

124 FERC ¶ 61,255
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.

James Lichoulas Jr.

Project No. 9300-018

ORDER TERMINATING LICENSE BY IMPLIED SURRENDER

(Issued September 18, 2008)

1. This order terminates the license for Appleton Trust Project No. 9300, based on an implied surrender of the license. The constructed 346-kilowatt (kW) project is located on the Hamilton Canal in Middlesex County, Massachusetts.

Background

2. The license for Project No. 9300 was issued to James Lichoulas on July 18, 1986.¹ The project is located in the basement of what was formerly a six-story mill building (part of the Appleton Mill Complex) between the Hamilton and Lower Pawtucket canals, components of the Pawtucket Canal system, which is adjacent to the Merrimack River in Lowell. Boott Hydropower, Inc. (BHI) owns and operates the canal system as part of the licensed Lowell Project No. 2790, of which it is the co-licensee.²

3. As licensed, the project includes: an intake off the Hamilton Canal; two 160-foot-long open masonry flumes; a 20-foot-long steel penstock; a turbine chamber containing two turbine-generators with a total installed capacity of 346 kW; two stone masonry tailraces; a transformer; and a 300-foot-long, 480-volt underground cable.

4. The project does not include a dam; it relies on the head created by the dam and impoundment of the Lowell Project and the difference in elevation between the Hamilton and Pawtucket canals. Project flows pass from the intake on Hamilton Canal, through the

¹ *James Lichoulas*, 36 FERC ¶ 62,047 (1986).

² The Lowell Project was licensed in 1983 (*Boott Mills and Proprietors of the Locks and Canals on Merrimack River*, 23 FERC ¶ 62,043 (1983)) and then transferred to Boott and General Electric Credit Corporation. 25 FERC ¶ 61,386 (1983).

flumes, penstock, generating equipment and tailraces located beneath the mill buildings, and discharge into the Lower Pawtucket Canal.

5. The project is located within the Lowell Locks and Canals National Historic Landmark District (District), which is listed in the National Register of Historic Places (National Register). The building where the project is located is not defined as a contributing element to the District.
6. The project has not operated regularly since November 1994, and it needs major repairs to resume operation. On March 11, 1997, Commission staff asked Mr. Lichoulas, the licensee, for a schedule of repairs. On September 29, 1997, he responded that he needed 20 more weekends to complete repairs, i.e., by the end of March 1998. By letter of March 24, 1998, the licensee said that he had made some progress, and that he would perform additional repairs and restart project operations in the summer of 1998.³
7. On March 5, 1999, Commission staff asked for the status of the project and a plan for resuming operations by April 16, 1999. When the licensee failed to respond, Commission staff sent another letter on July 8, 1999, noting the lack of a response and staff's understanding that "there is uncertainty as to whether you will resume operation of the project in the near future, if at all." The licensee responded September 14, 1999, stating that repairs would take 120 days and that project operations would resume in late February or early March 2000. They did not.
8. A July 24, 2002 inspection by the Commission's New York Regional Office revealed that the Appleton Mills Complex was being renovated for mixed residential and commercial uses. The mill building in which the project is located was demolished to street level as part of the renovations. The licensee's representatives told Commission staff that recently the project had briefly generated power, but operations were halted because of a turbine-generator vibration problem. They further stated that, although the project was not operating, the rehabilitation of the project was ongoing. A section of the powerhouse roof had caved in and debris was accumulated within the powerhouse area, which reportedly was the result of a storm that occurred in the days prior to the inspection.
9. On July 31, 2002, Commission staff directed the licensee to submit, within 10 days, a plan and schedule for making necessary repairs and resuming operations. He responded that the site would be cleared and made safe by November 2002 and that the project would be operational by March 2003.⁴ The licensee later pushed the date back to

³ The letter was filed in the public record for Project No. 2192 on June 14, 1999.

⁴ See March 17, 2003 letter from Commission staff to Mr. Lichoulas.

May 2003.⁵ On March 17, 2003, Commission staff directed the licensee to resume project operations by May 30, 2003, and reminded him that failure to do so would be a violation of the license. The letter also directed the licensee to file a progress report by June 15, 2003. He did not file the required report, and did not resume project operations.

10. On September 5, 2003, Commission staff notified the licensee that, because the project was in disrepair and had not generated power since November 1994, he was in violation of section 10(c) of the Federal Power Act (FPA)⁶ and subject to the civil penalty provisions of section 31(a) of the FPA.⁷ The letter directed the licensee to file, within 21 days, a plan and schedule for resumption of project operation. The licensee did not respond.

11. On September 23, 2004, Commission staff notified the licensee that, given his failure to respond to Commission staff directives and to repair the project and resume operations, staff considered the project to be abandoned under standard Article 16 of the project license⁸ and section 6.4 of the Commission's regulations,⁹ and presumed that it was the licensee's intent to surrender the license. The letter explained that, under these circumstances, the Commission could terminate the license through an implied surrender proceeding or the licensee could voluntarily surrender the license by filing a surrender application.

12. The licensee filed a response on December 6, 2004, stating that asbestos had been discovered and that the removal and cleanup process had taken several years, but that process had been completed. He further stated that "planning is underway for the reconstruction of the equipment and wheelhouse," and he was "in discussions . . . regarding the mechanical repairs." The licensee also said that by early March 2005 he

⁵ *Id.*

⁶ 16 U.S.C. § 803(c) (2000). That section requires licensees to maintain project works in a condition of repair adequate for the efficient operation of the project.

⁷ Under section 31, the Commission may revoke a license or assess civil penalties up to \$11,000 per day, per violation, for failure to comply with its terms and conditions.

⁸ Article 16 is set forth in Form L-15 (October 1975) [reported at 54 FPC 1883], entitled "Terms and Conditions of License for Unconstructed Minor Project Affecting the Interests of Interstate or Foreign Commerce," and is incorporated by reference in the license for Project No. 9300. 36 FERC ¶ 62,047 at 63,134.

⁹ 18 C.F.R. § 6.4 (2008).

would file a document explaining the full scope of work that needed to be done and a timeline for doing the work. Mr. Lichoulas never submitted this information.

13. On July 26, 2006, the City of Lowell (City) notified the Commission that it had acquired the parcel of land on which the Appleton Trust Project is located through eminent domain on April 25, 2006, and that the property is part of a 15-acre site that the City is marketing to developers for a major mixed-use project. The licensee did not respond.

Implied Surrender Proceeding

14. On March 21, 2007, Commission staff issued notice of the termination of license by implied surrender with a deadline for filing comments, protests, and motions to intervene of April 23, 2007. The City and BHI (a co-licensee of the Lowell Project No. 2790) filed timely motions to intervene, supporting termination of the license by implied surrender.¹⁰ In filings of April 20 and October 26, 2007, the licensee argued against termination of his license.

15. On February 15, 2008, Commission staff issued an Environmental Assessment (EA) that evaluated the environmental effects and impacts to various resources associated with the proposed action (surrender). Comments on the EA were due March 17, 2008.

16. On March 17, 2008, the licensee filed comments on the EA, objecting to the EA's recommendation that the Commission accept surrender of the license and the conclusion that license surrender would not affect historic properties. On April 2, 2008, the City filed a response to the licensee's comments.¹¹ A number of others filed late comments. William K. Fay made seven filings between March 27 and May 30, 2008, most of which were simply copies of e-mails from him to various individuals asking for their support for the project, draft e-mails for other individuals to send, or copies of e-mails from another

¹⁰ The City argues that the interests of both the residents of the City and the public at large are served by the surrender of the license and the urban redevelopment project being undertaken by the City's Department of Planning and Development.

¹¹ On April 11, 2008, the licensee filed a reply, which included a motion to strike the City's reply as prohibited by Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213d(a)(2) (2008). On April 28, 2008, the City filed reply to the licensee's motion to strike. We will not reject any of these submittals.

individual.¹² In addition, John Werner, Michael Rodman, David Wright, Christiaan Beeuwkes, James T. Lichoulas III (Mr. Lichoulas's son), Kenneth Smith, and Luke McInnis filed late comments expressing support for the licensee's position.¹³ We will accept the late filings.

17. We have considered the comments and motions filed in this proceeding in deciding whether, or under what conditions, to terminate the license for Project No. 9300 by implied surrender.

Discussion

18. Standard Article 16 of the license for Project No. 9300 provides:

If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms or the license and the lawful orders of the Commission . . . , the Commission will deem it to be the intent of the Licensee to surrender the license. . . . [T]he Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

In addition, section 6.4 of the Commission's regulations provides, among other things, that it is deemed to be the intent of a licensee to surrender a license, if the licensee abandons its project for a period of three years.

¹² Although none of the filings comply with the Commission's requirements for captioning, signing, and verifying, we will not reject them. *See* 18 C.F.R. § 385.2002 and 385.2005 (2008). In addition, Mr. Fay's April 2 and May 30, 2008 filings, although the Commission's electronic docket labeled them as motions to intervene, did not ask for intervention, nor did they comply with the Commission's requirements for such a motion. *See* 18 C.F.R. § 385.214 (2008).

¹³ Most of the comments were quite brief, citing the development history of the project, alleging its historic value, or asserting the public interest in the production of even the small amount of power produced by the project. Mr. Lichoulas's son also referenced his father's substantial personal commitment of time and money to the project.

19. The licensee argues that he has diligently pursued rehabilitation and repair of his project. He states that the mill complex had undergone a selective demolition that resulted in a required asbestos clean-up process that lasted several years; that the City took over the project by eminent domain; and that consequently, he had been prevented from rehabilitating and restarting the project. In his March 17, 2008 comments on the EA, the licensee reiterates his earlier arguments that he has been making a “good faith effort to restore the project to working condition as soon as possible” but says that he has been frustrated at almost every turn.¹⁴ He states that he has signed a letter of intent with two individuals, William Fay and Ken Smith, to jointly undertake rehabilitation and operation of the project. The licensee also argues that the City’s purported taking of the project land and structures by eminent domain violates the provisions of the Federal Power Act and Massachusetts law, and that the Commission should therefore not terminate his license until the matter is resolved in court.¹⁵

20. The licensee’s renewed interest in the project is too little, too late. The project has not operated for almost 14 years, and it needs major repairs and a power sales contract to resume operation. For over 10 years, Commission staff tried to work with the licensee, repeatedly asking for repair schedules and plans. Again and again, the licensee either failed to respond or responded by providing schedules for fixing the project that were never met. In addition, he neglected to keep the Commission abreast of the status of his project, only responding when required to do so.¹⁶

21. Today, there is no evidence that the project is any closer to being able to resume operation than it was 14 years ago. In fact, the City’s acquisition of the land and buildings by eminent domain (over what appears to be the delayed objection of the licensee)¹⁷ makes any possibility of repairing the project and resuming operations even less likely. In addition, we note that the City did not acquire the project land and

¹⁴ See licensee’s filing of March 17, 2008, at 4. The City’s April 2, 2008 response asserts that the damage to the project by a 1997 fire should not excuse the long-standing failure to resume project operations.

¹⁵ The filing includes a copy of a compliant filed by the licensee on April 13, 2007, in the United States District Court for the District of Massachusetts objecting to the City’s taking of its property.

¹⁶ There is no evidence that the licensee has sought or secured a power sales contract.

¹⁷ It is also not clear why the licensee waited until after our notice of termination and almost a year after the City acquired the property before challenging the City’s action in court.

facilities until 2006, long after Commission staff notified the licensee that it considered the licensee to have abandoned good faith operation of the project and long after the licensee stopped communicating with Commission staff.¹⁸

22. In addition, in his March 17, 2008 comments on the EA, the licensee contends that the EA's conclusion that the project is not eligible for listing in the National Register is incorrect. The licensee asserts the project is eligible for listing in the National Register because it "... is historically significant and displays distinctive characteristics related to early practices and designs in the electric industry and appears to satisfy the criteria for inclusion in the National Register."¹⁹ The licensee did not provide any supporting documentation for this contention.

23. As noted previously, the project is located within the Lowell Locks and Canals National Historic Landmark District (District), which is listed in the National Register of Historic Places (National Register). However, the building where the project is located is not defined as a contributing element to the District. In addition to determining that the project was not a contributing element to the District, Commission staff evaluated the project under the regulations that implement the National Historic Preservation Act²⁰ to determine if any of the project features were eligible for inclusion in the National Register.²¹ Given the current state of the project (i.e., the building over the substructure generating facilities has been demolished, the generating equipment is covered with collapsed building material, and the wicket gate operators of the turbines appear to be inoperable), the project does not possess integrity to be further evaluated for listing in the

¹⁸ Given our action here, there is no need to address the legality of the City's use of eminent domain to acquire the project.

¹⁹ See March 17, 2008 filing at 7. Specifically, the licensee states that the project has what "is believed to be one of the last, if not the last, leather belt-driven waterwheels in the United States." *Id.*

²⁰ 16 U.S.C. § 470 *et seq.* (2000).

²¹ See 36 C.F.R. § 60.4 (2008).

National Register.²² Pursuant to 36 C.F.R. § 800.4(c)(2), Commission staff then notified the National Park Service, the State Historic Preservation Officer, and the Advisory Council on Historic Preservation of its conclusion that license surrender would have no effect on historic properties. None of the consulted agencies objected to this determination.

24. The licensee's March 17, 2008 filing also asks for a trial-type, evidentiary hearing on the grounds that there are material facts in dispute²³ and that standard license Article 16 expressly provides for notice and hearing. The licensee has not identified any issues of material fact that cannot be adequately resolved based upon the record before us. Moreover, while the Commission may conclude, in its discretion, that it is appropriate to set a hydropower matter for a trial-type hearing, the hearing required by Article 16 of the license can be, as it was here, a paper hearing.²⁴

Conclusion

25. For the reasons discussed above, we find that the licensee has abandoned good faith operation of his project, and that it is in the public interest to terminate the license for Project No. 9300 by implied surrender.

²² *Id.* That section provides that, to be eligible for consideration, the site or structures must "possess integrity of location, design, setting, materials, workmanship, feeling, and association . . ." In any event, even assuming the project structures were intact, the project does not meet the other requirements of 36 C.F.R. § 60.4. It is not associated with events that have made a significant contribution to the broad patterns of our history, or with the lives of persons significant in our past. It does not embody distinctive characteristics of a type, period, or method of construction; or that represent the work of a master; or possess high artistic values; or represent a significant and distinguishable entity whose components may lack individual distinction. Nor does it yielded, or may be likely to yield, information important in prehistory or history.

²³ The licensee alleges that material, disputed issues of fact include whether (1) the licensee actually has abandoned or surrendered his license for the project; (2) the project can be made operational, and if so at what cost; (3) the historic nature and import of the project would be impacted by termination of the license; and (4) termination of the license is consistent with the public interest. *See* March 17, 2008 filing at 9.

²⁴ *See, e.g., Cascade Power Company*, 74 FERC ¶ 61,240 at 61,822 and n. 16 (1996), *citing Sierra Association for Environment v. FERC*, 744 F.2d 661, 661-62 (9th Cir. 1984).

26. As explained in the EA, there are no recreation facilities or activities associated with the project. The proposed surrender of the license would involve no changes to project structures and no ground-disturbing activities; and therefore would have no impact on terrestrial, recreational, or aesthetic resources. Nor would there be any impact to wetlands, threatened and endangered species, or current conditions related to emigrating aquatic resources that may enter the Pawtucket Canal system. In addition, as discussed above, the project is not eligible for listing in the National Register, and surrender of the project's license thus would have no effect on historic properties. We conclude, based on the record of this proceeding, including the EA and comments received, that termination of the license by implied surrender would not constitute a major federal action significantly affecting the quality of the human environment.

The Commission orders:

(A) The license for the Appleton Trust Project No. 9300 is terminated by implied surrender, effective 30 days from the date of this order.

(B) This order constitutes final agency action. Requests for rehearing of this order may be filed within 30 days from the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2008).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.