

129 FERC 61,132
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Seneca Falls Power Corporation

Project No. 2438-095

ORDER DENYING REHEARING

(Issued November 19, 2009)

1. Seneca Falls Power Corporation (Seneca Falls) is the licensee of the Waterloo and Seneca Falls Project, which is located on the 12.6-mile Seneca River section of the New York State Barge Canal System (Canal System) in Seneca, Yates, Schuyler, and Ontario Counties, New York. On July 16, 2009, Commission staff issued a compliance order¹ citing Seneca Falls for various failures to comply with its license, including the requirement to acquire rights necessary for project operation, to control reservoir surface elevations, to file results of wetland vegetation monitoring, and to construct a car-top launch facility. On August 17, 2009, Seneca Falls filed a timely request for rehearing, arguing that it has complied with its license, and that the compliance order was thus issued in error.² For the reasons set forth below, we deny Seneca Falls' request for rehearing.

Project Description

2. The 9.94 megawatt (MW) Waterloo and Seneca Falls Project consists of two developments that are 4.2 miles apart. The major features of the Waterloo development include a 16.5-foot-high, 306-foot-long dam (including a navigational lock structure that is part of the Canal System); an impoundment with a surface area of 43,200 acres (including Seneca Lake) and normal water surface elevations of 446.0 feet Barge Canal Datum (BCD) (summer) and 445.0 feet BCD (winter); an intake structure and forebay

¹ 128 FERC ¶ 62,039 (2009). The compliance order was issued under section 31(a) of the Federal Power Act (FPA), 16 U.S.C. § 823b(a) (2006).

² On August 3, 2009, Seneca Falls filed an incomplete request for rehearing, which was superseded by the August 17, 2009 filing.

canal; a powerhouse with three turbines; a tailrace; and a 20-foot-long primary transmission line.

3. The major features of the Seneca Falls development include a 68-foot-high, 286-foot-long dam (including a navigational lock structure that is part of the Canal System); an impoundment (Van Cleef Lake) with a surface area of 135 acres and normal water surface elevation of 430.5 feet BCD; an intake structure; a powerhouse with four turbines that rests on the crest and downstream face of the dam and extends 100 feet from the left bank to approximately the middle of the dam's downstream face; a tailrace; and a 300-foot-long primary transmission line.

Background

4. In 1965, the Commission first issued a license to New York State Electric & Gas Corporation (NYSEG) for the Waterloo and Seneca Falls Project, with an expiration date of December 31, 1993.³ The license included the powerhouses, but not the dams and lock structures at the Waterloo and Seneca Falls developments, which are owned and operated by the New York State Thruway Authority (Authority).

5. In 1991, the Commission issued an order,⁴ which concluded that the dams and lock structures were project works and thus required to be licensed by section 23(b)(1) of the FPA.⁵ The order noted NYSEG's statement that it did not have any property interests in the Seneca Falls dam, but that it was negotiating "easements for NYSEG's operations at the dam."⁶ The order stated that, if NYSEG decided to file an application to relicense the project, it would be required to include the dams and locks as part of the project works.⁷

³ Order Issuing License (Major), 33 F.P.C. 413 (1965).

⁴ *New York state Electric & Gas Corporation*, 56 FERC ¶ 61,144 (1991). The order required NYSEG to make certain repairs at the Seneca Falls dam, which NYSEG was able to do in cooperation with the State of New York.

⁵ 16 U.S.C. § 817(1) (2006).

⁶ 56 FERC at 61,528-29. Because the order concerned repairs only at Seneca Falls dam, the licensee did not address whether it possessed any property interests in the Waterloo dam.

⁷ *Id.* at 61,528.

6. NYSEG declined to seek a new license for the project. As a result, the Commission staff issued a notice soliciting applications from interested entities, and Seneca Falls filed an application for a new license for the project on November 5, 1993, as amended on October 6, 1994. The amended application included the project facilities licensed to NYSEG as well as the Canal System dams and locks, as required by the 1991 order. While the Commission considered Seneca Falls' application, NYSEG continued to operate the project under annual licenses.

7. In February 1997, Commission staff issued a new license for the project to Seneca Falls.⁸ Ordering Paragraph (B) made clear that the new license includes the locks and dams at both the Waterloo and Seneca Falls developments.

8. The conditions of the license that are at issue in this proceeding are: (1) standard Article 5, which requires Seneca Falls to acquire and retain title in fee to or the right to use in perpetuity project property sufficient to accomplish project purposes,⁹ and Article 203, which requires Seneca Falls to execute an asset purchase agreement with NYSEG and to file it for Commission approval; (2) Article 405, which requires Seneca Falls to maintain specific impoundment elevations for Seneca Lake and Van Cleef Lake to protect wetlands, wildlife, fish habitat, and recreation; (3) Article 412, which requires Seneca Falls to monitor wetland vegetation in the area of the Waterloo bypassed reach; and (4) Article 414, which requires Seneca Falls to file a recreation plan providing for, among other things, a car-top boat launch access point on Van Cleef Lake.

Discussion

A. Standard Article 5 - Rights Necessary for Project Operation

9. Standard license Article 5 requires a licensee, by five years after issuance of its license, to acquire and retain title in fee to, or the right to use in perpetuity, project property sufficient to accomplish all project purposes. The purpose of standard Article 5 is to ensure that the licensee has sufficient rights in project property to enable the

⁸ 78 FERC ¶ 62,113 (1997).

⁹ Ordering Paragraph (D). 78 FERC at 64,403, incorporating by reference the standard license articles set forth in Form L-3 (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States," printed at 54 F.P.C. 1817 (1975).

Commission, through the licensee, to carry out its regulatory responsibilities with respect to the project.¹⁰

10. In addition, recognizing that under the prior license NYSEG had owned and operated the project, Article 203 of the license required that Seneca Falls timely execute an asset purchase agreement with NYSEG to acquire from NYSEG the rights to project lands and facilities that NYSEG held and that were necessary for the continued operation and maintenance of the project.¹¹ The article required Seneca Falls to submit the agreement, for Commission approval, within four months (i.e., by July 1, 1997). The deadline was later extended to November 1, 1997.¹² Seneca Falls sought no further extensions and did not submit the asset purchase agreement for Commission approval.¹³

11. Over the years, the Commission and its staff have tried, without success, to get Seneca Falls to execute, and file with the Commission, an easement or operating agreement that would define its rights and responsibilities with respect to the Authority's dams and lock structures that are part of the license. Such an agreement is necessary to ensure that Seneca Falls can comply with the conditions of its license, including its operational and dam safety responsibilities. In the July 16 compliance order, Commission staff once again cited Seneca Falls for its continuing violation of standard Article 5.

12. On rehearing, Seneca Falls contends that it has not violated standard Article 5 of its license. It argues that easements (some dating back to 1916) obtained from NYSEG give it sufficient rights to operate the project, as required by standard Article 5. Seneca Falls maintains that it has all the rights that "NYSEG had and used to operate the project from 1965" until Seneca Falls assumed control in 1997.¹⁴ Moreover, it asserts that, by

¹⁰ Any non-licensee who owns or controls rights necessary for the operation of a project must become a licensee. *See City of Fayetteville Public Works Commission*, 16 FERC ¶ 61,209 (1981).

¹¹ *Id.* at 64,393.

¹² *See* order (unpublished) of October 14, 1997.

¹³ By letter filed June 15, 1998, NYSEG notified the Commission that, effective May 21, 1998, it had transferred its ownership interests in the project to Seneca Falls. On March 11, 1998, Commission staff placed a copy of the asset purchase agreement in the non-public record for the project. The agreement was, however, incomplete in that it contained none of the schedules referred to in the agreement.

¹⁴ Request for rehearing at 4.

acquiring all of NYSEG's rights to the project as required by Article 203, it has fully complied with its license. Seneca Falls alleges that NYSEG's operation of the project with these same rights for more than thirty years without incident is further evidence that nothing further is required of it. In support of its arguments, Seneca Falls provides a copy of the sale and purchase agreement with NYSEG, including copies of the easements and other documents referred to therein.¹⁵

13. We reject Seneca Falls' arguments. As noted, Article 203 required Seneca Falls to submit for Commission approval, no later than November 1997, its asset purchase agreement documenting the rights in the project that NYSEG transferred to it. For some 12 years, Seneca Falls never submitted the agreement for Commission review and approval. Now, it belatedly submits the agreement and related documents with its rehearing request and avers that they demonstrate that Seneca Falls has all the rights it needs to operate the project. In fact, they do not.¹⁶

14. As noted, the prior license did not include the dams and lock structures, and NYSEG (the prior licensee) admitted that it lacked any property interest in the structures.¹⁷ Thus, any property and other rights it conveyed to Seneca Falls through the asset purchase agreement could not have included rights to operate and maintain in a safe condition the dams and lock structures. Indeed, the asset purchase agreement bears this out. The agreement shows that Seneca Falls owns the project's powerhouses and generating facilities and certain parcels of land at the project. In addition, Seneca Falls (as successor in interest) has "the right, without prejudice to the canal, and subject always

¹⁵ Any suggestion by Seneca Falls that it has met its obligations under standard Article 5 by its compliance with Article 203 is without merit. Article 203 deals only with property rights transferred from NYSEG to Seneca Falls at the time that Seneca Falls assumed control of the project. Standard Article 5 is an independent, ongoing requirement to acquire and hold through the license term whatever rights a licensee needs to carry out its responsibilities under the license, which, as the Commission made clear in the 1991 order, includes facilities not held by NYSEG under the prior license. In any event, as noted, Seneca Falls has not complied with Article 203. It did not (until now) file its asset purchase agreement, and the Commission has not yet approved it.

¹⁶ And even if they did, it would not excuse Seneca Falls long-term lack of compliance or invalidate staff's conclusion that the company was not in compliance with its license.

¹⁷ See 56 FERC at 61,528-29. NYSEG stated that "its lack of any property interest in Seneca Falls Dam" prevented it from performing required stabilization work at the dam. It was able to perform the required work only in cooperation with the Authority.

to the prior and dominant rights of the State, to utilize at such new dams, for the production and use of power, the remaining waters of the Seneca Outlet, not needed for canal purposes....”¹⁸ However, the State of New York specifically retains “the right to construct, and, in perpetuity to maintain and operate the dam, pool, locks and other structures now constructed and in the process of construction ... as part of the canal system of the State....”¹⁹

15. Seneca Falls’ claim that the rights acquired from NYSEG through the asset purchase agreement are sufficient for project purposes is disingenuous.

16. From at least late 1996 (before its license was issued) until August 2009 when it filed its request for rehearing in this proceeding, Seneca Falls has known that an easement or operating agreement with the Authority was needed. In a meeting shortly before the license was issued, Commission staff discussed with Seneca Falls the need for an operating agreement to give Seneca Falls the ability to operate, maintain, and (when necessary) repair the dams and appurtenant facilities owned by the Authority, but included in the license.²⁰ At that meeting, Seneca Falls “assured the Commission staff that once the license was issued, [Seneca Falls] would take the necessary steps to ensure that its Part 12 responsibilities were met.”²¹ In a 2004 filing, Seneca Falls stated that it was negotiating an easement agreement with the New York State Canal Corporation (Canal Corporation), a subsidiary of the Authority, and was reminded that it “remains out of compliance with Article 5 until such an agreement is reached.”²² In 2004, Commission staff issued a compliance order, citing Seneca Falls’ continuing violation of standard Article 5 for its failure to acquire the rights needed to operate and maintain all project facilities.²³

17. In 2005, Seneca Falls, among other things, (1) admitted that it failed to file the required operating agreement between it and the Authority, (2) agreed to pay penalties for

¹⁸ Rehearing request, Exhibit 3 at 16.

¹⁹ *Id.* at 15.

²⁰ *See* Compliance Order, 87 FERC ¶ 62,237 at 64,386 (1999); and Compliance Order, 92 FERC ¶ 62,031 at 64,036 (2000).

²¹ 87 FERC ¶ 62,237 at 64,386.

²² *See* Order Modifying and Approving, In Part, Flow Monitoring Plan Under Article 406, 108 FERC ¶ 62,232 at n.4 (2004).

²³ 109 FERC ¶ 62,030 (2004). Seneca Falls did not seek rehearing of this order.

the violation, and (3) agreed to execute and submit the operating agreement.²⁴ In 2006, Commission staff noted Seneca Falls' failure to file the agreement.²⁵ In 2007, the Commission affirmed the Commission staff's finding of the continuing violation and reminded Seneca Falls that, "[u]nder 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."²⁶

18. Seneca Falls also attaches to its rehearing request²⁷ certain operating procedure documents (e.g., Spillway Gate Operations Plans) showing "operating parameters, governing items such as emergency procedures."²⁸ These operating procedure documents were made "[i]n the absence of an operating agreement" and their limited rights in the Authority's locks and dams are not a substitute, under the requirements of standard Article 5, for a comprehensive operating agreement that provides the broader rights necessary for the construction, operation, and maintenance of licensed project works.²⁹

19. For the above reasons, we deny rehearing on this issue.

²⁴ Order Approving Stipulation and Consent Agreement, 113 FERC ¶ 61,142 (2005). Under the agreement, the Commission assessed total penalties of \$300,000 for numerous license violations (for this and other licenses), \$110,000 of which would be returned to the licensees' parent company as an incentive for the licensee to achieve and maintain full compliance. *Id.* P 16. Seneca Falls' admission of non-compliance estops it from arguing to the contrary here.

²⁵ See Commission staff letter dated November 7, 2006. The letter informed Seneca Falls and the other licensees that the remission of the \$110,000 in penalties was cancelled because of continuing, uncorrected violations.

²⁶ Order Denying Rehearing, 118 FERC ¶ 61,195 at n.20 (2007).

²⁷ Request for rehearing, Exhibit 4.

²⁸ Request for rehearing at 6.

²⁹ In addition to their limited operational scope, the documents do not appear to include provisions making them perpetual and transferable, which are required to comply with standard Article 5. See, e.g., *Menominee Co., et al.*, 72 FERC ¶ 62,065 (1995), *reh'g denied*, 74 FERC ¶ 61,023 (1996).

B. Article 405 - Reservoir Surface Level Elevation

20. Article 405 requires Seneca Falls to control fluctuations of the reservoir surface elevations at both the Seneca Falls and Waterloo developments for the protection of wetlands, wildlife, fish habitat, and recreational opportunities in the project impoundments. Deviations from the Article 405 parameters are permitted if due to emergency conditions beyond Seneca Falls' control, or for short periods of time upon mutual agreement with the Authority and the New York State Department of Environmental Conservation (New York DEC). If the water levels are so modified, Seneca Falls must notify the Commission as soon as possible, but not later than 10 days after each such incident.

21. Over the years, there have been many issues regarding Seneca Falls' maintenance of the reservoir elevations required by Article 405.³⁰ In May 2009, Commission staff informed Seneca Falls that lake levels at Seneca Lake exceeded the Article 405 parameters from December 28, 2008, through January 2, 2009.³¹ The letter ordered Seneca Falls to file a report containing reservoir surface level elevation records and generation data from November 10, 2005, to the present, and to provide a detailed analysis and summary of all deviations from Article 405 parameters during that time period, giving the reasons for each deviation, the severity of each deviation, and a plan to avoid such deviations in the future.³² The letter called for a response by June 2, 2009. Seneca Falls did not file the data by June 2, 2009, and did not request an extension of time.

22. After receipt of the July 16 compliance order, Seneca Falls filed a response to the May 12 letter on August 5, 2009. On rehearing, Seneca Falls argues that it "has operated the project in compliance with the license article and any deviations are the result of circumstances outside its control."³³

23. We reject this argument. The August 5, 2009 filing indicates that the licensee was in violation of its Article 405 rule curve requirements for a total of 380 days during the period from November 10, 2005, through June 30, 2009, or more than 28 percent of the

³⁰ See, e.g., Commission staff letter orders dated January 29, 2003; September 29, 2006; September 16, 2008; and September 10, 2009.

³¹ See May 12, 2009 letter from Commission staff.

³² This information is required by Seneca Falls' flow monitoring plan. See 108 FERC ¶ 62,232 at 64,452-53 (2004).

³³ Request for rehearing at 9.

time. Further, the filing does not fully respond to the May 12, 2009 letter. Rather than providing a detailed analysis and summary of the Article 405 deviations for the relevant time period, with the reasons for each deviation, the severity of each deviation, and a plan to avoid deviations in the future, Seneca Falls provided only sketchy descriptions such as “Storm runoff surcharge.” This hardly rises to the level of a detailed analysis and summary of all deviations, as required by the May 12, 2009 letter, and certainly does not provide any assurances that Seneca Falls has a plan for avoiding such deviations in the future.³⁴ Finally, Seneca Falls’ license requires that it submit this information for each Article 405 deviation within 10 days of each incident, which it has not done.

24. For the above reasons, we deny rehearing on this issue.

³⁴ On rehearing, Seneca Falls references its submissions of data on April 2, 2009, April 3, 2009, April 21, 2009, and June 2, 2009, prior to the issuance of the compliance order. Rehearing request at 8. These data submissions were also deficient. The April 2, 2009 filing contained data on project reservoir levels for December 2008 through February 2009, indicating that the licensee was in violation of its Article 405 requirements at Seneca Lake for 5 consecutive days during that period. No explanation for the deviations or additional information was provided. The April 3, 2009 filing contained data on project reservoir levels for June 2008 through October 2008, indicating that the licensee was in violation of its Article 405 requirements at Seneca Lake for 38 consecutive days during that period. While “drought conditions” were cited for deviations, no plan to avoid deviations in the future was provided. Seneca Falls attached to its rehearing request a letter, dated April 21, 2009, from Seneca Falls to State Senator Michael Nozzolio, stating that locking practices of the Canal Corporation contribute to low lake levels at Seneca Lake, but made no filing on that date. No plan to avoid deviations in the future was provided. The June 2, 2009 filing is a letter responding to a letter that the Canal Corporation filed with the Commission on May 19, 2009. The Canal Corporation letter stated that Seneca Lake’s water levels are regulated through hydropower generation and complained that Seneca Falls is violating its Article 405 requirements. Seneca Falls’ June 2, 2009 letter stated that its compliance with the requirements of Article 405 is affected by the Canal Corporation’s locking practices during summertime and periods of drought conditions. In its letter, Seneca Falls attempted to place blame for its failure to comply with the Article 405 requirements on the Canal Corporation locking practices. The letter did not contain reservoir surface level elevation records and generation data for November 10, 2005, to the present, and, again, did not contain a plan to avoid deviations in the future.

C. Article 412 - Wetland Monitoring

25. Article 412 requires Seneca Falls to file a plan to monitor an area of wetland vegetation in the Waterloo bypassed reach. Seneca Falls filed a plan, which the Commission staff modified and approved in September 2004.³⁵ The September 2004 order requires Seneca Falls, during the 2008 growing season, to (1) measure the approximate dimensions of the wetland; (2) perform a vegetation survey for the wetland; and (3) measure flows at two locations in the bypassed reach of the Waterloo development in order to estimate leakage and confirm the adequacy of releases to the wetland. Further, the order required Seneca Falls to file a report with the Commission describing the results of the monitoring by September 30, 2008. Prior to filing the report, Seneca Falls was required to submit the report to the U.S. Fish and Wildlife Service (FWS) and the New York DEC for a 30-day comment period, and to include in the filing the comments received from FWS and the New York DEC in addition to its response to these comments. Seneca Falls did not file the report by the September 30, 2008 deadline or seek an extension of the deadline.

26. In response to the compliance order, Seneca Falls filed on July 24, 2009, a copy of its report at the same time that it sent the report to the FWS and New York DEC. On August 28, 2009, Seneca Falls filed the same report, this time along with a letter indicating that the report had been submitted to FWS and New York DEC and that no responsive comments were received. In its rehearing request, Seneca Falls states it filed the report on July 24, 2009, and it therefore has complied with Article 412.

27. Seneca Falls' July 24, 2009 filing was deficient because it lacked documentation of consultation, comments from resource agencies, or responsive comments as required by Article 412 and the September 2004 order. The August 28, 2009 filing is under review by Commission staff. However, even assuming that the report is sufficient, the report was almost one year late, and then only filed in response to the compliance order. That Seneca Falls may have eventually come into compliance with a condition of its license does not alter the fact of the prior violation.

28. For the above reasons, we deny rehearing on this issue.

³⁵*Seneca Falls Power Corporation*, 108 FERC ¶ 62,234 (2004). The plan was due September 1997, but was not filed until June 2004. See *Compliance Order*, 99 FERC ¶ 62,171 (2002).

D. Article 414 - Car-Top Launch Facility

29. Article 414 requires Seneca Falls to file a final recreation plan by July 1, 1997.³⁶ On July 26, 2004, Seneca Falls filed its recreation plan, and Commission staff approved it on March 14, 2006.³⁷ The order approved Seneca Falls' plan to develop a car-top boat launch with parking for five vehicles on Van Cleef Lake, and its proposal to obtain any necessary permits by May 16, 2006, and construct the facility as soon as soil conditions permit and water levels are drawn down in the fall. Seneca Falls has not constructed the car-top boat launch and parking area.

30. On rehearing, Seneca Falls states that it has designed the facility and has filed a permit application with the Canal Corporation but that the permit has been unjustifiably denied. Seneca Falls argues that “[i]ts inability to construct is the result of the NYS Canal Corp and is clearly outside the control of Seneca Falls.”

31. The 1997 license required the construction of a car-top launch. Seven years later, Seneca Falls filed its recreation plan, which stated that Seneca Falls expected to obtain the necessary permits within 30 days, after which it would install the required facilities. Now, twelve years after the requirement was established and five years after Seneca Falls filed its implementation plan, the facilities have yet to be constructed. The information submitted with its rehearing request shows that, in fact, Seneca Falls applied for the permit on July 28, 2009, after the issuance of the July 16 order. The Authority states that it cannot process the permit request until an operations and maintenance agreement is in place.

32. That Seneca Falls has been unable to obtain a permit from the Canal Corporation does not excuse Seneca Falls' failure to comply with its license. As noted above, standard Article 5 requires Seneca Falls to obtain all rights necessary to carry out its responsibilities under the license. Moreover, as we have explained to Seneca Falls previously, in the event that it is unable to acquire the necessary rights through contracts or other agreements, section 21 of the FPA confers on it the power of eminent domain to acquire such rights.³⁸

33. For the above reasons, we deny rehearing on this issue.

³⁶ It did not seek extensions of the 1997 deadline. *See* Compliance Order, 99 FERC ¶ 62,171 (2002.)

³⁷ Order Modifying and Approving Recreation Plan Pursuant to Article 414, 114 FERC ¶ 62,243 (2006).

³⁸ 118 FERC ¶ 61,195 P 11 n.20 (2007).

Conclusion

34. The magnitude of Seneca Falls' violations and their continuing nature are unacceptable. Accordingly, we are referring the matter to our Office of Enforcement for consideration of appropriate action.

The Commission orders:

(A) Seneca Falls' request for rehearing is denied.

(B) Seneca Falls' violations of its license and the orders referenced herein are referred to the Commission's Office of Enforcement for consideration of appropriate action.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.