

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Seneca Falls Power Corporation	Project No. 2438-062
Commonwealth Power Company	Project Nos. 11120-035, 11300-029, and 11516-031
Cameron Gas and Electric Company	Project No. 11150-023
Tomahawk Power and Pulp Company	Project No. 2239-039

ORDER DENYING REHEARING

(Issued March 15, 2007)

1. On November 9, 2005, the Commission issued an order (Agreement Order) approving a Stipulation and Consent Agreement (Agreement)<sup>1</sup> between Commission staff and American Energy, Inc. (American Energy), on behalf of four of its wholly-owned subsidiaries, which are licensees for the six above-captioned projects. Pursuant to the Agreement, the Commission and American Energy and its licensees<sup>2</sup> agreed that American Energy would not be required to pay \$110,000 out of the total \$300,000 penalty called for in the Agreement, if American Energy came into and maintained compliance with all the Agreement's specified deadlines. American Energy failed to meet all the deadlines, and on November 7, 2006, the Director of the Division of Hydropower Administration and Compliance in the Commission's Office of Energy

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<sup>1</sup> *Seneca Falls Power Corporation, Tomahawk Power and Pulp Company, Commonwealth Power Company, and Cameron Gas and Electric Company*, 113 FERC ¶ 61,142 (2005). The Agreement and a Regulatory Appendix (which lists the outstanding violations and dates by which the licensees must come into compliance with the Agreement) are attached to the Agreement Order.

<sup>2</sup> References in this order to either "American Energy" or "licensees" mean American Energy and its licensees (jointly).

Projects (Director) cancelled the conditional remittance and ordered American Energy to pay the \$110,000.<sup>3</sup> American Energy filed for rehearing on December 7, 2006. In this order, we deny American Energy's request for rehearing.

## **Background**

2. American Energy is a holding company that owns Seneca Falls Power Corporation (Seneca Falls), licensee for the Seneca Falls Project No. 2438;<sup>4</sup> Tomahawk Power and Pulp Company (Tomahawk), licensee for the Kings Dam Project No. 2239;<sup>5</sup> Cameron Gas and Electric Company (Cameron), d/b/a Grand River Power Company, licensee for the Smithville and Mix Project No. 11150;<sup>6</sup> and Commonwealth Power Company (Commonwealth), licensee for the Middleville Project No. 11120,<sup>7</sup> the LaBarge Project No. 11300,<sup>8</sup> and the Irving Project No. 11516.<sup>9</sup>

3. The license for each of the projects requires the licensee to operate the project safely. In addition, each license contains conditions requiring the licensees to consult with the U.S. Fish and Wildlife Service, the relevant state natural resource agencies, other resource agencies, and local governments, in preparing required reports or plans with respect to various matters, including project operations, recreational facilities, water quality monitoring, erosion control, and spill containment.

4. The November 9, 2005 Agreement Order resolved thirty-seven outstanding license violations.<sup>10</sup> American Energy agreed to a compliance plan set forth in the Regulatory Appendix to the order to remedy the numerous violations. The Appendix set forth specific actions to be taken by American Energy and also established deadlines by which

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<sup>3</sup> See November 7, 2006 letter to Scott D. Goodwin and Elizabeth W. Whittle, from the Director, Division of Hydropower Administration and Compliance (November 7, 2006 cancellation letter).

<sup>4</sup> *Seneca Falls Power Corporation (Seneca Falls)*, 78 FERC ¶ 62,113 (1997).

<sup>5</sup> *Tomahawk Power and Pulp Company (Tomahawk)*, 76 FERC ¶ 61,055 (1996).

<sup>6</sup> *Cameron Gas and Electric Company (Cameron)*, 96 FERC ¶ 62,182 (2001).

<sup>7</sup> *Commonwealth Power Company (Commonwealth)*, 98 FERC ¶ 62,211 (2002).

<sup>8</sup> *Commonwealth*, 98 FERC ¶ 62,212 (2002).

<sup>9</sup> *Commonwealth*, 98 FERC ¶ 62,210 (2002).

<sup>10</sup> See Agreement Order, 113 FERC ¶ 61,142, Regulatory Appendix.

compliance actions were to be completed. American Energy agreed to a total civil penalty of \$300,000. The Agreement provided for a conditional remittance of \$110,000 of the penalty, subject to cancellation if American Energy failed to come into, and maintain, compliance.<sup>11</sup>

5. On April 18, 2006, the Director notified American Energy that it had fourteen outstanding violations, and that the conditional remittance of \$110,000 would be cancelled if the licensees continued to be in noncompliance with the Agreement.<sup>12</sup> To

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<sup>11</sup> See Agreement Order, 113 FERC ¶ 61,142 at P 12-14. The Agreement provides (at P 27):

The conditional remittance is cancelled, and . . . shall be due and payable to the United States Treasury within 60 days after either: (1) written notification from the Director of the Division of Hydropower Administration and Compliance, Office of Energy Projects . . . that any of the Licensees has failed to comply in a timely manner with the agreed-upon compliance measures in the Regulatory Appendix hereto, . . . but such written notification will be issued only after (a) written notice of proposed loss of remittance, in which the Licensee(s) are notified of the failure to comply and the specific actions needing to be taken to achieve compliance, including the providing of an acceptable reason justifying the Licensee's failure to comply, and (b) Licensee(s) fail(s) to comply within the time provided; or (2) the Commission issues a new Compliance Order to any of the Licensees under section 31(a) of the [Federal Power Act], and the Commission subsequently affirms the order on rehearing, or the time for seeking rehearing of the order expires, with respect to any [new] compliance matter. . . .

<sup>12</sup> See April 18, 2006 letter to Scott D. Goodwin, from the Director (April 18, 2006 notice). Seneca Falls had failed to: (1) install a spillway gate system (due April 1, 2006); (2) enter into an operating agreement with the New York State Canal Corporation (NYSCC) and file the agreement with the Commission (due November 22, 2005); and (3) file a cultural resource plan (due March 1, 2006). Commonwealth had failed to: (1) file a repair/replacement plan for the left embankment and training wall for the LaBarge Project (due December 31, 2005); (2) file a work plan for placing fill at the right dike where the section is the thinnest and raising the crest of the intake canal dike at the Irving Project (due December 31, 2005); (3) file a final recreation plan as required by Articles 411 and 412 of the LaBarge, Irving, and Middleville Projects (due January 15, 2006); and (4) file a report, described in Article 412 and 413 of the licenses, on the results of monitoring of recreation use at the LaBarge, Irving, and Middleville Projects to determine whether existing recreation facilities are meeting recreation needs

(continued...)

avoid cancellation, licensees were required to (1) provide an explanation of licensees' failure to comply timely and (2) achieve satisfactory compliance by May 10, 2006.

6. The licensees fulfilled seven of the outstanding requirements by the May 10, 2006 deadline. Seven violations remained.<sup>13</sup> On November 7, 2006, the Director notified American Energy that the conditional remittance of \$110,000 was due in full to the United States Treasury.

7. On December 7, 2006, American Energy filed a request for rehearing in which it seeks withdrawal of Commission's November 7, 2006 cancellation letter.<sup>14</sup>

### **Discussion**

8. American Energy requests rehearing of the cancellation of the conditional remittance, claiming that as a result of its substantial compliance, clear diligence, and effort the Commission should rescind the November 17, 2006 cancellation letter.

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(due January 15, 2006). At the Smithville and Mix Project, Cameron had failed to: (1) file a photograph of the left slide gate (due October 17, 2005); (2) file an operating plan for the use of the spillway gates (due October 17, 2005); and (3) file a final recreation plan (due January 15, 2006). Only one of the licensees, Tomahawk, had completed its requirements in a timely manner.

<sup>13</sup> The licensees subsequently made (untimely) five filings: Seneca Falls' report detailing the installation of the spillway gate system (filed August 7, 2006); Commonwealth's final recreation plans for the LaBarge and Irving Projects (filed November 13, 2006); and Cameron's final recreation plan (filed November 7, 2006), and its operating plans for the spillway gates at the Smithville and Mix Project. On August 15, 2006, Commission staff found Cameron's spillway gate plan acceptable. The three recreation plans are pending before the Commission.

<sup>14</sup> American Energy paid the conditional remittance of \$110,000 to the United States Treasury on January 31, 2007, 23 days after the January 8, 2007 due date. For late payments, interest begins to accrue from the date that payment is due. *See* 18 C.F.R. § 35.19(a)(2)(iii) (2006); and Agreement, 113 FERC ¶ 61,142 at P 28. Failure to make a timely payment, or otherwise to comply with any of the terms and conditions stated in this Agreement will violate a final order of the Commission and may subject American Energy to additional action under the enforcement provisions of section 31 of the FPA, 16 U.S.C. § 823(b) (2000). *See* Agreement, 113 FERC ¶ 61,142 at P 29.

9. American Energy alleges that its late submissions<sup>15</sup> were a result of “significant events” beyond its control. It states that sometime around the issuance of the Director’s April 18, 2006 notice, it became aware that the engineering consultant undertaking the studies at multiple projects suddenly left the country, and that it thereafter took immediate action to complete and file most of the reports. Even if we accept the unproven implication that the absence of the consultant made it impossible for American Energy to timely comply, the company’s explanation is seriously weakened by the fact that it did not raise the matter in the course of the compliance proceeding until its request for rehearing.

10. American Energy further asserts that it has shown due diligence and made more than best efforts to execute an operating agreement at the Seneca Falls Project with the New York State Canal Corporation (NYSCC). The licensee alleges that it continues to negotiate with the NYSCC and hopes to come to an agreement “as soon as practicable.”

11. American Energy’s claims are without merit. American Energy entered into the Agreement voluntarily, the terms of the conditional remittance were set out in the Agreement,<sup>16</sup> and American Energy agreed to comply with all of the terms of the Agreement in a timely manner. On April 18, 2006, fourteen out of the original thirty-seven requirements were between one to six months late. American Energy was given ample notification and an opportunity to mitigate the cancellation of the conditional remittance by complying with the terms of the Agreement and providing an explanation of its lateness by May 10, 2006. American Energy did not act promptly to meet the explicit deadlines stated in the Agreement or the April 18, 2006 notice.<sup>17</sup> Indeed, it has yet to file the recreation monitoring reports for the Middleville Project. Nor has it executed and submitted the required operating agreement with the NYSCC. American

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<sup>15</sup> *See supra* n. 13.

<sup>16</sup> Agreement, 113 FERC ¶ 61,142 at P 26-29.

<sup>17</sup> The Agreement requires strict and timely compliance with its provisions, regardless of negotiations or the availability of an engineering consultant. By the November 7, 2006 cancellation letter the licensees still had not completed seven requirements.

Energy has been in violation of this requirement for more than two years,<sup>18</sup> and its statement that it “intends to continue negotiations ... and hopes to wrap up an agreement ... as soon as practicably possible”<sup>19</sup> cannot after all this time constitute diligence.<sup>20</sup>

12. We take compliance with hydropower licenses seriously. American Energy has a record of continuing non-compliance, and we have no assurance that this will change in the future.<sup>21</sup> It has produced no convincing argument why it should not be held to the terms of the Agreement. Therefore, we find no reason to excuse the latest instances of non-compliance by American Energy.

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<sup>18</sup> On October 13, 2004, Commission staff issued a Compliance Order finding the licensee in violation of its license for, among other things, failing to file the operating agreement and directing it to do so within 30 days (by November 13, 2004). *Seneca Falls*, 109 FERC ¶ 62,030 (2004).

<sup>19</sup> Request for rehearing at 3.

<sup>20</sup> The October 2004 Compliance Order, *supra* n.21, notes that failure to execute an operating agreement with NYSCC is a continuing violation of standard Article 5 of the Seneca Falls Project license. *Seneca Falls*, 78 FERC ¶ 62,113 at Ordering Paragraph (D) (Form L-3, printed at 54 FPC 1817 (1975)). Pursuant to that article, the licensee must, within five years from the date of issuance of the license, acquire sufficient property rights in project facilities to enable the Commission, through the licensee, to carry out its regulatory responsibilities with respect to the project. *See, e.g., New York State Electric & Gas Corp*, 16 FERC ¶ 61,176 (1981). Under section 21 of the Federal Power Act, 16 U.S.C. § 814 (2000), if the licensee is unable to negotiate an agreement, it may acquire the necessary property interests by exercising the right of eminent domain in federal district court or in the courts of the state in which the property is located. *See Niagara Mohawk Power Corp.*, 38 FERC ¶ 61,057 (1987).

<sup>21</sup> These are not the first violations for American Energy. Commission staff has issued four Compliance Orders in addition to the one issued in October 2004 (*supra* n.21). *See Seneca Falls*, 99 FERC ¶ 62,171 (2002); *Tomahawk*, 102 FERC ¶ 62,103 (2003); *Tomahawk*, 111 FERC ¶ 62,038 (2005); *Cameron*, 110 FERC ¶ 62,341 (2005); *Commonwealth*, 110 FERC ¶ 62,336 (2005).

The Commission orders:

The request for rehearing filed on December 7, 2006, by American Energy, Inc. and Seneca Falls Power Corporation, Tomahawk Power and Pulp Company, Commonwealth Power Company, and Cameron Gas and Electric is denied.

By the Commission.

( S E A L )

Philis J. Posey,  
Acting Secretary.