

162 FERC ¶ 61,116
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;
Cheryl A. LaFleur, Neil Chatterjee,
Robert F. Powelson, and Richard Glick.

Boyce Hydro Power, LLC

Project No. 10808-056

ORDER DENYING REHEARING

(Issued February 15, 2018)

1. On December 20, 2017, Boyce Hydro Power, LLC (Boyce Hydro or licensee) filed a request for rehearing of a November 20, 2017 order requiring Boyce Hydro to cease generating at the Edenville Hydroelectric Project No. 10808 (Edenville Project).¹ As discussed below, we deny rehearing.²

I. Background

2. On October 16, 1998, the Commission issued a license for the Edenville Project, a 4.8-megawatt (MW) hydroelectric project located in Gladwin and Midland counties, Michigan.³ The Edenville Project consists of earthen embankments, known as the Edenville dam, totaling about 6,600 feet in length and having a maximum height of 54.5 feet. The dam spans both the Tittabawassee and Tobacco Rivers creating a 2,600-acre reservoir known as Wixom Lake with a gross storage capacity of about

¹ *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 (2017) (Cease Generation Order).

² Concurrent with this Order Denying Rehearing, we are issuing a separate order proposing revocation of Boyce Hydro's license for the Edenville Project.

³ *Wolverine Power Corporation*, 85 FERC ¶ 61,063 (1998). The license was transferred from Wolverine Power Corporation to Synex Michigan, LLC on June 23, 2004. See *Wolverine Power Corporation, Synx Energy Resources, Ltd., and Synex Michigan, LLC*, 107 FERC ¶ 62,266 (2004). Synex Michigan, LLC changed its name to Boyce Hydro Power, LLC, and filed a statement with the Commission on July 12, 2007, to this effect. See Notice of Change in Licensee's Name (filed July 12, 2007).

40,000 acre-feet and a 49-mile-long shoreline at full pool. There is a 50-foot-long intake leading to the powerhouse located at the dam on the eastern side of the project. The powerhouse contains two 2.4-MW Francis-type turbine generator units for a total installed capacity of 4.8 MW. The project creates a 0.4-mile-long bypassed reach on the Tobacco River that extends from the dam to the point where the Tobacco River meets the Tittabawassee River. The project also includes two reinforced concrete multiple arch spillways. The 69-foot-wide, 39-foot-high Tittabawassee spillway (also referred to as the Edenville spillway) is located on the eastern side of the project and contains three Tainter gates and two low-level sluice gates. The Tobacco spillway is about 72 feet long and 72 feet wide with a crest height of about 40 feet, and contains three steel Tainter gates located on the western side of the project.

3. A June 15, 2017 Compliance Order issued pursuant to section 31 of the FPA detailed Boyce Hydro's long-standing violations of various terms and conditions of its license and the Commission's regulations, as well as staff's multi-year effort to bring Boyce Hydro in compliance.⁴ Specifically, the Compliance Order stated that Boyce Hydro: (1) failed to increase the spillway capacity of the project to be able to pass the probable maximum flood (PMF);⁵ (2) performed unauthorized dam repairs; (3) performed unauthorized earth-moving activities; (4) failed to file an adequate Public Safety Plan; (5) failed to construct approved recreation facilities; (6) failed to acquire all necessary project property rights; and (7) failed to comply with the Commission's 1999 Order approving Boyce Hydro's Water Quality Monitoring Plan. The Commission's primary concern has been the licensee's longstanding failure to address the project's inadequate spillway capacity, which is designed to pass only approximately 50 percent of the PMF. Failure of the Edenville dam could result in the loss of human life and the destruction of property and infrastructure.⁶ The Compliance Order required Boyce Hydro

⁴ *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017) (Compliance Order).

⁵ The PMF is a flood that may occur from the most severe combination of meteorological and hydrologic conditions that is reasonably possible in the drainable basin under study. The Regional Engineer has repeatedly directed the licensee to address the PMF concerns at the project. *See, e.g.*, Letter from Peggy A. Harding, P.E. to Greg Sunell (Sept. 23, 2004) (requesting designs for auxiliary spillways).

⁶ With respect to Boyce Hydro's failure to comply with its PMF obligations, the Compliance Order notes: "[T]he potential loss of life and destruction of property and infrastructure is grave should the project not be maintained and operated appropriately, with consequences that could certainly affect the Village of Sanford, Northwood University, City of Midland, Michigan, and other areas downstream." Compliance Order at P 7.

to provide specific plans, specifications, reports and other information to come into compliance with the Commission's regulations and the terms of its license.⁷

4. Boyce Hydro failed to comply with ordering paragraphs in the Compliance Order, except for some directives to acquire and document certain property rights⁸ and complying with certain specific requirements in the project's approved Water Quality Monitoring Plan.⁹ In addition, Boyce Hydro failed to comply with two dam safety-related directives issued by the Commission's Division of Dam Safety and Inspection, Chicago Regional Engineer (Regional Engineer) subsequent to the Compliance Order.¹⁰ These directives required Boyce Hydro to: (1) file a plan and schedule for designing and carrying out corrective measures recommended in the Part 12D report of the independent

⁷ Extensions of time for certain filings were granted on July 25, 2017, and August 15, 2017.

⁸ The Compliance Order required additional evidence regarding property rights for the land necessary to complete the Tobacco Auxiliary Spillway and the Tittabawassee Auxiliary Spillway, and for all project lands within the existing project boundary. As required, Boyce Hydro filed clarifying documentation regarding property rights and its compliance with ordering paragraphs (C), (E), and (M) of the Compliance Order on July 26, 2017, August 22, 2017, and January 22, 2018. Boyce Hydro states that it possesses the necessary property rights over the land within the project boundary and has obtained all the necessary rights for the land needed to complete the work for the Tobacco Auxiliary Spillway project. Depending on the drawings and specifications filed for the work being completed for the auxiliary spillway projects, the project boundary may need to be amended in the future to incorporate additional land. Boyce Hydro indicated in the January 22, 2018 filing that, should the Tobacco Auxiliary Spillway construction effort require additional land to be brought into the project boundary, it has obtained the rights to acquire additional land to do so. However, because the licensee has not provided plans and specifications for the Tittabawassee Auxiliary Spillway or provided other documentation specific to where the Tittabawassee Auxiliary Spillway will be constructed, Commission staff is still uncertain if the licensee possesses lands needed for this work.

⁹ As stated in the Cease Generation Order, the licensee has complied with ordering paragraph (L) of the Compliance Order with respect to specific water quality monitoring requirements.

¹⁰ Cease Generation Order at P 3.

consultant pursuant to section 12.39(a) of the Commission's regulations¹¹ and (2) file a plan and schedule to perform a Focused Spillway Assessment.

5. On November 20, 2017, Commission staff issued an order requiring Boyce Hydro to cease generating at the Edenville Project. That order was based on careful consideration of Boyce Hydro's extensive history of non-compliance with (1) the FPA, (2) Boyce Hydro's license, and (3) the Commission's regulations and orders, including the June 15, 2017 Compliance Order. In particular, it provided a detailed outline of the licensee's failure to comply with specific requirements set out in the Compliance Order and the two additional dam safety directives, emphasizing yet again the Commission's public safety concern with the licensee's failure to address the PMF issue. In analyzing the significance of those violations, the Cease Generation Order noted that Commission staff had spent more than 13 years trying to work with Boyce Hydro to address its failure to meet the PMF standards and had granted the company two extensions of the relevant deadlines set out in the Compliance Order. After weighing the relevant factors, Commission Staff determined that the violations required prompt action and that the licensee's persistent pattern of noncompliance provided strong evidence that it would not make serious efforts to come into compliance absent an order disrupting its operation. Accordingly, consistent with Commission precedent,¹² the Cease Generation Order required Boyce Hydro to stop generating until further order by the Commission. To address prior violations, the order referred Boyce Hydro to the Commission's Office of Enforcement for potential further action, including potential imposition of civil penalties under section 31 of the FPA.

6. On December 1, 2017 (as supplemented on December 28, 2017), Boyce Hydro filed an emergency motion for stay of the Cease Generation Order.¹³

¹¹ 18 C.F.R. § 12.39(a) (2017). Subpart D of the regulations, 18 C.F.R. pt. 12, Subpt. D (2017), requires projects like the Edenville Project to be inspected by independent consultants and take corrective actions based on the consultants' reports.

¹² See *Cameron Gas and Elec. Co.*, 150 FERC ¶ 61,101, at PP 10 & 20 (2015) (*Cameron*) (denying rehearing of cease generation order issued in response to licensee's "long-term and persistent pattern of non-compliance with its license and with Commission orders designed to bring [licensee] back into compliance.").

¹³ The supplement addressed both the instant request for rehearing and the motion for stay. The Commission considered the latter in its January 5, 2018 Order on Stay. *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,007 (2018). Its effort to supplement its request for rehearing is rejected as untimely. See *Elec. Plant Bd. Of Paducah, Ky.*, (*continued ...*)

7. On December 20, 2017, Boyce Hydro filed a timely request for rehearing of the Cease Generation Order, alleging that the Commission: (1) lacked authority to require Boyce Hydro to cease generation; (2) acted arbitrarily and capriciously by issuing an order that will make it impossible for Boyce Hydro to comply with the license; and (3) did not take into account the recent actions taken by Boyce Hydro to increase the project's spillway capacity. Boyce Hydro concurrently filed, with the U.S. Court of Appeals for the D.C. Circuit, an emergency motion to stay the Cease Generation Order.¹⁴

8. On January 5, 2018, the Commission denied the motion for permanent stay, but it granted a temporary stay until March 1, 2018, so that Boyce Hydro could use the powerhouse to pass flows in an effort to combat ice formation on the project's spillway gates during harsh winter conditions.¹⁵

9. On February 2, 2018, Boyce Hydro filed a request for rehearing of the January 5, 2018 Order on Stay.

10. On February 7, 2018, the D.C. Circuit granted Boyce Hydro's motion for a stay, in part, and stayed the portion of the Cease Generation Order that required Boyce Hydro to cease generation.¹⁶

II. Discussion

A. Authority to Require the Project to Cease Generation

11. Boyce Hydro argues that the Commission lacks authority under the FPA to require a licensee to cease generation for alleged noncompliance with a Commission license or other Commission order, asserting that section 31 of the FPA specifies the actions that the Commission can take in response to noncompliance, and those actions do not include forcing a licensee to cease generation.¹⁷ The licensee contends that prior to the enactment of the Electric Consumers Protection Act (ECPA) in 1986, the Commission lacked

121 FERC ¶ 61,091, at P 6 (2007) (“We do not permit supplements or amendments to requests for rehearing filed ... more than 30 days after the date of the order at issue.”).

¹⁴ See *In re Boyce Hydro Power, LLC*, Emergency Motion for Stay, D.C. Cir. No. 17-1270 (Dec. 20, 2017).

¹⁵ *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,007 (2018) (Stay Order).

¹⁶ *In re: Boyce Hydro Power, LLC*, D.C. Cir. No. 17-1270 (Feb. 7, 2018).

¹⁷ Boyce Hydro's Request for Rehearing at 7 (citing 16 U.S.C. § 823b (2012)).

authority to enforce its license conditions by revoking or threatening to revoke a license, and that district courts had jurisdiction over proceedings dealing with noncompliance of Commission orders and regulations. Boyce Hydro states that while ECPA substantially increased the Commission's enforcement authority,¹⁸ it did not authorize the Commission to order a licensee to cease generation.¹⁹ The licensee contends that if the Commission wants to force a project to cease generation it must do so pursuant to FPA section 314, which allows the Commission to bring an action in federal court to enjoin acts that violate orders issued pursuant to the FPA.²⁰

12. Boyce Hydro further contends that section 31(a) of the FPA, which authorizes the Commission, after notice and opportunity for public hearing, to "issue such orders as necessary to require compliance with the terms and conditions of licenses ... issued under [the FPA]" is not a source of authority for the Commission's actions in this proceeding because the Cease Generation Order is purely punitive. Moreover, the licensee asserts that the effect of the Cease Generation Order is to impose a monetary penalty and that to assess a civil penalty pursuant to section 31(c), the Commission would have had to comply with certain procedural requirements, including an opportunity for a hearing before an administrative law judge.

13. Last, Boyce Hydro argues that the Commission lacks authority under section 309 of the FPA to order a licensee to cease generation, averring that section 309 only "augments existing powers" and "does not confer independent authority to act."²¹ Thus, the licensee asserts that the Commission's actions must "conform[] with the purposes and

¹⁸ Boyce Hydro states that the ECPA, which added section 31 to the FPA, gave the Commission: (1) monitoring and investigation powers and authority to issue orders to require compliance; (2) the power to revoke licenses when the licensee violated a compliance order; and (3) the authority to assess civil penalties. Boyce Hydro's Request for Rehearing at 7-8 (citing 16 U.S.C. § 823b (2012)).

¹⁹ Boyce Hydro asserts that the statute is clear and unambiguous regarding the authority given to the Commission. Boyce Hydro's Request for Rehearing at 8 (citing *Wolverine Power Co. v. FERC*, 963 F.2d 446, 451-53 (D.C. Cir. 1992)) (*Wolverine*). *Wolverine* simply stands for the proposition that the Commission may impose civil penalties only on licensees, permittees, or exemptees, and does not address the scope of the Commission's broad general enforcement authority. In any event, Boyce Hydro is a licensee, and this case does not involve the imposition civil penalties.

²⁰ Boyce Hydro's Request for Rehearing at 8 (citing 16 U.S.C. § 825m (2012)).

²¹ Boyce Hydro's Request for Rehearing at 9-10 (citing *New England Power Co. v. FPC*, 467 F.2d 425, 430-31 (D.C. Cir. 1972), *aff'd*, 415 U.S. 345 (1974)).

policies of Congress and ... not contravene any terms of the [FPA].”²² Boyce Hydro contends that the Cease Generation Order is not consistent with the enforcement purposes and policies of Congress and contravenes the enforcement provisions of the FPA.

14. We disagree that the Commission lacks the authority to require a licensee to cease generation for continued noncompliance with Commission orders and the FPA. Section 31(a) provides that “[a]fter notice and opportunity for public hearing, the Commission may issue such orders as necessary to require compliance with the terms and conditions of licenses ...”;²³ and section 309 states that “[t]he Commission shall have power 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 this [Act].”²⁴ Together, these provisions provide the Commission with broad authority to ensure that licensees comply with the FPA, Commission regulations, and conditions of their license.²⁵ Moreover, the Commission’s ability to craft orders that will best ensure compliance is not limited to a narrow group of specific actions.

²² Boyce Hydro’s Request for Rehearing at 9-10 (citing *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967)).

²³ 16 U.S.C. § 823b(a) (2012).

²⁴ 16 U.S.C. § 825h (2012).

²⁵ Given the broad language in section 31(a), section 309 properly augments this existing Commission authority. See *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (necessary and proper provisions like section 309 authorize an “agency to use means of regulation not spelled out in detail, provided the agency’s action conforms with the purposes and policies of Congress and does not contravene any terms of the Act.”); *Cameron*, 150 FERC at P 20 (“An order to cease generation is an exceptional remedy. However, the Commission is authorized to issue orders as may be necessary or appropriate to ensure that projects licensed by the Commission are best adapted to the comprehensive development of the waterway, taking into account all beneficial uses of the waterway . . .”). See also H.R. Rep. No. 99-507, at 39 (1986) (“new section 31 to the Federal Power Act that provides the Commission with additional enforcement authority to ensure that license, exemption or permit conditions are met. The amendments are not intended to reduce, restrict, or limit the authority of the Commission under other provisions of the Act. It supplements that authority, including section 309 of the Federal Power Act.”); *Pub. Utils. Of Cal. Comm’n. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006) (“[The Commission] has remedial authority to require that entities violating the [FPA] pay restitution for profits gained as a result of a statutory or tariff violation. This authority derives from [section] 309 of the [FPA] . . .”).

Sections 31(b) and (c) merely clarify that the Commission may revoke a license or impose civil penalties under certain circumstances. However, these provisions do not in any way limit the Commission's ability under section 31(a) to issue orders necessary to require compliance.

15. We also find that Boyce Hydro mischaracterizes the purpose and nature of the Cease Generation Order. The Cease Generation Order details the Commission's attempts since 2004 to bring Boyce Hydro into compliance with its license requirements and finds that requiring Boyce Hydro to cease generation at the Edenville Project was necessary given the unlikely chance that the licensee would come into compliance without further action. The Cease Generation Order makes clear that issues related to Boyce Hydro's previous noncompliance were referred to the Commission's Office of Enforcement for further investigation and action, as appropriate.²⁶ Therefore, we find that the Cease Generation Order is a proper exercise of the Commission's authority under sections 31(a) and 309 of the FPA in order to require compliance with Boyce Hydro's license, Commission regulations, and the FPA. That order represented part of the Commission's ongoing efforts to bring Boyce Hydro into compliance and was neither punitive nor, although it might have resulted in a loss of revenue, a civil penalty.²⁷

16. Last, we disagree with Boyce Hydro's contention that if the Commission seeks to require a licensee to cease generation, it must do so pursuant to section 314 of the FPA by seeking an injunction in federal court. Section 314 states that the Commission "may in its discretion bring an action ... to enjoin such acts or practices [that violate the FPA] and to enforce compliance." That section provides the Commission with an additional tool for obtaining compliance, but it is not exclusive and does not preclude administrative actions such as those we have taken here. When Congress added section 31 to the FPA, it made clear that it was providing the Commission "with additional enforcement authority to ensure that license, exemption or permit conditions are met."²⁸ The Commission's authority under other sections of the FPA is in no way circumscribed by the Commission's ability to seek judicial relief.

²⁶ Thus, if civil penalties are proposed for past noncompliance pursuant to section 31(c) of the FPA, the Commission would follow the procedural requirements of the FPA.

²⁷ See, e.g., *Carolina Power & Light Co.*, 87 FERC ¶ 61,083, at 61,355-56 (1999) (rejecting the argument that a Commission order issued pursuant to the FPA directing a company to make substantial refunds constituted an impermissible civil penalty); *PacifiCorp Elec. Operations*, 60 FERC ¶ 61,292, at 62,039 (1992) (same).

²⁸ H.R. Rep. No. 99-507, at 39 (1986) (emphasis added).

B. The Cease Generation Order was not Arbitrary and Capricious

17. Boyce Hydro argues that the Cease Generation Order is arbitrary and capricious because the result of the order is to deny Boyce Hydro's revenue necessary to comply with the Commission's dam safety and other license requirements. Boyce Hydro states that from 2012 to 2016, generation from the Edenville Project accounted for 54 percent of the total revenue from Boyce Hydro's four projects, and removal of this revenue will prevent it from being able to meet its compliance obligations and from continuing to operate its four projects.²⁹ Specifically, Boyce Hydro alleges that lack of revenue will require it to lay off personnel necessary to its compliance efforts and curtail spending for engineering consulting services related to increasing the spillway capacity. Moreover, Boyce Hydro avers that forcing the project to cease generation does nothing to address the underlying issues related to the spillway capacity. Boyce Hydro notes that it is highly unlikely that a PMF would occur before the spillway capacity can be increased.³⁰

18. Next, Boyce Hydro asserts that any sustained cessation of generation will substantially harm other parties because it will be forced to surrender its license. The licensee states that a surrender would halt efforts to improve the project's dam and public safety posture and force closure of public recreation facilities. Boyce Hydro further contends that it is not clear that the Commission would grant a surrender application absent improvements in the dam's ability to pass high flows, and concludes that the Cease Generation Order is self-defeating because it harms its ability to improve dam safety, and thus, is not the product of reasoned decision making.

19. We disagree. As stated in the Cease Generation Order, Commission staff has attempted to bring Boyce Hydro into compliance with its license obligations since Boyce Hydro acquired the project in 2004. Despite these efforts, Boyce Hydro has failed to address important safety concerns regarding the project's spillway capacity. Additionally, the licensee has been unresponsive in addressing certain other compliance matters related to dam safety and recreation. Moreover, on June 15, 2017, Commission staff issued the Compliance Order, providing Boyce Hydro notice of its violations and an

²⁹ In addition to the Edenville Project, Boyce Hydro also owns and operates the Sanford Project No. 2785, Secord Project No. 10809, and Smallwood Project No. 10810. Boyce Hydro's admission that it diverted revenues that could have been used to ameliorate dam safety risks at the Edenville Project to support other projects further undermines any contention that Boyce Hydro has diligently attempted to address issues at the Edenville Project.

³⁰ Boyce Hydro states that the probability of such a flood occurring in the next 5 to 10 years ranges from 5 to 10 in one million.

opportunity to bring the project into compliance. Notwithstanding multiple extensions of deadlines, Boyce Hydro still failed to meet its obligations. Staff has exhibited patience and undertaken substantial efforts to bring Boyce Hydro into compliance, to no avail. We find it particularly telling that Boyce Hydro has never disputed the violations addressed by the Cease Generation Order. Therefore, requiring Boyce Hydro to cease generation is the appropriate action.

20. We do not take the economic impacts of requiring Boyce Hydro to cease generation lightly. This remedy has been imposed only after many years of Boyce Hydro's refusal to comply with Commission requirements designed to protect the public and the environment. We disagree with any suggestion that Boyce Hydro's obligation to comply with its license is limited by project revenues.³¹ A licensee's requirement to satisfy all license terms does not change, regardless of whether revenues exceed, match, or fail to meet its costs. Otherwise, licensees could decline to meet their public interest obligations if they alleged that their projects were not profitable. To the extent that Boyce Hydro's revenue have been cut as a result of it being required to cease generation, this is a situation of Boyce Hydro's own making.

C. Boyce Hydro's Recent Efforts to Bring the Project into Compliance

21. Boyce Hydro argues that the Cease Generation Order fails to consider its recent efforts to address the project's spillway capacity. Specifically, the licensee states that it has engaged the services of Gomez and Sullivan Engineers, PC to review the engineering design submittal requirements, and is actively working to meet the requirements of the Compliance Order. Boyce Hydro states that its consultant has completed nearly 800 hours of work on the Tobacco Auxiliary Spillway design package including, among other items, design drawings, site design plans, and an assessment of geotechnical data needed, and asserts that it anticipates being able to produce final contract documents for the Tobacco Auxiliary Spillway approximately eight weeks after completing all needed geotechnical investigations.³²

³¹ See *Bluestone Energy Design, Inc. v. FERC*, 74 F.3d 1288, 1295 (D.C. Cir. 1996) (noting, with respect to civil penalties, that the FPA does not require the Commission to consider a licensee's ability to pay).

³² We note that some of the information that Boyce Hydro identified in support of this argument was provided after the Cease Generation Order was issued. We previously have rejected parties' attempts to submit new facts and allegations at the rehearing stage because doing so "presents a moving target and frustrates needed finality." *TransCanada*

(continued ...)

22. Boyce Hydro filed plans to complete geotechnical investigations with the Regional Engineer dated October 27, 2017, and November 22, 2017; however, the Regional Engineer issued letters to the licensee dated November 6, 2017, and December 22, 2017, respectively, finding these plans inadequate. Boyce Hydro has since filed a third plan to complete this work, on January 15, 2018, which Commission staff approved by letter dated February 8, 2018.

23. Boyce Hydro states that if the Commission agrees to allow it to resume generation, it would create an escrow account and set aside 50 percent of its gross revenues from the project to fund construction of the Tobacco Auxiliary Spillway.³³ The licensee asserts that this demonstrates its commitment to resolve the spillway issue. Additionally, Boyce Hydro asks the Commission to approve a new schedule for all dam safety requirements noted in the Compliance Order. The proposed schedule is structured such that dam safety requirement deadlines are contingent on the Commission's approval of geotechnical evaluation plans.

24. Boyce Hydro's request to fund construction of the Tobacco Auxiliary Spillway with 50 percent of project revenues is inadequate. Based on its own cost estimate, it would take over two years for the licensee to fully fund the construction of the Tobacco Auxiliary spillway,³⁴ and, in the absence of detailed plans and schedules, it is unclear whether the escrowed funds would be sufficient or how long construction would take. Further, the proposal fails to address how the licensee would fund, and when it would

Power Mktg. Ltd., 122 FERC ¶ 61,049, at P 21 (2008). In any event, none of the information that Boyce Hydro submitted regarding its recent activities convinces us that it would have come into compliance absent the Cease Generation Order.

³³ In conjunction with this plan, Boyce Hydro requests further extensions of time to complete other outstanding requirements from the Compliance Order. It claims that putting 50 percent of its revenue into escrow will make it difficult to timely complete those other requirements.

³⁴ This timeframe is based on Boyce Hydro's estimated cost of the Tobacco Auxiliary Spillway (\$1.25 million) and the average annual revenue of the Edenville Project (\$1.08 million). See *Boyce Hydro Power, LLC, The Cease Generation Order – Why it Happened and What it Means, The Past and Future of Wixom Lake* (Nov. 29, 2017), <http://wixomlakefacts.com> (last visited Jan. 29, 2017) (“Design and construction of the Tobacco Auxiliary Spillway alone is projected to cost more than \$1.25 million”) and Boyce Hydro's Request for Rehearing at 14 (gross revenue averages \$1,082,744 per year). Because Boyce Hydro has yet to develop plans and specifications for the spillway construction, the Commission cannot verify if the cost estimate is reasonable.

complete, the additional work needed at the project to comply with license requirements and other dam safety directives of the Regional Engineer, including the work that is needed at the Tittabawassee Auxiliary Spillway. Given that the public has already been at risk for more than 13 years due to the licensee's refusal to remediate the project spillways, we cannot accept a proposal that will perpetuate the problem even longer. Moreover, we note that Boyce Hydro offered in 2008 to set up an account for auxiliary spillway work in exchange for an extension of the deadline to complete that work.³⁵ There is no evidence that the account was ever established and, in any case, the spillways have not been built.

25. Last, Boyce Hydro's proposed schedule is not a workable solution. As has proved to be the case with respect to the licensee's filing of inadequate geotechnical plans (discussed above), non-specific schedules proposed by Boyce Hydro have historically led to further delays. We are thus left with too much uncertainty as to when spillway construction would actually be completed. In light of the licensee's long history of noncompliance, we do not find the public interest served by granting rehearing and allowing Boyce Hydro to resume generation.

The Commission orders:

Boyce Hydro's December 20, 2017 request for rehearing is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

³⁵ See Letter from Michael A. Swiger and John Clements to Peggy A. Harding, P.E., at 3 (Nov. 26, 2008) ("Boyce [Hydro] is essentially pledging the entire income of all four project to this effort for several years to come.").

Document Content(s)

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