

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

**Boyce Hydro Power, LLC**

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**Project No. 10808-058**

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**REQUEST FOR REHEARING AND  
RENEWED EMERGENCY MOTION FOR STAY  
OF BOYCE HYDRO POWER, LLC**

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Pursuant to Section 313(a) of the Federal Power Act (“FPA”)<sup>1</sup> and Rules 212 and 713 of the Federal Energy Regulatory Commission’s (“Commission” or “FERC”) Rules of Practice and Procedure,<sup>2</sup> Boyce Hydro Power, LLC (“BHPLLC”) respectfully files this Request for Rehearing of the Commission’s September 10, 2018 Order Revoking License (“Revocation Order”)<sup>3</sup> and renews its September 17, 2018 Emergency Motion for Stay of the Revocation Order (“BHPLLC Emergency Motion”).<sup>4</sup> The Revocation Order revoked BHPLLC’s license for the Edenville Project No. 10808 (“Project”), effective September 25, 2018. The BHPLLC Emergency Motion requested a stay of the Revocation Order pending action on rehearing of that order and judicial review.

The Revocation Order is arbitrary and capricious because it is fundamentally inconsistent with the Commission’s greatest public interest concern as expressed in the Revocation Order: maintaining dam safety to protect the public. In fact, the Revocation Order will *prevent* BHPLLC from maintaining dam safety and protecting the public from

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<sup>1</sup> 16 U.S.C. § 825l(a) (2012).

<sup>2</sup> 18 C.F.R. §§ 385.212 and 385.713 (2018).

<sup>3</sup> *Boyce Hydro Power, LLC*, 164 FERC ¶ 61,178 (2018) (“Revocation Order”).

<sup>4</sup> Emergency Motion for Stay, Project No. 10808-058 (filed Sept. 17, 2018) (“Emergency Motion”).

a dam failure by slashing BHPLLC's gross revenues in half, starving it of the very funds it needs to maintain, let alone increase, the spillway capacity of the Edenville Project dam. The draconian nature of the Revocation 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")<sup>5</sup> occurring in the next five to 10 years ranges from 5-10 in one million. It also defies reason because the Commission dismissed on specious grounds a well-supported request for deferral of action by organizations representing several thousand shoreline property owners ("Lake Associations")<sup>6</sup> most directly and adversely affected by license revocation who are in the midst of a due diligence review to determine if they will be able to acquire the Project via a license transfer and assume responsibility for meeting the license obligations, including the dam safety requirements.

The Commission also failed to acknowledge or ignored information regarding BHPLLC's diligent, good faith efforts and progress made toward increasing Project spillway capacity to pass the PMF, including extensive design work by a well-respected hydroelectric engineering consulting firm and its proposal to place into escrow 50 percent of the gross revenues of the Project in order to fund the Tobacco Auxiliary Spillway. Neither of these things can happen if there is no Project revenue.<sup>7</sup>

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<sup>5</sup> 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." *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,110 (2017) at P 4 n.3 ("Cease Generation Order"), *reh'g denied*, 162 FERC ¶ 61,116 (2018).

<sup>6</sup> See Letter to Secretary Bose from the Sanford Lake Preservation Association, Wixom Lake Association, and Sanford Lake Association, Project No. 10808-058 (filed Apr. 12, 2018) ("Lake Associations Letter").

<sup>7</sup> The same offer was made by BHPLLC in the First Emergency Motion. Emergency Motion for Stay Pending Rehearing, Request for Approval of Plan to Fund the Tobacco Auxiliary Spillway, and Request for Extensions of Time at 2, Project No. 10808-057 (filed Dec. 1, 2017) ("First Emergency Motion"). The

The Commission also made the situation with respect to public safety worse by reducing to negligible the likelihood that any entity will be able and willing to take responsibility for the dam when faced with the prospect of the multi-year, costly process of applying for a future original license with an uncertain outcome and uncertain timeline.

Finally, the Commission has pending before it a well-supported emergency request for stay from the Lake Associations and Gladwin County, which is supported by federal, state, and local governments and the Saginaw Chippewa Indian Tribe of Michigan (“Saginaw Chippewa Tribe”), in order that they may have a reasonable opportunity to complete their inquiry into transfer of the license to an entity with sufficient resources to satisfy the Commission’s dam safety requirements. That outcome would provide the means for the Project dam to meet the Commission’s dam safety standards. Instead, the Commission has rushed to saddle the affected public and state and local governments with an unsafe dam owned by an entity that will not be able to improve, or even maintain the dam in the long-term.

All of these factors support a determination that the public interest in dam safety will best be served if the Commission grants this rehearing request and rescinds the Revocation Order. If the Commission will not do that, it should, at the very least, grant BHPLLC’s emergency motion for a stay, including sufficient time to allow the community directly and adversely affected by the Revocation Order reasonable time to fully explore the possibility of transferring the Project license to a new owner with the

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First 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.

means to satisfy the Commission's dam safety requirements, and to allow BHPLLC to resume generating power so that it may at least maintain the dam until this matter is concluded.

#### **I. SPECIFICATION OF ERROR**

In compliance with Rule 713(c)(1), BHPLLC specifies the following errors in the Revocation Order.<sup>8</sup> The Commission erred by:

(a) Ignoring or dismissing without justification the evidence of BHPLLC's financial constraints, and reasonable, good faith efforts to complete design plans for the Tobacco Auxiliary Spillway and fund the construction of increased spillway capacity;

(b) Ignoring the impact of its action on public safety by eliminating BHPLLC's ability to increase the spillway capacity of the dam, or even to maintain it over the long-term;

(c) Ignoring the impact of its action on public safety by dramatically reducing the likelihood that any entity will be able and willing to take responsibility for the dam when faced with the prospect of the multi-year, costly, process of applying for a future original license with an uncertain outcome and uncertain timeline.

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<sup>8</sup> *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,007 (2018).

## II. STATEMENT OF ISSUES

Pursuant to Rule 713(c)(2) of the Commission's regulations,<sup>9</sup> BHPLLC submits the following statement of issues: Did the Commission act arbitrarily and capriciously by:

(a) Ignoring or dismissing without justification the evidence of BHPLLC's financial constraints, and reasonable, good faith efforts to complete design plans for the Tobacco Auxiliary Spillway and fund the construction of increased spillway capacity; *E.g., Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018) (agency acted arbitrarily and capriciously when it ignored available biological data relevant to its decision regarding whether to list a species under the Endangered Species Act); *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d 1265, 1278 (D.C. Cir. 2005) (finding agency denial of medical malpractice liability coverage arbitrary and capricious because it failed to address relevant evidence before it).

(b) Ignoring the impact of its action on the paramount issue of public safety by eliminating BHPLLC's ability to increase the spillway capacity of the dam, or even to maintain it over the long-term; *Bluestone Energy Design*, 64 FERC ¶ 61,003, *reh'g denied*, 65 FERC ¶ 61,042 (1993); *Flambeau Paper Corp.*, 53 FERC ¶ 61,063 at p. 61,203 (1990).

(c) Ignoring the impact of its action on public safety by dramatically reducing the likelihood that any other entity will be able and willing to take responsibility for the dam when faced with the very daunting prospect of the multi-year, costly, and very uncertain outcome of applying for an original license. *E.g., Travis Kavulla & Laura*

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<sup>9</sup> 18 C.F.R. § 385.713(c)(2).

Farkas, Streamlining the Production of Clean Energy: Proposals to Reform the Hydroelectricity Licensing Process, *Public Land & Resources Law Review*, Vol. 39 (2018);<sup>10</sup> U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Energy, Hearings on Improving the Hydropower Licensing Process, June 6-7, 2018.

### **III. BACKGROUND**

#### **A. Order to Cease Generation**

There is no need to go into detail here regarding the Commission's November 20, 2017 Order to Cease Generation<sup>11</sup> at the Project, as the relevant facts are covered in BHPLLC's December 1, 2017 emergency motion for stay of that order,<sup>12</sup> in BHPLLC's February 2, 2018 request for rehearing of that order,<sup>13</sup> and in the Commission's February 15, 2018 order denying rehearing of the Cease Generation Order.<sup>14</sup>

On April 11, 2018, BHPLLC filed a petition for review of the Commission's Cease Generation Orders with the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit").<sup>15</sup> On May 8, 2018, the court granted BHPLLC's unopposed motion to hold the case in abeyance pending further order of the Court.<sup>16</sup>

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<sup>10</sup> Available at: [http://psc2.mt.gov/commissioners/district1/pdf/FarkasKavulla\\_FinalDraft\\_ConferenceUse.pdf](http://psc2.mt.gov/commissioners/district1/pdf/FarkasKavulla_FinalDraft_ConferenceUse.pdf).

<sup>11</sup> *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 (2017).

<sup>12</sup> See First Emergency Motion.

<sup>13</sup> Request for Rehearing of Boyce Hydro Power, LLC, Project No. 10808-056 (filed Dec. 20, 2017).

<sup>14</sup> *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,116 (2018).

<sup>15</sup> *Boyce Hydro Power, LLC v. FERC*, D.C. Cir. No. 18-1097 (filed Apr. 11, 2018).

<sup>16</sup> As directed by the Court, BHPLLC filed with it a status report on August 6, 2018.

## B. License Revocation

On February 15, 2018, the Commission issued an order proposing to revoke the license pursuant to section 31(a) of the FPA.<sup>17</sup> After reciting BHPLLC's noncompliance with parts of a 2017 Compliance Order and multiple extensions granted by the Commission, the order concluded that there was no reason to believe BHPLLC intended to come into compliance with the license, and therefore, proposed to revoke the license.<sup>18</sup>

On March 16, 2018, BHPLLC filed a motion<sup>19</sup> seeking withdrawal of the Order Proposing Revocation ("Motion for Withdrawal"), stating several reasons why license revocation would not be in the public interest.

On April 4, 2018, the Commission requested additional information in connection with the Motion for Withdrawal.<sup>20</sup> On May 18 and May 29, 2018, BHPLLC responded to the additional information request.<sup>21</sup>

In April 2018, the Lake Associations, concerned about the effects of license revocation on their members, requested that the Commission delay its decision on license revocation until November 1, 2018, citing their efforts to investigate, in partnership with county governments and other stakeholders, transitioning the Project to a public or non-

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<sup>17</sup> *Boyce Hydro Power, LLC*, 162 FERC ¶ 62,115 (2018).

<sup>18</sup> *Id.* at P 10.

<sup>19</sup> Motion of Boyce Hydro Power, LLC for Withdrawal of Order Proposing Revocation of License, Project No. 10808 (filed Mar. 16, 2018) ("Motion for Withdrawal").

<sup>20</sup> Letter to Lee Mueller, BHPLLC, and Michael Swiger and John Clements, Van Ness Feldman, LLP, from CarLisa Linton, Acting Director, FERC Division of Hydropower Administration and Compliance, Project No. 10808-058 (issued Apr. 20, 2018).

<sup>21</sup> Boyce Hydro Power, LLC Response to FERC Request for Additional Information, Project No. 10808-058 (filed May 18, 2018) ("May 18 AIR Response"); Letter to FERC Secretary Bose from Lee W. Mueller, Co-Member Manager, BHPLLC, Project No. 10808-058 (filed May 29, 2018).

profit corporation, with the option to retain the existing FERC license.<sup>22</sup> The Attorney General of Michigan,<sup>23</sup> a member of the Midland County Board of Commissioners,<sup>24</sup> and the Gladwin County Board of Commissioners<sup>25</sup> filed letters supporting the Lake Associations' request.

On July 30, 2018, the Lake Associations filed a progress report ("Progress Report") with the Commission and requested that it continue to withhold action on license revocation.<sup>26</sup> On September 10, 2018, the Commission issued the license Revocation Order. On September 17, 2018, BHPLLC filed the BHPLLC Emergency Motion.<sup>27</sup>

On September 18, 2018, the Sanford Lake Preservation Association, Wixom Lake Association, and Gladwin County (Michigan) Board of District Commissioners ("Gladwin County") filed an emergency motion for stay of the Revocation Order, and requested that the Commission issue a ruling by September 25, 2018.<sup>28</sup> Letters supporting the Lake Associations' and Gladwin County's emergency stay request were

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<sup>22</sup> Lake Associations Letter. The Lake Associations represent over 6,000 owners of lakefront property on the shoreline of the four reservoirs formed by the BHPLLC projects. *See* Emergency Motion to Stay Order Revoking License at 2, Project No. 10808-058 (filed Sept. 18, 2018) ("Lake Associations and Gladwin County Emergency Motion").

<sup>23</sup> Letter to FERC Secretary Bose from Bill Schuette, Attorney General, State of Michigan, Project No. 10808-000 (filed Apr. 30, 2018).

<sup>24</sup> Letter to FERC Secretary Bose from Jeanette Snyder, Midland County Commissioner, Project No. 10808-000 (filed May 2, 2018).

<sup>25</sup> Letter to FERC Secretary Bose from Terry L. Walters, Chair, Gladwin County Board of Commissioners, Project No. 10808-058 (filed Apr. 12, 2018).

<sup>26</sup> Lake Associations' Progress Report No. 1 on Efforts in Response to the Proposed Revocation of License, Project No. 10808-000 (filed July 30, 2018).

<sup>27</sup> BHPLLC also filed an emergency motion for a stay of the Revocation Order pending completion of agency proceedings and judicial review in the D.C. Circuit. Emergency Motion of Boyce Hydro Power, LLC to Stay Order of the Federal Energy Regulatory Commission Pending Completion of Agency Proceedings and Judicial Review, *In re Boyce Hydro Power, LLC*, No. 18-1255 (D.C. Cir. Sept. 17, 2018). The motion was denied. Order, *In re Boyce Hydro Power, LLC*, No. 18-1255 (D.C. Cir. Sept. 25, 2018) (per curiam).

<sup>28</sup> *See supra* note 21.

filed by the Midland County Board of Commissioners,<sup>29</sup> Michigan State Senator Jim Stamas,<sup>30</sup> the Attorney General of Michigan,<sup>31</sup> the Saginaw Chippewa Indian Tribe,<sup>32</sup> Congressman John Moolenaar,<sup>33</sup> and United States Senator Debbie Stabenow.<sup>34</sup>

The Commission has not responded to BHPLLC's or the Lake Associations' and Gladwin County's emergency stay requests.

#### **IV. REQUEST FOR REHEARING**

##### **A. The Commission Ignored or Dismissed without Justification Evidence of BHPLLC's Financial Condition and Good Faith Efforts to Comply with the Dam Safety Requirements.**

The Commission cannot ignore or fail to properly address relevant information.<sup>35</sup>

The Commission claims that BHPLLC has not substantiated its claims regarding financial hardship with evidence.<sup>36</sup> That is patently untrue. BHPLLC fully documented the financial constraints under which it has operated while trying to meet the Commission's dam safety requirements, submitting data on plant revenues for the past

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<sup>29</sup> Letter to FERC Secretary Bose from Mark C. Bone, Chair, Midland County Board of Commissioners, Project No. 10808-058 (filed Sept. 20, 2018).

<sup>30</sup> Letter to FERC Secretary Bose from Michigan State Senator Jim Stamas, Project No. 10808-058 (filed Sept. 20, 2018).

<sup>31</sup> Letter to FERC Secretary Bose from Bill Schuette, Michigan Attorney General, Project No. 10808 (filed Sept. 25, 2018).

<sup>32</sup> Letter to FERC Chairman Kevin J. McIntyre from Ronald F. Ekdahl, Chief, Saginaw Chippewa Indian Tribe of Michigan, Project Nos. 10808-057, -058 (filed Sept. 25, 2018) ("Saginaw Chippewa Letter").

<sup>33</sup> Letter to FERC Secretary Bose from Representative John Moolenaar, Project No. 10808-000 (filed Sept. 26, 2018).

<sup>34</sup> Letter to Secretary Bose from United States Senator Debbie Stabenow, Project No. 10808-000 (filed Sept. 25, 2018).

<sup>35</sup> *E.g., Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053 (agency acted arbitrarily and capriciously when it ignored available biological data relevant to its decision regarding whether to list a species under the Endangered Species Act); *El Rio Santa Cruz Neighborhood Health Ctr., Inc. v. U.S. Dep't of Health & Human Servs.*, 396 F.3d at 1278 (finding agency denial of medical malpractice liability coverage arbitrary and capricious because it failed to address relevant evidence before it).

<sup>36</sup> Revocation Order at P 50.

five years, the 2016 profit and loss statement, 2017 cash flow, its expenses from 2010-2017, 2016-2017 land rent expenses<sup>37</sup> and costs incurred in connection with the engineering/design of the Tobacco River Auxiliary Spillway.<sup>38</sup> BHPLLC has minimal cash reserves and relies on a steady stream of income to satisfy the Commission's dam safety and other requirements.<sup>39</sup>

The Commission states that it will not rely on the uncontroverted data regarding BHPLLC's financial condition because BHPLLC declined to provide additional financial information on assets and liabilities or financial data regarding entities other than BHPLLC.<sup>40</sup> The Commission suggests such information is germane to this matter, but it is not. No additional information regarding BHPLLC assets and liabilities will alter the information submitted with the Mueller affidavit plainly demonstrating that BHPLLC cannot increase the spillway capacity unless it is given a reasonable opportunity to accumulate funds dedicated to that purpose and find additional financing via nonconventional lending arrangements. The Commission's attempt to collect information regarding the finances of entities other than the licensee is improper. The Commission's jurisdiction extends only to the licensee; it has no authority to require a non-licensee to fund a licensee's obligations.<sup>41</sup>

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<sup>37</sup> First Emergency Motion, Att. A, Affidavit of Lee W. Mueller and Exhibits 1-6 thereto ("Mueller Aff.").

<sup>38</sup> May 18 AIR Response, Schedule A (response to question 3 and Attachment A thereto).

<sup>39</sup> First Emergency Motion at 6-7; Mueller Aff. ¶ 4.

<sup>40</sup> Revocation Order at P 50.

<sup>41</sup> *E.g.*, *James A. Boyd*, 136 FERC ¶ 62,119 at P 27 (2011) ("The Commission has jurisdiction only over its licensees. It cannot require . . . a non-licensee to undertake actions or implement measures with respect to [a] project, nor would it be able to enforce such requirements."), *reh'g denied*, 138 FERC ¶ 61,085 (2012).

The Commission faults BHPLLC because it discontinued working on the spillway design in February 2018.<sup>42</sup> However, that was in response to the Commission's order proposing to revoke the license. It would have been foolish for BHPLLC to expend scarce resources for this purpose when, if the Commission followed through on its proposal, those substantial costs would have been incurred for naught. Likewise, the Commission finds that BHPLLC has made insufficient progress toward developing plans and specifications for repairs to the Tobacco River abutment spillway walls.<sup>43</sup> BHPLLC proposed to complete those plans and specifications within 90 days after Commission approval of the plans and specifications for the Tobacco Auxiliary Spillway design but, as noted, the Commission eliminated any incentive to continue the design work for Project improvements by proposing to revoke the license.

The Commission criticizes BHPLLC's inability to set a definitive timetable for making improvements necessary to pass the full PMF.<sup>44</sup> BHPLLC explained that it cannot do so because it must have Commission-approved design plans for the Tobacco Auxiliary Spillway—the timing of which is within the Commission's control—in order to know the cost of the Project which, of course, will determine how long it takes to accumulate the funds necessary to begin construction.<sup>45</sup> The Commission does not dispute the logic of BHPLLC's position, but simply asserts that even if it allowed the work to proceed in phases, the spillway capacity would remain insufficient for years to come.<sup>46</sup> That is true, but the negative effect of slow progress pales in comparison to the

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<sup>42</sup> Revocation Order at P 44.

<sup>43</sup> *Id.* at P 47.

<sup>44</sup> *Id.* at P 45.

<sup>45</sup> First Emergency Motion at 12-13.

<sup>46</sup> Revocation Order at P 45.

inevitable negative effect of revoking the license, i.e., elimination of any possibility that the license will be transferred to an entity willing and able to operate the project in compliance with the license condition, thereby almost certainly ensuring that BHPLLC will *never* have the resources to improve spillway capacity.<sup>47</sup>

The Commission also claims that the evidence of BHPLLC's financial straits is insufficient because BHPLLC has not sought financing from a bank or other financial institution.<sup>48</sup> It completely ignores the financial data BHPLLC has provided, which amply demonstrates that under present financial conditions, no bank would advance funds for the purpose of increasing spillway capacity.<sup>49</sup> Thus, BHPLLC has been forced to seek alternative forms of financing, such as its effort to obtain non-cash financing in the form of the services of a contractor who would build the auxiliary spillway.<sup>50</sup>

BHPLLC also documented the active steps it took in response to the Cease Generation Order to complete the design package for the Tobacco Auxiliary Spillway<sup>51</sup> and its proposal to place half of the gross revenues from the Edenville Project into escrow for the sole purpose of financing the auxiliary spillway.<sup>52</sup> The Commission's response was simply to reiterate its opinion that progress toward increasing spillway capacity has been insufficient.

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<sup>47</sup> See discussion *infra* Section IV.B.

<sup>48</sup> Revocation Order at P 50.

<sup>49</sup> May 18 AIR Response, Schedule A, Response to Question 4; Mueller Aff. ¶¶ 3-4.

<sup>50</sup> BHPLLC Response to AIR, Schedule A, Response to Question 4; Motion for Withdrawal at 6-7.

<sup>51</sup> First Emergency Motion at 8-9; Motion for Withdrawal at 8-10.

<sup>52</sup> First Emergency Motion at 10; Mueller Aff. ¶¶ 6, 8.

**B. Eliminating the Source of Funds Needed by BHPLLC to Improve Spillway Capacity Will Ensure that the Project Is Never Able to Meet Federal or State Dam Safety Standards.**

The Commission clearly and consistently held that ensuring dam safety is “a matter of the utmost concern and seriousness”<sup>53</sup> and a matter of the “highest priority.”<sup>54</sup> It requires all owners of high and significant hazard dams to have a formal Owners Dam Safety Program approved by the Commission<sup>55</sup> and an Emergency Action Plan.<sup>56</sup> Consistent with that theme, the Commission claims that its greatest concern in this matter is the fact that BHPLLC has not increased the capacity of the Edenville dam to pass flood flows up to the PMF.<sup>57</sup>

In its Emergency Stay Request, BHPLLC clearly showed that the Revocation Order failed to take into account the effect of the Commission’s action on public safety because it would do nothing to improve spillway capacity because it would eliminate the source of income needed to maintain and upgrade the dam, a result completely inconsistent with the Commission’s oft-stated position that maintaining dam safety is a matter of utmost concern.<sup>58</sup> Instead of attempting to address how BHPLLC can be expected to maintain, let alone upgrade, the dam when the Commission has permanently

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<sup>53</sup> *Bluestone Energy Design, Inc.*, 64 FERC ¶ 61,003 at p. 61,022 (1993) (quoting *Flambeau Paper Corp.*, 53 FERC ¶ 61,063 at p. 61,203 (1990)).

<sup>54</sup> *See, e.g.*, Letter to Thomas A. Smith, Oglethorpe Power Corp., from William A. Allerton, Director, FERC Division of Dam Safety and Inspections at 1, Project No. 2725-000 (issued May 4, 2012) (establishing requirement for Owners Dam Safety Program).

<sup>55</sup> FERC, Owners Dam Safety Program (ODSP), <https://www.ferc.gov/industries/hydropower/safety/initiatives/odsp.asp> (last visited Oct. 3, 2018).

<sup>56</sup> 18 C.F.R. Part 12, Subpart C.

<sup>57</sup> Cease Generation Order at PP 3, 11; Revocation Order at P 3.

<sup>58</sup> BHPLLC also showed that the Commission’s reliance on *Eastern Hydroelectric Corp.*, 148 FERC ¶ 61,028 (2014) as precedent for the Revocation Order is completely unfounded. Motion for Withdrawal at 13. The Commission acknowledges BHPLLC’s argument in the Revocation Order, but does not even attempt to refute it. Revocation Order at P 54.

slashed its income in half, the Commission merely asserts that public safety will be protected because the Michigan Department of Environmental Quality will inherit the Commission's responsibility.<sup>59</sup> But it is obvious that the mere existence of state regulatory authority over a dam is not alone sufficient to ensure public safety. The dam owner must have the resources to implement the state regulatory program. As amply demonstrated by the financial information supplied by BHPLLC, eliminating over one half of BHPLLC's revenue will ensure that BHPLLC will not have sufficient resources for this important public purpose. Thus, the Revocation Order is self-defeating and irrational and will only make the situation worse.

**C. Revoking the License Will Almost Certainly Ensure that No Entity Willing and Able to Remedy the Edenville Spillway Deficiencies Will Be Found.**

The Lake Associations, speaking on behalf of approximately 6,000 owners of shoreline property at the four BHPLLC project reservoirs,<sup>60</sup> asked the Commission to delay its decision on revocation in order that they might investigate the possibility of transferring ownership of the Project to a public or not-for-profit association.<sup>61</sup> Although the Lake Associations demonstrated in their Progress Report that they are actively investigating whether it will be possible for them to acquire the Project as an operating licensed project with an income stream via license transfer—and have invested much time, effort, and money in that investigation—the Commission, consistent with its indifference to the effects of license revocation on BHPLLC's ability to meet federal or state dam safety requirements, issued the Revocation Order notwithstanding. By way of

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<sup>59</sup> Revocation Order at P 55.

<sup>60</sup> Lake Associations and Gladwin County Emergency Motion at 2.

<sup>61</sup> Lake Associations Letter.

explanation, the Commission stated that the Lake Associations are free to attempt to acquire the Project after license revocation and apply for an original license at some future time.<sup>62</sup>

The Commission's response is truly specious. It ignores the fact, evident to all the concerned parties, that it would make no sense for any other entity to acquire the Project unless it is able to generate a steady stream of revenue. As the Lake Associations and Gladwin County put it: "[t]he need to obtain a new license from the Commission rather than take transfer of the Boyce Hydro license would be infeasible from both cost and timing perspectives."<sup>63</sup> As stated by the Saginaw Chippewa Tribe:

Revocation of the operating license of Edenville, by the Commission will force the Tribe to abandon its due diligence review process outright prior to reaching any conclusions regarding the investment potential of the project. It is the Tribe's opinion that the expense and time required applying for a new operator license rather than transferring an existing license destroys the economic viability of the transaction.<sup>64</sup>

Indeed, requiring *any* potential new owner to obtain an original license from the Commission would make acquisition of the Project extremely unlikely. The hydroelectric licensing process, particularly for original licenses, is universally regarded as unduly long, costly, and subject to uncertain timelines and uncertain outcomes.<sup>65</sup> As recently as this year, Congress held the most recent of many oversight hearings on

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<sup>62</sup> Revocation Order at 37.

<sup>63</sup> Lake Associations and Gladwin County Emergency Motion at 6.

<sup>64</sup> Saginaw Chippewa Letter at 2.

<sup>65</sup> A recent lengthy and detailed article on the hydroelectric licensing process describes the difficulties of hydroelectric licensing as "notorious." See Travis Kavulla & Laura Farkas, "Streamlining the Production of Clean Energy: Proposals to Reform the Hydroelectricity Licensing Process at 143, *Public Land & Resources Law Review*, Vol. 39 (2018), available at: [http://psc2.mt.gov/commissioners/district1/pdf/FarkasKavulla\\_FinalDraft\\_ConferenceUse.pdf](http://psc2.mt.gov/commissioners/district1/pdf/FarkasKavulla_FinalDraft_ConferenceUse.pdf).

improving the hydropower licensing process.<sup>66</sup> As stated by the Co-Chairman of the House of Representatives, Subcommittee on Energy: “[w]hile a typical relicensing action should take approximately 5 years according to FERC, it is not uncommon for the process to stretch much longer.”<sup>67</sup> It would take at least as long for an entity to develop and receive an original license for the Edenville Project. Added to the inherent challenge of obtaining a Commission license is the costly spillway capacity issue, plus the fact that the Edenville Project was initially licensed 20 years ago with state water quality certification waived.<sup>68</sup> That will certainly not be the case for any potential future license application, which is certain to require the full panoply of environmental, recreational, and other study and information gathering required for contemporary license applications, not to mention that any license issued would include the greatly increased post-license resource management planning and data gathering conditions the Commission now routinely includes in licenses.

In sum, the circumstances of this Project are such that license revocation will inevitably and powerfully discourage any potential future license applicant, which can only result in increased jeopardy to public safety from a lack of resources to address the spillway capacity limitations, as well as eliminate the public recreation benefits provided by the Project.

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<sup>66</sup> U.S. House of Representatives, Committee on Energy and Commerce, Subcommittee on Energy, Hearings on Improving the Hydropower Licensing Process, June 6-7, 2018.

<sup>67</sup> Opening Statement of the Honorable Fred Upton, Subcommittee on Energy, Hearing: “Improving the Hydropower Licensing Process,” at 2 (June 7, 2018), *available at* <https://docs.house.gov/meetings/IF/IF03/20180607/108391/HHRG-115-IF03-MState-U000031-20180607.pdf>.

<sup>68</sup> *Wolverine Power Corp.*, 85 FERC ¶ 61,063 at p. 61,205 (1998).

**V. THE COMMISSION SHOULD GRANT BHPLLC'S REQUEST FOR STAY OF THE REVOCATION ORDER PENDING COMPLETION OF ADMINISTRATIVE ACTION AND JUDICIAL REVIEW**

The Commission's rush to relieve itself of the difficult situation is understandable, but in light of the consequences it is self-defeating because it does not serve the public interest regarding dam safety. What clearly would serve the public interest is for the Commission to grant BHPLLC's Emergency Motion to stay the Revocation Order pending completion of administrative action and judicial review. That would enable BHPLLC, the Lake Associations, local governments, and the Saginaw Chippewa Tribe to complete their due diligence regarding potential transfer of the Project license to an entity with sufficient resources to satisfy the Commission's dam safety requirements.

There is no reason for the Commission to act in haste, particularly since the probability of the PMF occurring in the time it would take for these entities, the entities other than BHPLLC most directly affected by the Commission's action, to complete their due diligence is negligible. On the contrary, there are very good reasons for the Commission to pause its drastic action: (1) revoking the license will ensure that BHPLLC *never* has the resources to improve the spillway capacity of the Edenville dam and could even drive it out of business; (2) eliminating the revenue stream and requiring any potential successor licensee to seek to apply for an original license for the Project will drive away any potential investors, public or private; and (3) these same impacts will burden the Michigan state government, local governments, and over 6,000 shoreline property owners with an unsafe dam.

## VI. CONCLUSION

For the foregoing reasons, BHPLLC requests that the Commission: (1) grant rehearing of and rescind the Revocation Order or, (2) in the alternative, grant a stay of the order pending the conclusion of administrative proceedings at the Commission and judicial review.

Respectfully submitted,

/s/ Michael A. Swiger

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**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 5th day of October, 2018.

*/s/ Sharon White* \_\_\_\_\_

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