lands and facilities as required in the P-10808 license.

Summary

We ask the Commission to deny the Motion to Stay the Order To Cease Generation, view with great skepticism the proposal to fund construction of the Tobacco Auxiliary Spillway, reject the proposed changes to deadlines and insist that the June 2017 Compliance Order be complied with in full and in a timely manner. We also ask, and strongly urge, the Commission to require Licensee to complete all necessary rehabilitation of the original spillway structures while engineering, review, and permitting of the new auxiliary spillways is ongoing.

Please feel free to contact me with questions.

Sincerely,

Larry Woodard
President, Wixom Lake Association
7600 Rossman Hwy.
Eaton Rapids
MI. 48827
Fireplugwood@aol.com
517-203-6444