

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

October 24, 2018

OFFICE OF THE CHAIRMAN

The Honorable John Moolenaar
U.S. House of Representatives
Washington, D.C. 20515

Dear Congressman Moolenaar:

Thank you for your September 18, 2018, letter regarding the motion to stay the Order Revoking License for the Edenville Hydroelectric Project (Docket No. P-10808), filed by the Sanford Lake Preservation Association, Wixom Lake Association (Lake Associations), and the County of Gladwin.

On October 18, 2018, the Commission issued an Order Denying the Stay Request, which is attached. The order explained that Boyce Hydro Power, L.L.C. has violated its license by failing for 14 years to implement measures needed to protect public safety. The Commission also explained that the Lake Associations and the County could continue to pursue acquisition of the project, whether or not they wished to operate it as a hydropower facility, and that Commission staff would be available to discuss with them any issues of concern.

I hope this information has been helpful. If I can be of any further assistance on this or any other Commission matter, please let me know.

Sincerely,



Kevin J. McIntyre
Chairman

Attachment: Order Denying Stay Request

165 FERC ¶ 61,027
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Neil Chatterjee,
and Richard Glick.

Boyce Hydro Power, LLC

Project Nos. 10808-062
10808-063

ORDER DENYING STAY

(Issued October 18, 2018)

1. On September 10, 2018, the Commission issued an order revoking Boyce Hydro Power, LLC's (Boyce Hydro) license for the 4.8-megawatt (MW) Edenville Project No. 10808 (Edenville Project).¹ Boyce Hydro and, later, the Sanford Lake Preservation Association, the Wixom Lake Association, and the Gladwin County Board of District Commissioners (collectively, Lake Associations) filed motions to stay the order. For the reasons discussed below, we deny the motions.

I. Background

2. The 4.8-MW Edenville Project is located on the Tobacco and Tittabawassee Rivers in Gladwin and Midland Counties, Michigan. The project includes a 6,600-foot-long dam, with maximum height of 54.5 feet, spanning both rivers, and the 2,600-acre Wixom Lake, which has a 49-mile shoreline at full pool.²

3. In multiple orders, the Commission has set forth a history, going back to 2004, of Boyce Hydro's failure to comply with its license, the Commission's regulations, and

¹ *Boyce Hydro Power, LLC*, 164 FERC ¶ 61,178 (2018) (Revocation Order).

² See *Wolverine Power Corporation*, 85 FERC ¶ 61,063, at 61,205 (1998). The Commission issued a 30-year license for the project. The license was transferred from Wolverine Power Corporation to Synex Michigan, LLC on June 23, 2004. See *Wolverine Power Corporation 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).

Commission orders.³ The Commission's primary concern has been Boyce Hydro's "longstanding failure to address the project's inadequate spillway capacity."⁴ Nevertheless, 14 years after acquiring the license for the project, the licensee has still not increased the project's spillway capacity.⁵ The licensee has shown a pattern of delay and indifference to the potential consequences of this failure, which the Commission has found must be remedied in order to protect life, limb, and property.⁶ Taken together with Boyce Hydro's pattern of non-compliance, we found that Boyce Hydro's "violations of the terms and conditions of its license, the Commission's regulations, and several orders are extensive."⁷

4. On June 15, 2017, Commission staff issued a Compliance Order detailing Boyce Hydro's failure to comply with a number of license and regulatory requirements and setting forth specific requirements that needed to be met to achieve compliance with the

³ See *Boyce Hydro Power, LLC*, 159 FERC ¶ 62,292 (2017) (2017 Compliance Order); *Boyce Hydro Power, LLC*, 161 FERC ¶ 62,119 (2017) (Cease Generation Order), *reh'g denied*, 162 FERC ¶ 61,116 (2018) (Cease Generation Rehearing Order); *Boyce Hydro Power, LLC*, 162 FERC ¶ 61,115 (2018) (Order Proposing Revocation); Revocation Order, 164 FERC ¶ 61,178.

⁴ 2017 Compliance Order, 159 FERC ¶ 62,292 at PP 2, 5-29, 146. Specifically, the Commission's Dam Safety Guidelines require that, if the failure of project works would present a threat to human life or would cause significant property damage, the project works must be designed to either withstand overtopping or the loading condition that would occur during a flood up to the probable maximum flood (PMF), or to the point where a failure would no longer constitute a hazard to downstream life and/or property. In the alternative, the capacity of the spillway must be adequate to prevent the reservoir from rising to an elevation that would endanger the safety of the project works. See Federal Energy Regulatory Commission, *Engineering Guidelines for the Evaluation of Hydropower Projects*, Chapter 2: Selecting and Accommodating Inflow Design Floods for Dams, at 2-3 (August 2015), <http://www.ferc.gov/industries/hydropower/safety/guidelines/eng-guide/chap2.pdf>.

⁵ Currently, spillway capacity at the Edenville Project can only pass about 50 percent of the PMF.

⁶ 2017 Compliance Order, 159 FERC ¶ 62,292 at PP 16, 146.

⁷ *Id.* PP 147-48.

license, Commission regulations, and prior orders.⁸ The 2017 Compliance Order warned that further failure to comply may lead to revocation of the license.⁹

5. Boyce Hydro did not come into compliance. Accordingly, on February 15, 2018, the Commission issued an Order Proposing Revocation of the license pursuant to section 31(a) of the Federal Power Act (FPA),¹⁰ and, on September 10, 2018, the Commission issued an order revoking Boyce Hydro's license for the Edenville Project. The Revocation Order required Boyce Hydro, within 15 days of the issuance of the order, to permanently disable the project's generating equipment in the project's powerhouse, but did not mandate removal or any modification of the dam or any other project facilities.¹¹

6. Boyce Hydro and the Lake Associations filed motions for stay on September 17, 2018, and September 18, 2018, respectively.¹²

7. On September, 18, 2018, Boyce Hydro asked the U.S. Court of Appeals for the District of Columbia Circuit to stay the Revocation Order. By order dated September 25, 2018, the court denied the motion. We now dispose of the motions for stay pending before us.

II. Discussion

8. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act,¹³ i.e., the stay will be granted if the Commission finds that

⁸ 2017 Compliance Order, 159 FERC ¶ 62,292; *see also id.* at PP 30-50 (failing to report structural instability and performing unauthorized dam repairs); PP 51-81 (performing unauthorized earth-moving activities); PP 82-87 (failing to file an adequate Public Safety Plan); PP 88-114 (failing to construct approved recreation facilities and restricting public access); PP 115-29 (failing to acquire all necessary property rights); and PP 130-145 (failing to comply with approved Water Quality Monitoring Plan).

⁹ *Id.* P 149.

¹⁰ Order Proposing Revocation, 162 FERC ¶ 61,115.

¹¹ Revocation Order, 164 FERC ¶ 61,178 at P 60, n.137, and ordering para. (A).

¹² Senator Debbie Stabenow, Congressman John Moolenaar, the Attorney General of the State of Michigan, the Midland County Board of Commissioners, State Senator Jim Stamas, and the Saginaw Chippewa Indian Tribe of Michigan filed letters in support of the Lake Associations' motion.

¹³ 5 U.S.C. § 705 (2012).

“justice so requires.” Under this standard, the Commission considers a number of factors, such as whether the movant will suffer irreparable injury in the absence of a stay, whether the issuance of a stay would substantially harm other parties, and where the public interest lies.¹⁴ If the party requesting the stay is unable to demonstrate that it will suffer irreparable harm absent a stay, we need not examine other factors.¹⁵ In order to meet the requirement of irreparable injury for a stay, the injury must be both certain and great, actual and not theoretical.¹⁶ Economic loss alone does not constitute irreparable harm.¹⁷

9. Here, neither Boyce Hydro nor the Lake Associations have demonstrated that the potential harm is either certain and great, actual and not theoretical or that it would be more than economic.

10. Boyce Hydro argues it would suffer irreparable harm in the absence of a stay because it would have to operate and maintain the project dam without any offsetting revenues from power generation. Boyce Hydro asserts that economic harm is “irreparable” when it amounts to an uncompensated loss,¹⁸ and here, Boyce Hydro will never recover the lost generation revenues. Boyce Hydro further contends that without revenue from the project, it will be unable to make improvements to the Edenville dam and will be forced to lay off a substantial portion of its work force and incur maintenance costs that it would not incur if the project was generating.¹⁹

11. The loss of revenue from the Edenville Project does not demonstrate irreparable harm in the absence of a stay.²⁰ Although monetary loss may constitute irreparable harm

¹⁴ *Transcontinental Gas Pipeline, LLC*, 160 FERC ¶ 61,042, at P 5 (2017).

¹⁵ *Id.* (citing *Algonquin Gas Transmission*, 156 FERC ¶ 61,111, at P 9 (2016)).

¹⁶ *Guardian Pipeline, L.L.C.*, 96 FERC ¶ 61,204, at P 26 (2001) (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

¹⁷ *Id.*

¹⁸ Boyce Hydro’s Motion at 5 (citing *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 & n.2 (D.C. Cir. 1977); *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674, *aff’d in part, remanded in part*, 770 F.2d 1144 (D.C. Cir. 1985)).

¹⁹ Boyce Hydro’s Motion at 7.

²⁰ *Wis. Gas Co.*, 758 F.2d at 674 (“economic loss does not, in and of itself, constitute irreparable harm”).

where the loss threatens the very existence of the movant's business,²¹ Boyce Hydro has made no such claim here. Similarly, any additional maintenance cost as a result of the revocation of the project license is purely an economic harm that does not support issuance of a stay.²²

12. The Lake Associations allege that they have undertaken efforts to acquire the project under the assumption that they would also acquire the project license²³ and that the need to obtain a new license from the Commission would be infeasible from both cost and timing perspectives. Similarly, Boyce Hydro contends that without a license, it is unrealistic that the Lake Associations will continue their efforts to acquire the project.²⁴

13. Whether Boyce Hydro and the Lake Associations will reach agreement regarding the sale of the project works is speculative; these entities have not suggested that such a transaction has gone beyond the exploratory stages.²⁵ Nonetheless, nothing in the Revocation Order prevents the Lake Associations, or any other entity, from acquiring the project and subsequently applying for a license from the Commission, nor is it certain how expensive such a process would be. It is also possible that an entity such as the Lake Associations could acquire the project assets and elect not to seek a license. A license from the Commission is required only if an entity is using the dam to generate electricity. If an entity is using the dam exclusively for other purposes, e.g., for maintaining water levels, a license may not be required. In such a case, the Commission would have no jurisdiction over the assets and there would be no licensing expense. Commission staff will be available to discuss with the Lake Associations or other entity interested in the project any issues of concern to them. Finally, while we are sympathetic with the Lake

²¹ *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 843 n.2 (the destruction of a business is an economic harm that would constitute irreparable harm).

²² *See Cease Generation Rehearing Order*, 162 FERC ¶ 61,116 at P 20 (a licensee has no entitlement to profits. "A license's requirements to satisfy all license terms does not change, regardless of whether revenues exceed, match, or fail to meet its costs.").

²³ A licensee may transfer their project to a new owner upon obtaining prior Commission approval pursuant to Part 9 of the Commission's regulations. 18 C.F.R. pt. 9 (2018). *See also* "How to Transfer a License or Exemption" at <https://www.ferc.gov/industries/hydropower/gen-info/comp-admin/transfer.asp>.

²⁴ Boyce Hydro's Motion at 7 (citing *Cal. Indep. Sys. Operator Corp.*, 114 FERC ¶ 61,339, at PP 20-22 (2006)).

²⁵ In fact, on September 25, 2018, the Saginaw Chippewa Indian Tribe of Michigan filed comments stating that the tribe has been engaged with Boyce Hydro for over nine months regarding the potential acquisition of the company's generation assets. This makes the nature of any potential sale even more speculative.

Associations' understandable desire to avoid unnecessary expense, the possible cost of obtaining a license is a purely economic harm that does not justify the issuance of a stay.

14. Having found that neither the Lake Associations nor Boyce Hydro are able to establish that they will suffer irreparable harm absent a stay, we need not consider the other factors. We nevertheless address the public interest factor below.

15. Boyce Hydro contends that in the absence of a stay, there will be adverse public safety impacts in both the short- and long-term. Specifically, Boyce Hydro avers that because it will no longer be able to generate power at the project, it will be required to pass flows over the spillways, where there is significant deterioration of the concrete spillway rollways.²⁶ Boyce Hydro states that this will cause continual additional damage, particularly during winter freeze conditions.²⁷ Boyce Hydro further notes that to repair the spillways will require the installation of a cofferdam for four to six months, which will reduce the spillway capacity by approximately 50 percent, increasing the potential for overtopping of the dam.

16. We disagree that Boyce Hydro's only recourse to the revocation of the project license is to pass flows in a manner that could potentially endanger the project works. The turbines only pass 2,000 cubic feet per second,²⁸ which is 6.7 percent of the existing spillway capacity and 3.1 percent of the total PMF. Should Boyce Hydro determine that this flow must be passed through the powerhouse, it could make modifications to the powerhouse or to other project works to pass these flows. For example, Boyce Hydro could remove the trash rack system and install a stop log-type system that has a large gate opening on it, that, if properly designed, could be adjusted to pass varying flows. In sum, Boyce Hydro has not shown that the absence of a stay would adversely affect public safety.²⁹

17. Last, we disagree that the public interest favors granting a stay in this proceeding. For over 14 years, Boyce Hydro knowingly and willfully refused to comply with major aspects of its license and the Commission's regulatory regime. As we stated in the Revocation Order, "[w]e do not often revoke a license, but the licensee has left us with no

²⁶ Boyce Hydro's Motion at 6 (citing affidavit of Mr. Richard D. Purkeypile, P.E. (Attachment A of the Motion)).

²⁷ Boyce Hydro's Motion at 6 (citing affidavit of Mr. Richard D. Purkeypile, P.E.).

²⁸ Affidavit of Mr. Richard D. Purkeypile, P.E at 4.

²⁹ We also note that the State of Michigan, which will have regulatory authority over the Edenville Dam upon revocation of the license, has intervened (through the Michigan Department of Natural Resources) and has not expressed concerns about its ability to ensure that the dam is operated and maintained safely.

other way to vindicate the public interest here.” Essentially, Boyce Hydro’s argument is that the Commission cannot revoke a license because doing so will prevent compliance. Boyce Hydro’s long history of violations makes it unfortunately clear that, on rare occasion, the only remedy for a licensee’s continued and deliberate failure to meet its obligations is to revoke a license.

18. As a general matter, we do not favor stays, which can result in regulatory uncertainty.³⁰ In the absence of a showing that the absence of a stay will result in irreparable injury or harm to the public interest, the motions to stay the Revocation Order are denied.

The Commission orders:

(A) Boyce Hydro Power LLC’s September 17, 2018 motion for stay is denied.

(B) The Sanford Lake Preservation Association, Wixom Lake Association, and Gladwin County Board of District Commissioners’ September 18, 2018 motion for stay is denied.

By the Commission. Chairman McIntyre was not present at the Commission Meeting held on October 18, 2018 and did not vote on this item.

(S E A L)

Kimberly D. Bose,
Secretary.

³⁰ *Millennium Pipeline Co., L.L.C.*, 141 FERC ¶ 61,022, at 61,083 (2012).

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