

126 FERC ¶ 61,024
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.

Snoqualmie River Hydro, Inc.
Public Utility District No. 1 of Snohomish County,
Washington

Project No. 10359-039

ORDER DENYING REHEARING

(Issued January 15, 2009)

1. American Whitewater has filed a request for rehearing of an October 7, 2008 Commission staff order¹ approving the transfer of license for the 8.3-megawatt (MW) Youngs Creek Project No. 10359 from Snoqualmie River Hydro, Inc. (Snoqualmie Hydro) to Public Utility District No. 1 of Snohomish County, Washington (the District). Because we find no error in the transfer order, we deny rehearing. We also clarify certain matters, as requested by American Rivers.

Background

2. On May 5, 1992, the Commission issued Snoqualmie Hydro a license to construct, maintain, and operate the proposed Youngs Creek Project, to be located on Youngs Creek in Snohomish County, Washington.² Licensed project works included a 12-foot-high, 65-foot-long diversion weir with a crest elevation of 1,530 feet mean sea level; an intake structure; a 51-inch-diameter, 14,500-foot-long penstock; a powerhouse with a turbine generator unit with a generating capacity of 8.3 MW; a short tailrace; and a 12.5 kilovolt, 6.1-mile-long overhead transmission line. As issued, Article 301 of the license required

¹ *Snoqualmie River Hydro, Inc. and Public Utility District No. 1 of Snoqualmish County, Washington*, 125 FERC ¶ 62,017 (2008).

² *Snoqualmie River Hydro*, 59 FERC ¶ 62,124 (1992). On August 24, 1994, the license was amended to increase generating capacity from 7.5 MW to 8.3 MW. 68 FERC ¶ 62,173 (1994).

Snoqualmie Hydro to commence construction of the project works by May 5, 1994, two years following the issuance date of the license, and to complete construction by May 5, 1996, four years following the issuance date of the license.³

3. Project construction began in 1993.⁴ However, Snoqualmie Hydro halted construction activities in 1994 because of its inability to obtain a power purchase agreement and financing.⁵ Snoqualmie Hydro thereafter requested and received three extensions (for a total of ten additional years) of the deadline to complete construction.⁶

4. On January 27, 2006, Snoqualmie Hydro filed a fourth request for extension of the completion of construction deadline. In comments filed July 10, 2006, American Whitewater opposed the request and asked the Commission to terminate the project license.

5. By order dated October 4, 2006, Commission staff denied Snoqualmie Hydro's extension request and issued notice of implied surrender of the project's license. Citing the implied-surrender provisions of standard license Article 21,⁷ the notice stated that

³ *Snoqualmie River Hydro*, 59 FERC ¶ 62,124 at 63,330.

⁴ See letter from Frank W. Frisk, Jr. (counsel for Snoqualmie Hydro) to Lois Cashell (Commission Secretary) (filed November 16, 1995).

⁵ *Id.*

⁶ See unpublished orders issued on December 26, 1995, September 15, 1998, and May 11, 2004.

⁷ Since 1964, all licenses issued have contained a standard license article that states, in pertinent part:

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 of 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. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project

(continued...)

while the doctrine of implied surrender has typically been invoked when the licensee, by action or inaction, has clearly indicated its intent to abandon the project, the “exceptional circumstances” of this proceeding – namely, the passage of more than fourteen years since the license was issued and Snoqualmie Hydro’s repeated rationale for each of its deadline-extension requests, i.e., its inability to obtain financing or secure a power purchase agreement – indicated Snoqualmie Hydro’s failure to comply with the license and warranted applying the implied-surrender doctrine in this case. Ordering Paragraph (B) of the October 4, 2006 implied-surrender notice required Snoqualmie Hydro to file any reply within 30 days, i.e., by November 3, 2006. Snoqualmie Hydro did not make such a filing.

6. On June 22, 2007, Snoqualmie Hydro filed a letter notifying the Commission of its acquisition by Westford Energy, LLC (Westford).

7. On March 27, 2008, Snoqualmie Hydro filed another request for an extension of time to complete project construction.⁸ The company acknowledged the issuance of the implied-surrender order, but asserted that Westford, which it stated has a long history of successfully developing energy projects, had been fully engaged in moving the project forward, including entering into a letter of intent to develop a power purchase and/or asset purchase agreement with the District. Snoqualmie Hydro stated that Westford had also completed an engineering review of project design, obtained updated penstock material quotations and reinstated Snoqualmie Hydro’s water rights permit application at the Washington Department of Ecology. The request included a timeline for finalizing a

waters, lands, and facilities remaining within the project boundary to a [satisfactory] condition. . .

The Youngs Creek Hydro Project license contains this provision. See Article 21 of Form L-11, published at 54 FPC 1864 (October 1975), incorporated by reference, 59 FERC at p. 63,328, Ordering Paragraph D. The related "Termination by implied surrender" provisions of section 6.4 of the Commission's regulations (18 C.F.R. § 6.4 (2008)), in part state:

If any licensee ... shall cause or suffer essential project property to be removed or destroyed, or become unfit for use, without replacement, or shall abandon, or shall discontinue good faith operation of the project for a period of three years, the Commission will deem it to be the intent of the licensee to surrender the license; and not less than 90 days after public notice may in its discretion terminate the license.

⁸ See letter from Arch Ford to Kimberly D. Bose (Commission Secretary).

power purchase agreement with the District, applying for remaining construction permits, obtaining Commission approval of remaining construction plans, and selecting and ordering equipment. The company estimated completing project construction by the third quarter of 2010, and accordingly requested an extension of the completion-of-construction deadline to September 30, 2010. On April 10, 2008, American Whitewater filed comments opposing the proposed extension and again asking the Commission to terminate the project license.

8. On April 30, 2008, the District filed a letter reflecting its interest in purchasing the project and asking the Commission to delay surrender proceedings.⁹ On May 30, 2008, the District filed another letter, stating that it anticipated filing, within 60 days, an application for the transfer of the project license and asking that staff inform it whether, if the District were to purchase the project, the implied-surrender order would be lifted.¹⁰

9. On June 17, 2008, American Whitewater filed a motion to show cause why Snoqualmie Hydro's license should not be considered surrendered as of the thirty-day deadline imposed by the October 4, 2006 implied-surrender order.¹¹ On July 1 and 2, 2008, respectively, Snoqualmie Hydro and the District each filed an answer opposing American Whitewater's show cause motion. The District also asked the Commission to vacate the implied-surrender order.¹²

10. On July 15, 2008, American Whitewater filed a motion to intervene in the extension proceeding. Snoqualmie Hydro filed an answer in opposition on July 31, 2008.

11. On August 6, 2008, Snoqualmie Hydro and the District jointly filed an application to transfer the license for the Youngs Creek Project from Snoqualmie Hydro to the District. The Commission issued public notice of the transfer application on August 19, 2008, and American Rivers intervened.

12. On October 7, 2008, Commission staff issued an order approving the transfer. The transfer was conditioned upon the District filing a signed form accepting the findings in the transfer order as well as the filing of copies of conveyance documents, both of which were filed on November 6, 2008. The transfer order required the District to file, for Commission approval, a request to extend the deadline for completion of construction

⁹ See letter, filed April 30, 2008, from Kim Moore (District) to Kimberly D. Bose.

¹⁰ See letter, filed May 30, 2008, from Kim Moore (District) to Kimberly D. Bose.

¹¹ In light of the subsequent transfer order, and the fact that American Rivers reiterates its argument in its request for rehearing, we herein dismiss the motion as moot.

¹² In addition, the District filed a motion to intervene.

along with a plan and a schedule for completing project construction, which it filed on October 30, 2008 (requesting an extension until December 31, 2010), and which are pending.

13. American Whitewater's request for rehearing of the transfer order followed.¹³

Discussion

A. The Transfer Order Provides a Rational Basis for Deferring the Implied-Surrender Action.

14. American Whitewater begins its request for rehearing by stating that it does not oppose the transfer of the project license.¹⁴ However, American Whitewater contends that the transfer order is inconsistent with the plain meaning of the wording of the October 4, 2006 implied-surrender order stating the Commission's intent to accept surrender of the license and to terminate the license. It argues that the transfer order provides no rational basis for reversing the license termination action.

15. The implied-surrender order and the transfer order are not inconsistent. As of the date of the implied-surrender order, Commission staff concluded that the licensee's failure to live up to the obligations of its license constituted implied surrender. We believe that this finding was reasonable when made. However, at the time of the transfer, circumstances had changed. At that time, we were not simply faced with yet another extension request from Snoqualmie Hydro. Rather, the District, which the transfer order notes is an experienced co-licensee of a licensed project, had demonstrated an interest in constructing, operating, and purchasing power from the project. This cleared what had appeared throughout these proceedings to be the major roadblock to project development -- finding a power purchaser.

16. In licensing the project in 1992, the Commission determined that the production of power from the project was best adapted to a comprehensive plan for the development of Youngs Creek.¹⁵ No party challenged that finding at the time of licensing and no party, including American Whitewater, challenges it now. There is no question that this proceeding has gone on far longer than we would prefer and that development of this

¹³ On November 20, 2008, the District filed a motion to allow an answer and an answer to American's request for rehearing. Answers to requests for rehearing are not permitted, 18 C.F.R. §§ 385.213 (a)(2) and 713(d)(1) (2008), and we accordingly reject the District's answer.

¹⁴ See request for rehearing at 1.

¹⁵ See *Snoqualmie River Hydro*, 59 FERC ¶ 62,124, at p. 63,326 (1992).

project has been delayed to an unfortunate extent. However, given the Nation's need for clean power from renewable sources, and the fact that the District is now prepared to move forward with the project, we believe that it is reasonable to transfer the license to the District and give that entity the opportunity to comply with the terms of the license.¹⁶

17. We note that we are not giving the District carte blanche to take as long as it wants to complete project construction. The transfer order requires the District to file a request to extend the deadline for completion of construction along with a plan and a schedule for completing project construction. If we conclude that the request or the schedule is not appropriate, we will not approve it. And while we cannot predict with certainty how we might act in the future, we believe that the District would bear a very heavy burden to support any further request for extension of the completion of construction deadline.

18. American Whitewater asks the Commission to clarify that, in issuing the notice of implied surrender, we intended that an additional order would be required to complete surrender. We so clarify. As noted above, Section 6.4 of our regulations¹⁷ states that where the Commission deems a licensee to have impliedly surrendered a license, "not less than 90 days after public notice [the Commission] may in its discretion terminate the license." The way we carry out the regulation is to issue a notice of implied surrender, which in this case we did in the October 4, 2006 notice. If, after reviewing any responses to the notice and examining the entirety of the record, we determine that the license should be deemed surrendered, we then issue a surrender order. It is that order that effectuates license surrender and is subject to rehearing and judicial review. In this case, we issued the notice, but not the final order. Thus, the project license has not been surrendered.¹⁸

¹⁶ This case is analogous to *North Hartland, LLC*, 111 FERC ¶ 61,192 (2005), where, after a "white knight" purchased the transferee, thus giving customers the opportunity to receive the benefits of project power, we rescinded an order that had revoked approval of a long-delayed transfer.

¹⁷ 18 C.F.R. § 6.4 (2008).

¹⁸ American Whitewater takes issue with the applicability here of two cases cited in the transfer order, *Leonard Lundgren*, 10 FERC ¶ 61,270 (1980) and *SR Hydropower, Inc. and SR Hydropower of Brockway Mills, Inc.*, 86 FERC ¶ 61,279 (1999). American Whitewater argues that in neither case was there as great a delay as there was here following the notice of surrender. However, these cases were not cited with respect to the amount of time between a notice and a surrender order, but rather to show that we do indeed issue both a notice and a surrender order before surrender is complete, and that we have transferred licensees after issuing a surrender notice. American Whitewater is correct that there was an unusually long time following the implied-surrender notice

(continued...)

B. The Transfer Order Does Not Conflict with FPA Section 13's Requirements for Extension of the Construction Deadline.

19. American Whitewater contends that the transfer order and its requirement for the District to file a request for extending the project construction deadline conflicts with section 13 of the Federal Power Act,¹⁹ since, it argues, granting any extension of the deadline would be directly contrary to that section's requirements regarding the timely commencement and completion of project construction.

20. Section 13 of the FPA states in pertinent part:

. . . 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 . . . , then, after due notice given, the license shall . . . be terminated upon written order of the Commission.

Thus, FPA section 13 requires commencement of construction by two years following issuance of license, subject to one extension, and completion of construction, subject to extensions under circumstances in which the licensee is pursuing project construction with due diligence.

21. There is no argument here with respect to the commencement of construction. As discussed above, project construction commenced in 1993. American Whitewater does not dispute this fact, nor could it do so at this late date.

22. With respect to the deadline for completing project construction, the Commission is empowered to grant extensions upon a showing of due diligence by the licensee. The number and length of such extensions is not limited. The transfer order's deferral of

before the next Commission action, but the delay, occasioned at least in part by the sale of the licensee and by the initiation of discussions between Snoqualmie Hydro and the District, could not serve to transform the surrender notice into a termination order, given that the regulations clearly require both notice and a separate subsequent order. Moreover, delay in the implied-surrender proceeding does not in any way invalidate the transfer.

¹⁹ 16 U.S.C. § 806 (2006).

license surrender in favor of license transfer and the District's filing of a request to further extend the completion-of-construction deadline (accompanied by a plan and a schedule for completing project construction) is consistent with Commission precedent and does not conflict with section 13.

23. American Whitewater asserts that the transfer order concluded that a further extension of the deadline for completing construction was in the public interest, and argues that that conclusion is not supported by substantial evidence. In fact, the transfer order made no such conclusion. Rather, it required the District to file a request for approval of a further extension of the completion-of-construction deadline, which is pending.

C. The Transfer Order is Consistent with the Commission's Policy against Site Banking.

24. Referencing an argument made in its motion to show cause,²⁰ American Whitewater contends that the transfer order's decision to maintain the license is inconsistent with the Commission's policy against site-banking.

25. We agree with American Whitewater that valuable competition for project sites can be stifled by "site-banking," in which an entity that is not able to develop a proposed project ties up the project site, and thus prevents others from developing it. As the Commission explained in *Idaho Power Company*²¹:

...the time limitations in [FPA] Section 13, prohibiting delays by licensees in constructing projects, and other provisions of the Act indicate a Congressional intent that water power resources be utilized in the best possible manner and at the earliest possible time.

26. The Commission has found that "[a] licensee cannot be found to be improperly banking a site if the Commission grants the licensee's requests for extension of the construction deadlines,"²² as was the case here. More to the point, the transfer order does not allow Snoqualmie Hydro to "bank" the project site, but rather transfers the license from it to an unaffiliated municipal entity.

²⁰ Request for rehearing at 13–14.

²¹ 14 FPC 55, 68 (1955), *aff'd*, *Idaho Power Company v. FPC*, 237 F.2d 777 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 924 (1956).

²² *Fieldcrest Cannon, Inc., Consolidated Hydro Southeast, Inc. and Eagle & Phenix Hydro Company, Inc.*, 55 FERC ¶ 61,096, at 61,295 (1991).

D. The Transfer Order Did Not Err in Failing to Require the District to Prepare a Supplemental NEPA Document.

27. American Whitewater contends that the transfer order erroneously failed to require the District to submit an updated environmental analysis of the project in light of the long delay. However, environmental issues are not relevant in a transfer proceeding, which simply involves the transfer of license from one entity to another, without any changes to the project, and thus involves no environmental impacts.²³ We note that American Whitewater does not suggest that any specific environmental conditions in the project vicinity have changed or that the license will not adequately serve to protect environmental resources. Should American Whitewater in the future have any concerns about the impacts of the project, it may bring them to the Commission's attention.

The Commission orders:

(A) The request for rehearing or clarification filed in this proceeding on November 6, 2008, by American Whitewater, except to the extent requested clarifications are included in this order, is denied.

(B) The motion filed in this proceeding on November 20, 2008, by the Public Utility District No. 1 of Snohomish County, Washington, to allow an answer to the filing in Ordering Paragraph (A) above is denied.

²³ See, e.g., *New England Power Company, et al.*, 83 FERC ¶ 61,272 at 62,132-33 (1998) (The transfer of a license does not alter the project's environmental impacts, and a transfer proceeding therefore is not the appropriate forum for addressing issues related to such impacts). Also, see 18 C.F.R. § 380.4(a)(8) (2008) of the Commission's regulations, which categorically excludes "[t]ransfers of water power project licenses . . . under Part I of the Federal Power Act" from the requirement for preparation of an environmental assessment or environmental impact statement.

(C) The motion to show cause, filed by American Whitewater on June 17, 2008, is dismissed as moot.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.