

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Electric Plant Board of the City of Augusta, Kentucky Project Nos. 10395-027,
-029, and -030

ORDER REJECTING REVISED FINANCING PLAN, MAKING
DETERMINATION REGARDING COMMENCEMENT OF CONSTRUCTION,
DENYING REQUEST FOR STAY OF LICENSE, DISMISSING LICENSE
AMENDMENT APPLICATION, AND ISSUING NOTICE
OF PROBABLE TERMINATION OF LICENSE

(Issued September 28, 2005)

1. In this order, we respond to various pleadings related to the efforts of Electric Plant Board of the City of Augusta, Kentucky (Augusta), licensee for the Meldahl Hydroelectric Project No. 10395, to commence project construction. Specifically, we: (1) reject a revised plan to finance the project; (2) determine that Augusta did not commence construction by the statutory deadline; (3) deny Augusta's motion for a stay of license; (4) dismiss its application, filed April 29, 2005, for an amendment of the license; and (5) issue notice of probable termination of the license.

Background

2. On July 29, 1995, the Commission issued a license to Augusta for the proposed 105-megawatt Meldahl Hydroelectric Project, to be located at the U.S. Army Corps of Engineers' Meldahl Locks and Dam on the Ohio River, in Bracken County, Kentucky.¹

¹ *City of Augusta, Kentucky*, 72 FERC ¶ 61,114 (*Augusta*).

3. Section 13 of the Federal Power Act (FPA)² states that a licensee must commence construction of project works within the time fixed in the license, which shall not be more than two years from the date thereof, and that the Commission may extend the deadline for commencement of project construction once, for no longer than two additional years. Article 301 of the license required Augusta to begin construction within two years (by July 31, 1997) and to complete construction within four years from the issuance date of the license (by July 31, 1999).³ Augusta subsequently sought and obtained an extension of time to commence construction by July 31, 1999.⁴

4. Augusta thereafter sought and obtained legislation authorizing the Commission to grant up to three further two-year extensions of the commencement of construction deadline.⁵ Augusta requested, and Commission staff granted,⁶ all three extensions, bringing the current deadline to commence construction to July 31, 2005.

5. Augusta also applied for, and received in December 2003, an amendment of the license to revise the project design from a conventional design with turbines located at a new powerhouse to a design based on the placement of 105 small turbines within the dam (microturbine design).⁷ Augusta stated at that time that the microturbine design would make the project less costly to construct.⁸

² 16 U.S.C. § 806 (1994).

³ *Augusta*, 72 FERC at 61,607.

⁴ Unpublished order issued by the Office of Hydropower Licensing on June 24, 1997.

⁵ Pub. L. No. 105-213 (1998).

⁶ Unpublished orders issued by the Office of Energy Projects, Division of Hydropower Compliance and Administration, on July 29, 1999, August 8, 2001, and January 13, 2004.

⁷ *City of Augusta, Kentucky*, 105 FERC ¶ 62,265.

⁸ Augusta estimated the microturbine design to cost about \$89 million in 2004 dollars. See January 23, 2003 amendment application at E-1.

6. Augusta subsequently concluded that the microturbine design would be far more costly than anticipated and, on April 29, 2005, filed an application to amend the license to return to the originally licensed project configuration.⁹
7. On May 25, 2005, Commission staff notified Augusta that various preconstruction filings required by the license were overdue.¹⁰ On June 2, 2005, Augusta filed a letter with the Commission stating its intent to commence construction by the fabrication of equipment, and that it considered due dates for the preconstruction filing requirements, with the exception of a Financing Plan, to be triggered by the commencement of on-site construction activities, rather than by construction by fabrication of equipment.¹¹
8. On June 13, 2005, Augusta filed¹² for Commission approval a Project Financing Plan, as required by license Article 305.¹³ On June 30, 2005, the Financing Plan was rejected as patently deficient.¹⁴
9. On July 11, 2005, Augusta filed a letter of intent regarding the sale of project power to certain utilities.

⁹ The application was docketed as P-10395-027. Augusta now estimates the construction of the project as originally configured to be \$138 million in 2006 dollars. *See* April 29, 2005 amendment application, Appendix I at I-1. It does not provide a current estimate of the cost of the microturbine design.

¹⁰ Letter to Eddie Hay, City of Augusta, from William Guey-Lee, Division of Hydropower Compliance and Administration (DHAC). The overdue filings included plans for project financing, soil erosion control during construction, vegetation management, aesthetic resources management, water quality monitoring, streamflow gaging, endangered species monitoring, and recreation management.

¹¹ Letter to Commission Secretary from James B. Price, AJS Hydro Corp. Mr. Price is the President of Meldahl Hydroelectric LLC, agent for Augusta. AJS is a partner in Meldahl Hydroelectric LLC.

¹² The request to approve the Financing Plan was docketed as P-10395-029.

¹³ *Augusta*, 72 FERC at 61,067.

¹⁴ Letter to Eddie Hay, City of Augusta, from Mohamad Fayyad, DHAC.

10. On July 25, 2005, Commission staff issued a letter stating that commencement of construction, whether by on-site activities or by fabrication of the generating equipment, must, as required by the license, be preceded by a Commission-approved Financing Plan.¹⁵

11. On July 28, 2005, Augusta filed a revised Financing Plan, including additional explanation and documentation.¹⁶ On July 29, 2005, Augusta filed information purporting to demonstrate that it commenced construction by fabrication of equipment,¹⁷ as well as a motion for a stay of the license,¹⁸ including the deadline for commencement of construction, pending Commission action on its April 29, 2005 license amendment application.

Discussion

A. Financing Plan

12. Article 305 states, in pertinent part:

At least 90 days before starting construction, the Licensee shall file for approval . . . a project financing plan. The plan must show that Augusta has acquired the funds, or commitment for funds, necessary to construct the project in accordance with this license. The Licensee shall not start any project construction or ground-disturbing activities (other than those required for subsurface site exploration) before the project financing plan is approved.

13. Augusta's original Financing Plan stated its intention to secure project financing with the stream of revenue provided by the sale of project power to LG&E Energy (LG&E). It stated that Augusta had entered into an agreement with Energy Investor Funds, Inc. (EIF), to finance, construct, and operate the project, and that EIF and another

¹⁵ Letter to Eddie Hay from Mohamad Fayyad.

¹⁶ Letter to J. Mark Robinson, Director, Office of Energy Projects, from James B. Price.

¹⁷ Letter to Commission Secretary from James B. Price.

¹⁸ The stay request was docketed as P-10395-030.

entity (AJS Hydro, or AJS) would arrange project financing with a combination of debt and equity. Augusta's filing was accompanied by a letter from EIF stating that it is prepared to provide the equity investment subject to: (1) satisfactory completion of the license amendment application; (2) execution of a power purchase agreement, (3) execution of an engineering, procurement, and construction (EPC) contract; and (4) approval from EIF's board of directors.¹⁹ Commission staff found that EIF's letter of intent does not satisfy the requirement to show that Augusta has acquired the funds, or commitment of funds, necessary to construct the project.²⁰

14. In its revised Financing Plan, Augusta reiterates that EIF is committed to providing \$30,000,000 in equity financing, and attaches a letter from EIF to that effect. Augusta states that EIF and AJS have engaged BNP Paribas (BNP), to arrange approximately \$110,000,000 for construction financing and term debt for the project. A letter from BNP is attached to Augusta's filing. Augusta also attaches what it characterizes as a letter of intent "committing LG&E to buy the [project] power, based on final price negotiations," which will "serve as the basis for the power sale agreement."²¹

15. We have examined the materials submitted by Augusta. The letter from EIF is nothing more than a general statement, based on discussions with Augusta, LG&E, and Voith Siemens Hydro Power Generation (Voith) (a possible EPC contractor) that the project is viable, and that EIF will provide 100 percent of the equity financing, "subject to the satisfactory completion of outstanding regulatory approval and final approval of the Board of Directors." BNP states only that it has been retained to evaluate whether the project can be financed and, based on its review, "it is our belief that the Project should be able to access the bank markets and capital markets to obtain financing" for construction and operation. It concludes by stating that its letter is "not meant to be a binding commitment to lend" and lists numerous conditions that would apply to any such commitment. LG&E's letter of intent states that it does not bind the parties to enter into a power purchase agreement. It merely lists, by way of example, various terms and conditions that would be included in any power purchase agreement that might be executed. These documents do not come close to demonstrating that Augusta has acquired the funds, or a commitment of funds, necessary to construct the project.

¹⁹ Augusta's June 13, 2005 filing at 1.

²⁰ June 30 letter from Mohamad Fayyad at 2.

²¹ Revised Financing Plan at 2.

16. Augusta requests as an alternative to approving its Financing Plan that we find that Article 305 does not apply to commencement of construction by fabrication of equipment, but only to commencement of on-site construction. It contends that the intent of the project financing plan requirement is to ensure that the public is not harmed by a licensee failing to complete construction, which could cause environmental harm, damage to property, or expense to third parties to restore the project site.²²

17. Augusta is correct that financing plan requirements have been based at least in part on these concerns.²³ We note, however, that Article 305 prohibits “*any* project construction *or* ground-disturbing activities” (emphasis added) until a financing plan has been approved. The use of disjunctive language indicates that construction involving ground-disturbing activity is not the Commission’s only concern in making this requirement. The plain language is, moreover, consistent with our imposition of financing plan requirements based on more general concerns regarding the economic viability of a proposed project, including the license order in this proceeding.²⁴

18. Finally, Augusta requests that if we approve the revised Financing Plan but do not agree with its construction of Article 305, we grant it a waiver or extension of the requirement to file its Financing Plan 90 days before the commencement of construction, and backdate approval of the revised Financing Plan to ensure that Augusta remains in compliance with the prohibition on commencing construction until the Financing Plan is approved. Because we do not approve of the revised Financing Plan, and, as discussed below, we find that Augusta did not commence construction, this request is moot.

B. Commencement of Construction

19. In general, project construction is regarded as having commenced with the start of work on machinery or facilities considered to be significant, permanent elements of the

²² Revised Financing Plan at 3.

²³ See, e.g., *Eric R. Jacobson*, 96 FERC ¶ 61,298 at 62,105 (2001); *Felts Mills Energy Partners, L.P.*, 82 FERC ¶ 61,030 at 62,122 (1998); *City of LeClair, Iowa*, 74 FERC ¶ 62,127 at 61,462 (1996); and *Augusta*, 72 FERC at 61,600 (1995).

²⁴ See, e.g., *Halecrest Co.*, 60 FERC ¶ 61,121 at 61,401 (1992); *Augusta*, 72 FERC at 61,594.

project.²⁵ Because construction requirements range from building new dams and powerhouses to refurbishing existing ones, the acts which constitute the commencement of construction will vary from project to project.

20. Commencement of construction at an existing dam may take the form of construction at the project site to prepare facilities for the installation of turbines or generators, or the commencement of manufacture of turbines or generators where such manufacture will take as long as or longer than physical construction at the site.²⁶ FPA section 13's requirement to "commence actual construction" requires more than mere preliminary work performed by the licensee incidental to the initiation of actual physical construction of those project works or turbines.²⁷ Where the beginning of manufacture of turbines or generators or other equipment marks the commencement of construction, a licensee must substantiate actual construction in accordance with engineering specifications for that particular project and pursuant to an enforceable contract.²⁸

²⁵ See *Cascade Water Power Development Corp.*, 69 FERC ¶ 61,167 (1994) (*Cascade*) (significant permanent elements include diversion works, including the diversion tunnel, gates or other diversion equipment; or excavation for foundations, outlet works, power tunnels, or spillways); *City of Summersville, W. Va.*, 77 FERC ¶ 61,046 at 61,164 (1996) (*Summersville*) (fabrication of draft tubes). A building on the project site to store equipment is not a significant project element. *Daniel J. Horrall*, 52 FERC ¶ 61,302 at 62,210 (1990).

²⁶ See *Cascade*, 69 FERC ¶ 61,167 at 61,643; *UAH-Braendly Hydro Associates*, 46 FERC ¶ 61,178 at 61,591 (1989) (*UAH-Braendly*); *Geoffrey Shadroui*, 70 FERC ¶ 61,237 at 61,279 (1995) (*Shadroui*); *Atlantic Power Development Corp.*, 40 FERC ¶ 61,253 at 61,857 (1987) (*Atlantic*). This standard applies both to construction at an existing dam with an existing powerhouse (*e.g.*, *Cascade*, *UAH-Braendly*) and to construction at existing dams without an existing powerhouse (*e.g.*, *Shadroui*, *Atlantic*).

²⁷ *Atlantic*, 40 FERC ¶ 61,253 at 61,857 (1987); *City of Vanceburg, Ky.*, 25 FERC ¶ 61,352 at 61,787 (1983).

²⁸ *CPS Products, Inc.*, 111 FERC ¶ 61,071 at P 13 (2005); *City of Orrville, et al.*, 91 FERC ¶ 61,309 at 62,055 (2000); *Shadroui*, 70 FERC ¶ 61,237 at 71,729 (1995); and *Catalyst Energy Development Corp.*, 52 FERC ¶ 61,303 at 62,212, n. 9 (1990). The enforceable contract requirement was established in *UAH-Braendly*, 46 FERC ¶ 61,178 at 61,592.

21. Augusta submits that it commenced construction (on the project as proposed in the pending amendment application) prior to the July 31, 2005 deadline. In support, it submits documents showing that Voith fabricated two sections of steel plate for the draft tube liner²⁹ for one of the project turbines. Augusta further states that it has entered into “an agreement with [Voith] to construct the project,”³⁰ as evidenced by a term sheet, which sets forth conditions for project construction and for an EPC contract to complete construction.

22. Assuming that this was an instance where project construction could begin through the fabrication of equipment, rather than by activity at the project site,³¹ Augusta still would have failed to commence construction. As noted above, the test for commencing construction through the manufacture of equipment requires that work begin on machinery or facilities considered to be significant, permanent elements of the project, pursuant to the terms of an enforceable contract. Augusta fails both parts of this test. First, we do not consider a \$6,300 purchase order to fabricate two metal plates, with nothing more, to be an enforceable contract to construct a \$138 million project, or any significant, permanent element thereof.³² Second, the term sheet submitted by Augusta is merely an agreement that for a period of time Voith will have the exclusive right to offer a price for an EPC contract that would be subject to various conditions set forth on the term sheet, and that if the contract price target is met, the parties would negotiate an EPC contract. That is not an enforceable contract.

²⁹ A draft tube is the conduit through which water departing the turbines flows into the project tailrace.

³⁰ Augusta’s July 29, 2005 filing at 1.

³¹ Augusta has not shown that such is the case here. Augusta’s unsupported statement that equipment manufacture will be the most time-consuming part of project construction is not enough to show that fabrication will take longer than on-site activities. Indeed, the fact that, if Augusta’s amendment application is granted, it will construct a powerhouse, an intake channel, and a two-mile-long transmission line, makes such an assertion questionable.

³² By contrast, fabrication of the draft tubes in *Summersville* was undertaken pursuant to a contract to provide all of the electric generating equipment for the project, including the turbines and draft tubes, and under which the licensee had paid the contractor several hundred thousand dollars. *See* 77 FERC at 61,164 (1996).

23. Perhaps more important, Augusta's current license, as amended at its request, authorizes it to construct the microturbine design. The facilities based on which it purports to have commenced construction are not suitable for that design, but rather could be part of the project as originally proposed. Although Augusta's April 2005 amendment application seeks authorization to revert to the earlier design, that application has not been approved. Therefore, its activities were with respect to a project that it is not authorized to build, and cannot serve as the commencement of construction.³³

C. Stay Request, Amendment Application, and Notice of Probable Termination of License

24. As discussed above, we are rejecting Augusta's revised Financing Plan and have concluded that it did not timely commence construction. Augusta asks us to provide it a further opportunity to continue its efforts to construct the project by staying the license until we have acted on the amendment application and, if the application is granted, backdating it to allow sufficient time to complete these requirements, as well as the other pre-construction activities.

25. In acting on stay requests, the Commission applies the standard test set forth in the Administrative Procedures Act,³⁴ *i.e.*, the stay will be granted if "justice so requires."³⁵ We have granted requests for stay of the commencement of construction deadline, or of the entire license, only in narrowly-circumscribed circumstances.³⁶ We will not grant a request for a stay merely to relieve the licensee of the statutorily-prescribed commencement of construction deadline,³⁷ or to prevent mandatory termination where,

³³ See *CPS Products, Inc.*, *supra n.* 28, 111 FERC ¶ 60,071 at P 13 (work on unauthorized equipment cannot be considered construction for start-of-construction purposes).

³⁴ 5 U.S.C. § 705 (1994).

³⁵ See, *e.g.*, *Clifton Power Corp.*, 58 FERC ¶ 61,094 at 61,343 (1992).

³⁶ See, *e.g.*, *East Bench Irrigation District*, 59 FERC ¶ 61,277 at 62,005-06 (1992).

³⁷ See *Town of Telluride, Co.*, 75 FERC ¶ 61,296 (1996); *American Fork Hydro Associates*, 55 FERC ¶ 61,064 (1991); *John C. Simmons*, 52 FERC ¶ 61,315 at 62,265 (1990).

because of the licensee's own actions or inactions, construction was not commenced prior to the statutory deadline.³⁸

26. Augusta contends that it has worked diligently to pursue project construction and to amend the license for reasons beyond its control in the limited time available to it and that a stay is in the public interest. In support, it states that it did not learn of price increases in the microturbine design until late 2004 and shortly thereafter began drafting its license amendment application. It states that the amendment application was not filed until April 29, 2005, because it spent additional time consulting with various federal and state agencies to resolve numerous issues. Augusta cites in addition the actions and documents discussed above concerning financing, project construction, and the sale of project power. It contends that its actions are in contrast to instances where the Commission has denied applications for a stay of license based on "eleventh-hour" amendment applications.³⁹ Augusta concludes that granting a stay will serve the public interest by fostering the addition to the nation's energy supply of new capacity at an existing dam.

27. Augusta has not demonstrated that a stay is warranted. In the ten years since license issuance, it has been unable to execute project financing or power sales agreements under either project configuration. The record moreover does not support the conclusion that reconfiguration of the project as originally licensed is any more likely to enable it to be financed than it was when the license was issued a decade ago. Rather, it shows that the licensee, for whatever reasons, has been unable to settle on a project design or to secure financing, such that we see no reasonable prospect that the project will ever be built. After a licensee has held a license for such a length of time without making substantial progress toward project construction, the public interest requires that the license be terminated, thus freeing the site for development by other entities, or for other beneficial public uses. There is, contrary to Augusta's assertions, nothing extraordinary about this situation. We will, therefore, deny its request for a stay, dismiss its application to amend the license, and give notice of probable termination of the project license.

³⁸ See *Utilities Commission and City of Vanceburg, KY*, 42 FERC ¶ 61,169 at 61,600-1 (1988).

³⁹ Augusta cites *Southeastern Hydro-Power, Inc.*, 71 FERC ¶ 61,074 at 61,253 (1995) (amendment application filed two weeks before construction deadline), and *Borough of Leighton, PA*, 57 FERC ¶ 61,401 at 62,335-36 (1992) (licensee proposed to file amendment application following deadline date).

The Commission orders:

(A) The revised Financing Plan filed on July 28, 2005 by the Electric Plant Board of the City of Augusta, Kentucky (Augusta), is rejected.

(B) Augusta's motion for a stay of the license, filed July 29, 2005, is denied.

(C) Augusta's application to amend the license, filed April 29, 2005, is dismissed.

(D) This order constitutes notice of the probable termination of the license for Project No. 10395 after 30 days from the date of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.