

166 FERC ¶ 61,029
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur, Richard Glick,
and Bernard L. McNamee.

Boyce Hydro Power, LLC

Project No. P-10808-064

ORDER DENYING REHEARING

(Issued January 17, 2019)

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 the Sanford Lake Preservation Association (Sanford Lake Association) filed requests for rehearing of the Revocation Order. For the reasons discussed below, we deny rehearing.

I. Background

2. On October 16, 1998, the Commission issued a license for the Edenville Project, located in Gladwin and Midland Counties, Michigan.² The project includes a 6,600-foot-long dam, with a maximum height of 54.5 feet. The project spans both the Tittabawassee and Tobacco Rivers, creating a 2,600-acre reservoir known as Wixom Lake, with a gross

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).

storage capacity of about 40,000 acre-feet and a 49-mile-long shoreline at full pool. The powerhouse contains two 2.4-MW Francis-type turbine generator units for a total installed capacity of 4.8 MW. 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 Tainter gates located on the western side of the project. 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.

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 for the Edenville Project, the Commission's regulations, and Commission orders.³ Of particular concern has been the project's inability to pass the Probable Maximum Flood (PMF)⁴ due to inadequate spillway capacity. 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),⁵ and, on September 10, 2018, the Commission issued an order revoking Boyce Hydro's license for the Edenville Project.⁶ The Revocation Order found that Boyce Hydro knowingly violated its license, the 2017 Compliance Order, and other Commission orders and regulations, and that it was given a reasonable time to comply.⁷ The Revocation Order required Boyce Hydro, within 15 days of the issuance of the order, to permanently

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 The "PMF event" is the flood that may be expected from the most severe combination of critical meteorologic and hydrologic conditions that is reasonably possible in the drainage basin under study.

⁵ Order Proposing Revocation, 162 FERC ¶ 61,115.

⁶ Revocation Order, 164 FERC ¶ 61,178.

⁷ *Id.* P 59.

disable⁸ the project's generating equipment in the powerhouse, but did not mandate removal or any modification of the dam or any other project facilities.⁹

4. On October 18, 2018, the Commission issued an order denying motions to stay the Revocation Order filed by Boyce Hydro, and the Sanford Lake Association, the Wixom Lake Association, and the Gladwin County Board of District Commissioners.¹⁰

5. Boyce Hydro and the Sanford Lake Association (together, Petitioners) filed timely requests for rehearing. Petitioners argue that the Revocation Order erred by not taking proper account of the effect of license revocation on a potential transfer of the license and by finding that the Revocation Order would not affect public safety. Boyce Hydro also argues that the Revocation Order wrongly discounted its efforts to remedy the spillway capacity issue. Additionally, Sanford Lake Association contends that the Revocation Order erred in finding that the license revocation would not interfere with efforts to establish a state-mandated lake level and requiring the project to discontinue electricity generation within 15 days. In the alternative to granting rehearing, Sanford Lake Association requests the Commission delay the effective date of the revocation or suspend, rather than revoke, the project license.

6. On December 31, 2018, Sanford Lake Association filed what it styled a supplemental filing in support of its rehearing request. We do not permit supplements to requests for rehearing, given the FPA's 30-day statutory rehearing deadline,¹¹ and so reject the filing as a supplement. While the filing accordingly cannot be considered as demonstrating any infirmity in the September 10, 2018 Revocation Order, we will treat it as an informational filing and address it below, for the purpose of providing clarity.

⁸ Boyce Hydro disabled generating equipment at the Edenville project by removing two breakers and pulling two high voltage knife switches. September 26, 2018 Letter from the Regional Engineer at 1 (Accession No. 20180926-3102).

⁹ *Id.* P 60, n.137, and ordering para. (A).

¹⁰ *Boyce Hydro Power, LLC*, 165 FERC ¶ 61,027 (2018). Additionally, on September, 25, 2018, the U.S. Court of Appeals for the District of Columbia Circuit denied Boyce Hydro's motion to stay the Revocation Order.

¹¹ *See, e.g., Electric Plant Board of the City of Paducah, Kentucky*, 121 FERC ¶ 61,091, at P 6 (2007).

7. On January 16, 2019, Boyce Hydro filed a motion requesting the Commission to delay action on rehearing and to reinstate the project license for six months.

II. Discussion

A. The Commission Did Not Err in Failing to Account for the Effects of the Revocation Order on Project Acquisition

8. Petitioners argue that the Commission wrongly discounted concerns that revoking the project license will interfere with efforts to acquire the project.¹² Petitioners note that the Revocation Order stated that a new owner could simply apply for a new license after acquisition; however, Petitioners contend that such a process would be infeasible because the licensing process is unduly long, costly, and subject to uncertain timelines and outcomes.¹³ Boyce Hydro asserts that a new license for the Edenville Project is further complicated by the spillway capacity issue, the fact that the current license was issued over 20 years ago, and that the water quality certificate was waived in that licensing proceeding.¹⁴ Boyce Hydro speculates that a new license would require environmental, recreational, and other study information required in contemporary licenses.¹⁵

9. Boyce Hydro further notes that the Wixom Lake Association and the Sanford Lake Association (collectively, Lake Associations) and, separately, the Saginaw Chippewa Tribe, entities that have an interest in taking over the project, have expressed concern

¹² Boyce Hydro Request for Rehearing at 3, 14; Sanford Lake Association Request for Rehearing at 5.

¹³ Boyce Hydro Request for Rehearing at 15 (citing Travis Kavulla & Laura Farkas, *Streamlining the Production of Clean Energy: Proposals to Reform the Hydroelectricity Licensing Process*, 39 PUB. LAND & RESOURCES LAW REV. 143 (2018) and *Improving the Hydropower Licensing Process: Hearing Before the Subcomm. on Energy of the H. Comm. on Energy and Commerce* (June 6-7, 2018)); Sanford Lake Association Request for Rehearing at 8, 10. Sanford Lake Association states that the license application process poses a substantial risk for lenders.

¹⁴ Boyce Hydro Request for Rehearing at 16.

¹⁵ *Id.*

about acquiring the project without the ability to generate electricity.¹⁶ Similarly, Sanford Lake Association asserts that the Lake Associations and the Saginaw Chippewa Tribe have previously stated that preserving the current license was integral to the planning and negotiations that have occurred.¹⁷

10. It is not in the public interest for the Commission to delay action addressing a licensee's long history of noncompliance with dam safety regulations out of concern that such action may affect the possibility (based mostly on speculation) that some third party might accept transfer of the license and promptly bring the project into compliance. Petitioners acknowledge that Boyce Hydro has not complied with the terms of its license, including important dam safety requirements.¹⁸ Boyce Hydro and any interested potential buyer have had ample opportunity to investigate the option of license transfer. Boyce Hydro has been on notice that noncompliance could lead to license revocation since at least June 2017, when Commission staff issued a Compliance Order describing the specific steps that Boyce Hydro was required to take to bring the project into compliance.¹⁹ Additionally, the Commission explicitly proposed revoking the project license in February 2018, nearly a year ago.²⁰ While we do not discount the efforts made by the Lake Associations and others, we note that the Lake Associations previously requested a delay in the revocation proceeding until November 1, 2018, to investigate the purchase of the project,²¹ but as yet, several months beyond that date, have provided us

¹⁶ *Id.* at 15. Boyce Hydro notes that the Lake Associations have investigated possibly acquiring the project and requested that the Commission delay any action, and, despite the Lake Associations' investments, the Commission revoked the license. *Id.* at 14.

¹⁷ Sanford Lake Association Request for Rehearing at 3.

¹⁸ Boyce Hydro's March 16, 2018 Motion to Withdraw the Order Proposing Revocation at 5 (“[Boyce Hydro] does not dispute that it has not yet completed all the requirements of the 2017 Compliance Order.”); Sanford Lake Association Request for Rehearing at 4 (“[Sanford Lake Association] acknowledges that the Project has a demonstrated history of noncompliance with certain license requirements.”).

¹⁹ 2017 Compliance Order, 159 FERC ¶ 62,292 at P 149 (“failure to comply with this order may lead to ... license revocation”).

²⁰ Order Proposing Revocation, 162 FERC ¶ 61,115.

²¹ Revocation Order, 164 FERC ¶ 61,178 at P 36.

with no indication that they were prepared to move forward with acquisition of the project. Neither petitioner provided a date certain by which ownership and control of the project will be transferred – let alone a schedule for transferring the license or addressing the numerous compliance concerns – and none of the filings in this matter suggest that such transfer is imminent. In fact, Sanford Lake Association indicates that it needs more time to study the cost of the spillway upgrades and potential electricity sales before it could make a transfer decision.²² Given this uncertainty and Boyce Hydro’s longstanding compliance issues, it is not in the public interest for the Commission to further delay revocation of the license.

11. We also disagree with Petitioners’ claims that obtaining a new license for the project is unduly burdensome and would effectively prevent a new owner from acquiring the project. Where there are few environmental issues and there is consensus among stakeholders, licensing can be expedited and less expensive. We note that the Commission can also, where warranted, waive certain procedural requirements in its licensing regulations. Boyce Hydro’s concerns regarding the need to obtain a water quality certificate and gathering information for a license application are also speculative. Additionally, regardless of whether the current license is transferred or a new license is obtained, the owner of the project would have to address the long-standing issues related to the spillway capacity. Last, nothing in this order or the Revocation Order prevents Boyce Hydro or another entity from either operating the project as a non-generating facility, under applicable Michigan regulation and establishing lake levels through the State of Michigan, or seeking a Commission license for the project in the future.

B. The Commission Did Not Err in Finding that the Revocation Order Would Not Impact Public Safety

12. Petitioners argue that the Revocation Order is arbitrary and capricious because it is inconsistent with the Commission’s stated public interest concern, maintaining dam safety to protect the public.²³ Petitioners state that the Revocation Order found that

²² Sanford Lake Association Request for Rehearing at 7-8 (“[Sanford Lake Association] has established costs ... for the 2013 Boyce Hydro PMF engineering study, and has determined that this design is not economically feasible given the current and future electrical rates available to the owner.”).

²³ Boyce Hydro Request for Rehearing at 1; Sanford Lake Association Request for Rehearing at 4, 6. Boyce Hydro notes that the odds of a “probable maximum flood” event occurring in the next 5 to 10 years is 5 to 10 in one million.

revocation of the license does not have the potential to harm public safety.²⁴ Petitioners aver that revoking the license reduces the ability to finance the necessary repairs by eliminating a source of income (the generation of electricity) needed to maintain and upgrade the spillways.²⁵ Boyce Hydro further asserts that the Revocation Order merely stated that public safety will not be affected because the Michigan Department of Environmental Quality (Michigan DEQ) will inherit the Commission's responsibility, but, without revenue, it will not have sufficient resources to comply with state requirements.²⁶ Sanford Lake Association claims that preserving the license would create no additional harm to the current situation and that there is no credible evidence that revoking the license will help improve public safety.²⁷ Similarly, Boyce Hydro argues that revoking the license will only make the public safety situation worse.²⁸

13. We affirm our prior determination that revoking Boyce Hydro's license was not inconsistent with maintaining dam safety.²⁹ As stated in the Revocation Order, Michigan DEQ has extensive dam safety regulations, including enforcement mechanisms such as the ability to commence a civil action for appropriate relief for violations.³⁰ For over 14 years, the Commission has gone to great lengths to compel compliance with the license requirements and Boyce Hydro has delayed, disregarded its responsibility, and claimed that it was not financially capable of meeting such requirements. Meanwhile, Boyce Hydro continued to benefit from the revenues generated by the project. There is no evidence that allowing Boyce Hydro to maintain its project license will result in a

²⁴ Boyce Hydro Request for Rehearing at 13-14; Sanford Lake Association Request for Rehearing at 7.

²⁵ Boyce Hydro Request for Rehearing at 2, 13; Sanford Lake Association Request for Rehearing at 7.

²⁶ Boyce Hydro Request for Rehearing at 14. *See also* Sanford Lake Association Request for Rehearing at 10 (noting that regardless of who owns the project in the future, necessary repairs will be expensive).

²⁷ Sanford Lake Association Request for Rehearing at 10.

²⁸ Boyce Hydro Request for Rehearing at 14.

²⁹ Revocation Order, 164 FERC ¶ 61,178 at P 55; *see also* *Boyce Hydro Power, LLC*, 165 FERC ¶ 61,027 at PP 15-16 (order denying stay of revocation order).

³⁰ Revocation Order, 164 FERC ¶ 61,178 at P 55.

different outcome or that the longstanding compliance issues will be remedied. Rather, the history of Boyce Hydro's ownership of the project demonstrates that as long as it continues to have a license, it will continue to avoid its responsibilities under that license. As the Commission stated in the Revocation Order, revoking the license will leave the community and state agencies increased authority to deal with Boyce Hydro's noncompliance and perhaps come to an acceptable arrangement as to how the dam will be operated in order to maintain acceptable lake levels in the absence of hydropower generation.³¹ The assertion that public safety is harmed by removing regulatory authorization from an entity that has consistently refused to comply with safety requirements is unpersuasive.

14. Petitioners also contend that project safety is harmed by the Commission's action because, as discussed above, the Revocation Order made it less likely for a new owner to acquire the project and make the necessary spillway upgrades.³² Sanford Lake Association avers that the existence of a license is a valuable property right that will help an owner obtain financing necessary for the spillway repairs.³³ Sanford Lake Association also notes that the spillway design developed by Boyce Hydro in 2013 is inadequate due to the cost of upgrades, the fact that the upgrades do not allow the project to pass the full PMF, and the electricity rates available.³⁴ Sanford Lake Association asserts that license revocation prevents a new owner from being able to negotiate new power rates or pursue other spillway designs.³⁵

15. As discussed above, neither petitioner provided a date certain by which any transfer would occur or have alleged that a transfer agreement is imminent. Sanford Lake Association's assertion that the spillway must be redesigned and that a new power purchase agreement must be obtained further demonstrates that a license transfer is speculative. With respect to Sanford Lake Association's claim that the project license

³¹ *Id.* P 58.

³² Boyce Hydro Request for Rehearing at 3, 14; Sanford Lake Association Request for Rehearing at 9.

³³ Sanford Lake Association Request for Rehearing at 7, 10. Sanford Lake Association notes that the repairs will likely be extremely expensive relative to the size of the project. Sanford Lake Association Request for Rehearing at 7.

³⁴ Sanford Lake Association Request for Rehearing at 7-8.

³⁵ Sanford Lake Association Request for Rehearing at 7-8.

could help the owner obtain financing necessary for the spillway repairs, while this may be the case, there is no evidence that Boyce Hydro would follow through with such repairs or whether the revenue generated would be sufficient for a new owner to finance the repairs. In fact, for over 14 years, Boyce Hydro has failed to make meaningful progress in addressing these long-standing noncompliance issues while generating revenue from the project.

16. Last, Sanford Lake Association states that Michigan DEQ has not received all the safety information from the Commission necessary for the Michigan DEQ to calculate the state's PMF requirement or assess the general safety of the project.³⁶ Sanford Lake Association contends that if Michigan DEQ has not received the necessary safety information, the project clearly poses a safety risk.³⁷

17. Commission staff have contacted Michigan DEQ to ensure an orderly transfer of authority over the project. Michigan DEQ requested Critical Energy Infrastructure Information concerning the project and was provided that information on December 19, 2018. Michigan DEQ has not indicated that additional information is needed or suggested at any time that it is not capable of regulating the Edenville Dam and Wixom Lake.

C. The Commission Did Not Err in Finding Boyce Hydro's Recent Efforts to Address the Project Spillway Capacity Unpersuasive

18. Boyce Hydro argues that the Commission acted arbitrarily and capriciously in ignoring, or failing to provide sufficient justification for declining to be persuaded by, evidence of Boyce Hydro's financial condition and its alleged good faith efforts to comply with its dam safety requirements.³⁸ Boyce Hydro asserts that it documented the steps it took to complete designs necessary for building an auxiliary spillway (to increase spillway capacity) and its proposal to place half of the project's revenues into escrow, but

³⁶ Sanford Lake Association Request for Rehearing at 8.

³⁷ Sanford Lake Association Request for Rehearing at 8. Sanford Lake Association notes that its members are directly at risk if the State of Michigan is unable to replace the Commission as the primary regulatory authority over the project.

³⁸ Boyce Hydro Request for Rehearing at 2, 9 (citing *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053 (9th Cir. 2018) and *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)).

that the Commission simply stated that this progress was insufficient.³⁹ Boyce Hydro states that it provided evidence of its financial constraints including data on plant revenues, a 2016 profit and loss statement, 2017 cash flow data, expenses from 2010 through 2017, and the costs it incurred designing the auxiliary spillway.⁴⁰ Boyce Hydro notes that this information also demonstrates that it would be unable to obtain traditional financing to increase the project's spillway capacity,⁴¹ and, as a result of its inability to obtain financing, it had to obtain non-cash financing through a services contractor that agreed to actually build the spillway.⁴² Boyce Hydro states that no additional information will change the fact that it cannot increase the project's spillway capacity unless it is given a reasonable opportunity to accumulate funds and find a nonconventional lending arrangement.⁴³

19. Boyce Hydro further contends that the Commission wrongly found that financial information related to any trust holding a membership interest in Boyce Hydro were germane to this proceeding.⁴⁴ Boyce Hydro avers that the Commission's jurisdiction extends only to the licensee and that the Commission has no authority to require a non-licensee to fund a license obligation.⁴⁵ Boyce Hydro repeats its argument that no additional information will alter the fact that it cannot increase the spillway capacity unless it is given a reasonable opportunity to accumulate funds and find additional financing via nonconventional lending arrangements.⁴⁶

20. We disagree that the Revocation Order improperly discounted evidence of Boyce Hydro's financial condition. As we have stated multiple times in this proceeding, a

³⁹ Boyce Hydro Request for Rehearing at 2, 12.

⁴⁰ *Id.* at 9-10.

⁴¹ *Id.* at 12.

⁴² *Id.*

⁴³ *Id.* at 10.

⁴⁴ *Id.*

⁴⁵ *Id.* (citing *James A. Boyd*, 136 FERC ¶ 62,119, at P 27 (2011), *reh'g denied*, 138 FERC ¶ 61,085 (2012)).

⁴⁶ Boyce Hydro Request for Rehearing at 10.

licensee is obligated to satisfy the terms of its license regardless of what revenues are generated from the project.⁴⁷ Thus, the Revocation Order properly concluded that Boyce Hydro's financial condition is not an excuse for its continued noncompliance.⁴⁸ But the Revocation Order went further and explained why Boyce Hydro's claims of financial hardship are not compelling. It acknowledged Boyce Hydro's assertions, including the alleged financing of spillway improvements through a contractor, but found that Boyce Hydro's promises are not credible given its previous unfulfilled promises to the Commission. The order specifically noted that Boyce Hydro promised to put money into escrow in 2008 to fund the necessary spillway improvements, but never did so.⁴⁹ The order also noted that Boyce Hydro refused to provide information regarding its own assets and liabilities, claiming that such information was not germane to the proceeding. This left the Commission with no way to confirm Boyce Hydro's claims that it could finance necessary remediation work. Moreover, while Boyce Hydro claims that the information it provided demonstrates that no financial institution would advance funds for these purposes, based on the record, the only external source from which it sought financing is Johnston Contracting.⁵⁰ Thus it appears that Boyce Hydro did not even attempt to obtain traditional financing for the spillway improvements. In any case, even if it were true that Boyce Hydro could not obtain necessary financing, this does not show that the required work is not required by the public interest or that a more capable licensee could not obtain financing. Holding a license under the FPA carries with it the obligation to meet public interest obligations and the lack of capacity to do so leads to the conclusion that the entity in question should not continue to hold a license.

21. We also disagree with Boyce Hydro's assertion that it was improper for the Commission to seek to obtain additional financial information concerning any trust holding a membership interest in Boyce Hydro. Boyce Hydro has repeatedly claimed that it is unable to comply with its license obligations because it does not have the necessary funds. To evaluate this claim, it is reasonable for the Commission to evaluate

⁴⁷ Cease Generation Rehearing Order, 162 FERC ¶ 61,116 at P 20; Revocation Order, 164 FERC ¶ 61,178 at P 49.

⁴⁸ Revocation Order, 164 FERC ¶ 61,178 at P 49.

⁴⁹ *Id.* P 46.

⁵⁰ Boyce Hydro's May 29, 2018 Data Response at 3 (Accession No. 20180529-5194) ("The only external source from which [Boyce Hydro] has sought financing for the engineering/design or construction of the Tobacco River auxiliary spillway or future spillway gate capacity increases is Johnston Contracting.").

the financial well-being of those entities that make up Boyce Hydro. Boyce Hydro's citation to *James A. Boyd*⁵¹ is inapposite. The issue in that matter was not whether the Commission could seek information about an affiliated entity; rather, *James A. Boyd* was an implied surrender proceeding where the licensee sold the project and the new owner had not sought to acquire the license and bring the project back into operation.⁵² The Commission simply stated that it had no authority to require a non-licensee to undertake actions or implement measures with respect to an abandoned project. This case has no bearing on the issue in this proceeding, where the Commission was seeking information from a licensee that would support the licensee's claim of financial hardship.

22. Further, as noted, Boyce Hydro's refusal to provide information was not limited to entities holding a membership interest in Boyce Hydro. The Commission also asked for a "complete list of [Boyce Hydro's] current assets and liabilities" to which Boyce Hydro stated "[t]his information is private and confidential and is not germane to the subject of the license matter at hand and is therefore not available for disclosure."⁵³ Thus, the Revocation Order properly found that "the Commission will not rely on factual representations regarding Boyce Hydro's financial status when it later claims evidence regarding those representations is not germane to the matter at hand."⁵⁴

23. Next, Boyce Hydro argues that the Commission erred in finding fault in Boyce Hydro's discontinuation of spillway work in February 2018.⁵⁵ Boyce Hydro asserts that this was the direct result of the Commission's order proposing to revoke the license and it would not have made sense for it to continue expending resources without knowing whether or not the Commission would have allowed it to retain its license.⁵⁶

24. Boyce Hydro further contends that the Commission erred in criticizing Boyce Hydro's inability to set a definitive timetable for making improvements necessary to pass

⁵¹ 136 FERC ¶ 62,119 at P 27, *reh'g denied*, 138 FERC ¶ 61,085.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Revocation Order, 164 FERC ¶ 61,178 at P 50.

⁵⁵ Boyce Hydro Request for Rehearing at 11.

⁵⁶ *Id.* Boyce Hydro notes that this same dynamic resulted in it not completing plans and specifications to repair the Tobacco River abutment spillway walls.

the full PMF.⁵⁷ Boyce Hydro states that it has previously explained that it cannot do so because the Commission must approve design plans (the timing of which is out of Boyce Hydro's control) in order to determine the costs of the improvements, which will impact how long it will take to accumulate the necessary funds.⁵⁸ Boyce Hydro acknowledges that the Commission correctly determined that this would mean the situation would be unresolved for years, but argues that this slow progress is better than the results of revoking the license.⁵⁹

25. The Commission did not err in criticizing Boyce Hydro for its failure to develop a definitive timeline to address all of the project's noncompliance issues. As detailed in the Revocation Order, Boyce Hydro has been unwilling and/or unable to address the noncompliance issues at the project for over 14 years.⁶⁰ The Compliance Order laid out specific deadlines for, among other things, the planning and design of two new auxiliary spillways and the planning and schedule for any work necessary to pass the full PMF.⁶¹ These deadlines required that the work be done concurrently, and Boyce Hydro's phased approach is inconsistent with those deadlines. Moreover, Boyce Hydro acknowledges that if the Commission were to accept its schedule, the noncompliance issues at the project would continue for years, even assuming that Boyce Hydro does what it historically has been unwilling to do. In light of this history, the Commission appropriately found that a multi-year process with no definitive end date would not serve the public interest.

26. With respect to Boyce Hydro's assertion that the Commission wrongly criticized it for stopping work after the February 2018 Order Proposing Revocation, as long as Boyce Hydro held its license, it was under a continuing obligation to comply with that license and other Commission orders and regulations. If it wished to convince us of its good faith, continuing required work would have been wise.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 11-12.

⁶⁰ Revocation Order, 164 FERC ¶ 61,178.

⁶¹ 2017 Compliance Order, 159 FERC ¶ 62,292 at ordering para. (B) through (F).

D. The Commission Did Not Err in Finding that the Revocation Order Would Not Interfere with the Lake Associations' Effort to Establish a State-Required Lake Level

27. Sanford Lake Association argues that the Commission erred in finding that the Revocation Order would not negatively impact the ability of the Lake Associations to obtain an adequate lake level requirement under state law.⁶² Sanford Lake Association notes that the license includes a specific and legally enforceable lake level, and, following revocation, no new requirement can be put in place until after a lengthy and potentially complex judicial process, which may not even result in a lake level that addresses the community's concerns.⁶³ Sanford Lake Association states that if the project is not acquired, Boyce Hydro may exercise its discretion over lake levels in a manner that is adverse to the community's needs.⁶⁴ Sanford Lake Association concludes that the Revocation Order punished the Lake Associations and others by creating legal uncertainty and by forcing them to spend additional resources in the hopes of establishing a state-required lake level.⁶⁵

28. Sanford Lake Association provides no information to support its claim that the Revocation Order adversely affected its efforts to establish an enforceable lake level through the State of Michigan. Although the license's requirements are no longer applicable, Sanford Lake Association is still free to pursue a state-mandated lake level that will address the long-term operation of the dam. Even if this process may require the community to expend resources to establish such a lake level, we do not believe it would be in the public interest to further delay our action and allow Boyce Hydro to continue to ignore the Commission's directives while, as Sanford Lake Association describes, a potentially lengthy and complex state process is pursued.

⁶² Sanford Lake Association Request for Rehearing at 10.

⁶³ *Id.* at 11-12. Sanford Lake Association states that the Edenville Project is even more complicated due to the fact that the project needs to be repaired, the project is part of a four lake system affecting 6,000 parcels of land, and the lakes are interdependent, requiring significant coordination.

⁶⁴ *Id.* at 12.

⁶⁵ *Id.*

E. The Commission Did Not Err in Requiring the Project to Discontinue Power Production within 15 Days

29. Finally, Sanford Lake Association contends that the Commission wrongly made the revocation effective with just 15 days' notice.⁶⁶ Sanford Lake Association states that this quick timeline disrupted the community's efforts to find a long-term, viable plan for the project and made it more difficult to bring the project into compliance, improve public safety, and retain the project's benefits to the public.⁶⁷ It notes that community organizations have attempted to address the issues discussed above, as well as issues at the three other projects owned by Boyce Hydro.⁶⁸ Sanford Lake Association states that these efforts have been costly and time-consuming, and that the Revocation Order will disrupt the progress made in reaching both short-term and long-term solutions.⁶⁹ Further, it states that all the progress made to date was premised on the fact that Boyce Hydro would continue to operate the project until transferred to a new owner, who would then be licensee.⁷⁰ Sanford Lake Association reiterates its argument that obtaining a new license is infeasible from a cost and timing perspective.⁷¹

30. We disagree that the Revocation Order improperly made revocation effective with 15 days' notice. The Commission issued its order proposing revocation in February 2018, over six months before the Revocation Order was issued. All parties have been on notice since at least that time that the Commission was proposing to take this action. The purpose of the 15-day period was to provide Boyce Hydro enough time to safely discontinue generation from the project, not to allow other parties an opportunity to pursue alternative solutions to license revocation. Thus, requiring Boyce Hydro to

⁶⁶ *Id.* at 13.

⁶⁷ *Id.*

⁶⁸ *Id.* at 13-17. The efforts undertaken by the community organizations include coordinating with: (1) federal, state, and local officials; (2) multiple citizen groups; (3) technical and financial consultants; (4) legal counsel; (5) the local public utility; and (6) Boyce Hydro.

⁶⁹ *Id.* at 14 (citing the Lake Associations' April 12, 2018 Status Report, July 30, 2018 Status Report, and September 18, 2018 Motion for Stay of the Revocation Order).

⁷⁰ *Id.* at 16-17.

⁷¹ *Id.* at 17.

discontinue power production within 15 days was appropriate and consistent with Commission precedent.⁷²

F. Alternative Relief

31. In its rehearing request, Sanford Lake Association repeats its request for a stay of the Revocation Order if the Commission does not grant rehearing,⁷³ or delay the Revocation Order's effective date by 180 days from the date of an order on rehearing, to maintain the status quo and allow the parties additional time to develop a long-term solution.⁷⁴ Sanford Lake Association notes that modifying only the effective date of the Revocation Order would not frustrate the Commission's directives in that order, but would still relieve the immediate pressure on stakeholders to develop a transition plan for the project.⁷⁵ It further argues that such relief would be in the public interest and would not cause injury to any person or increase any threat to public safety.⁷⁶

32. In the alternative, Sanford Lake Association requests the Commission suspend, rather than revoke, the project license.⁷⁷ It states that a suspension would preserve the opportunity to transfer the license to a new owner and is consistent with prior Commission practice.⁷⁸ Sanford Lake Association notes that no party is opposed to such a delay.

⁷² See, e.g., *Eastern Hydroelectric Corporation*, 149 FERC ¶ 61,036, at ordering para. (B) (2014) (requiring the licensee to permanently disable the project's generating equipment within 10 days).

⁷³ As stated above, the Commission denied the Lake Associations Motion to Stay the Revocation Order on October 18, 2018. *Boyce Hydro Power, LLC*, 165 FERC ¶ 61,027.

⁷⁴ Sanford Lake Association Request for Rehearing at 17-18.

⁷⁵ *Id.* at 18.

⁷⁶ *Id.* at 18.

⁷⁷ *Id.*

⁷⁸ *Id.* at 19-20 (citing *PacifiCorp*, 155 FERC ¶ 61,271 (2016) (holding a relicense proceeding in abeyance)).

33. The Lake Association's December 31, 2018 filing provides an update on activity undertaken by the association and other entities with respect to the Edenville Project and the other three projects licensed to Boyce Hydro. We acknowledge these efforts. However, they generally involve meetings, discussions, and agreements of a preliminary nature, and do not provide any certainty as when the Edenville Project's public safety and environmental deficiencies would be remedied.

34. As we have explained above and in our previous orders, given the project's long history of noncompliance, any further delay in the revocation of this license would not be in the public interest.⁷⁹ Boyce Hydro has made clear that it will not bring the project into compliance for years to come,⁸⁰ and no firm proposal to transfer or otherwise dispose of the project has emerged. Accordingly, we deny the alternative relief requested by Sanford Lake Association.

35. Similarly, Boyce Hydro's January 16, 2019 filing indicates only that it is engaged in negotiations regarding new power rates and financing, which it alleges may improve its ability to pay for required actions. However, Boyce provides no assurance as to the outcome or timing of those discussions. Further, as we have noted, a licensee's lack of financial capacity does not excuse years of non-compliance with important license conditions. Accordingly, we deny Boyce Hydro's request to delay action on rehearing and to reinstate its license.

The Commission orders:

- (A) Boyce Hydro Power LLC's October 5, 2018 request for rehearing is denied.
- (B) Sanford Lake Preservation Association's October 10, 2018 request for rehearing is denied.

⁷⁹ The *PacifiCorp* case cited by Sanford Lake Association is not applicable because that proceeding dealt with holding a relicensing proceeding in abeyance and PacifiCorp made representations that a transfer proceeding would be initiated approximately two months from its request. *PacifiCorp*, 155 FERC ¶ 61,271, at P 13.

⁸⁰ Boyce Hydro Request for Rehearing at 11.

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(C) Boyce Hydro Power LLC's January 16, 2019, motion for deferred action and reinstatement of license is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Document Content(s)

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