

155 FERC ¶ 61,072
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

City of New York, New York

Project No. 13287-004

ORDER GRANTING EXTENSION OF TIME AND DENYING STAY

(Issued April 21, 2016)

1. On February 11, 2016, as supplemented on March 31, 2016, the City of New York, New York (City), licensee for the Cannonsville Hydroelectric Project No. 13287 (Project), filed a request for two-year extensions of the deadlines to commence and complete construction of the project. On March 2, 2016, the City filed a motion to stay the deadline to commence construction for 10 years. For the reasons discussed below, we will grant the City's request for extensions and deny as premature its request for a stay.

I. Background

2. On May 13, 2014, the Commission issued an original license to the City to construct, own, and operate the 14.08 megawatt Cannonsville Hydroelectric Project, located at the City's existing Cannonsville Dam, on the West Branch of the Delaware River, near the Town of Deposit, Delaware County, New York.¹ The Cannonsville Dam impounds the Cannonsville Reservoir for purposes of supplying the City with water.

3. Article 301 of the license requires the City to commence construction of the project within two years of the issuance date of the license (by May 13, 2016), and to complete construction within five years of the issuance date (by May 13, 2019).²

4. In July 2015, as a part of the final design phase of the project, boreholes were drilled in and around the area of the project works in order to test subsurface conditions. On July 8, 2015, the City noticed a "flow of turbid water in the tailrace," which it came to realize was due to a "far greater" than previously thought artesian zone beneath the

¹ *City of New York*, 147 FERC ¶ 62,113 (2014).

² *City of New York*, 147 FERC ¶ 62,113 at P 25.

tailrace, that had become depressurized due to the drilling of the boreholes.³ By telephone on July 12, 2015, the City notified the Commission of the discovery of the turbid water, and filed an incident report shortly thereafter.⁴

5. In September 2015, the City's independent Board of Consultants recommended the City perform a feasibility study to determine if the original powerhouse design would adequately address the City's dam safety concerns, and whether or not a redesign of the project would be necessary. On February 11, 2016, the City, citing the need to perform the feasibility study before project construction could commence, requested a two-year extension of the commencement of construction deadline. On March 31, 2016, the City clarified that it was also requesting an extension of the deadline to complete construction.

6. On March 2, 2016, the City submitted a motion to stay the commencement of construction deadline for 10 years, citing the lengthy process the City must undertake in order to procure a design consultant and construction manager to reanalyze and, if necessary, redesign the project.

II. Discussion

7. Section 13 of the Federal Power Act (FPA) requires a licensee to commence project construction no later than two years after issuance of the license; otherwise, the Commission is required to terminate the license. The Commission may extend this deadline once, for a maximum of two years.⁵

8. In narrowly circumscribed circumstances, the Commission has granted stays of the commencement of construction deadline. Such circumstances have included where a

³ Motion for Stay at 6-8.

⁴ See July 24, 2015 Incident Report in the docket for Project No. 13287-004.

⁵ 16 U.S.C. § 806 (2012). That section states in pertinent part:

That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof.... The periods for the commencement of construction may be extended once but not longer than two additional years.... In case the licensee shall not commence actual construction of the project works ... within the time prescribed in the license or as extended by the Commission, then, after due notice given, the license shall ... be terminated upon written order of the Commission.

license is being challenged in court,⁶ or where a required post-license authorization to commence construction, from an agency other than the Commission, has not yet been obtained.⁷

9. In acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act; that is, a stay will be granted if the Commission finds that “justice so requires.”⁸ Under this standard, the Commission considers such factors as whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay would substantially harm other parties, and where the public interest lies.

10. The City asserts that a stay in this instance is warranted because the existing conditions at the dam were out of its control, and the public interest requires the stay so that the feasibility study may be conducted, and (if necessary) the project may be redesigned.⁹ Further, the City cites Commission orders issuing stays where preexisting conditions at U.S. Army Corps of Engineers (Corps) dams caused a delay in construction commencement, because the Corps was forced to perform emergency safety studies.¹⁰

11. The cases cited by the City and the situation here are distinguishable. The licensees in *Lehighton* and *Broken Bow* were bound by Articles 309 and 310 of their

⁶ *E.g.*, *City of Summersville, W.V.*, 79 FERC ¶ 61,124 (1997), and *Northwest Power Co., Inc.*, 44 FERC ¶ 61,249 (1988).

⁷ *See City of Broken Bow*, 132 FERC ¶ 61,225 (2010) (*Broken Bow*) (order granting two-year stay of commencement of construction deadline while the U.S. Army Corps of Engineers (Corps) completed dam modification study); *Borough of Lehighton, PA.*, 140 FERC ¶ 61,211 (2012) (*Lehighton*) (order granting two-year stay of commencement of construction deadline to allow the Corps to develop a risk reduction plan); *Gull Industries, Inc.*, 70 FERC ¶ 61,253 (1995) (*Gull Industries*) (order granting stay pending resolution of endangered species issue and issuance of a dredge and fill permit).

⁸ 5 U.S.C. § 705 (2012); *Constitution Pipeline Co., LLC*, 154 FERC ¶ 61,092 (2016); *Duke Energy Carolinas*, 124 FERC ¶ 61,254 (2008).

⁹ Motion for Stay at 14-21.

¹⁰ *See* Motion for Stay at 15-16 (citing *Broken Bow*, 132 FERC ¶ 61,225); *Lehighton*, 140 FERC ¶ 61,211.

licenses, respectively, which required the licensees to obtain the Corps' written approval of final project designs before any construction of project works could commence.¹¹ Thus, the licensees were completely precluded from performing any construction until the Corps completed its study. Further, in *Leighton*, the motion for stay was submitted and approved only after the issuance and expiration of a two-year license extension,¹² during which time the licensee and the Corps were able to more adequately assess the extent of the issues present at the dam and what needed to be done before the project could proceed.¹³ Moreover, in both of these cases, the Commission granted only a two-year stay, noting that the licensee could, if necessary, seek further relief at the expiration of that period.

12. It would be premature at this stage to issue the City a 10-year stay of the commencement of construction deadline. The timeframe laid out by the City in justifying its stay is premised on the completion of the feasibility study; however, until progress has been made in completing the study, the extent of any further delay is speculative, and without a "definitive time frame" for the resolution of the issues at the dam.¹⁴ Unlike the licensees in *Leighton* and *Broken Bow*, the City is not bound by a license article precluding it from commencing any form of construction until final project designs have been approved by an outside entity. Further, as the City is a municipal licensee, it will not be required to pay annual charges until it begins generating electricity.¹⁵

13. Based on the foregoing, the Commission determines that two-year extensions of the commencement and completion of construction deadlines outlined in Article 301 of the City's license are justified. At this time, however, approving a 10-year stay is not. This finding is without prejudice to the City seeking further relief at the end of the two-year extension.

¹¹ *Leighton*, 140 FERC ¶ 61,211 at PP 4-6; *Broken Bow*, 132 FERC ¶ 61,225 at PP 3-5.

¹² See Order Granting Extension of Time, issued November 20, 2009, in the docket for Project No. 12455-008.

¹³ *Leighton*, 140 FERC ¶ 61,211 at P 3. See also *Gull Industries*, 70 FERC ¶ 61,253 at 61,783 (stay granted after the expiration of an extension of time).

¹⁴ *Leighton*, 140 FERC ¶ 61,211 at P 8 (citing *Broken Bow*, 132 FERC at 62,262).

¹⁵ 18 C.F.R. § 11.7(g) (2015).

The Commission orders:

(A) The motion for stay of license filed by the City of New York, New York on March 2, 2016, is denied.

(B) The deadlines for commencing and completing project construction in accordance with Article 301 of the license are extended to May 13, 2018 and May 13, 2021, respectively.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.