

128 FERC ¶ 61,092
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Price Dam Partnership, Limited

Project No. 12187-010

ORDER DENYING STAY

(Issued July 27, 2009)

1. Price Dam Partnership, Limited has filed a motion asking the Commission to stay the license for the Price Dam Hydroelectric Project No. 12187 or the commencement construction deadline contained in that license. As discussed below, we deny the motion.

Background

2. Section 13 of the Federal Power Act¹ provides that a licensee must commence the construction of project works authorized by a hydropower license by the time set forth in the license, which may not be longer than two years from the date of the license. Section 13 allows the Commission to issue one extension of the deadline, for a period not to exceed two years. If the licensee fails to timely commence construction, section 13 requires the Commission, after providing due notice, to terminate the license.

3. The proposed 92-megawatt (MW) Price Dam Project would be located at the existing U.S. Army Corps of Engineers' (Corps) Melvin Price Locks and Dam, on the Mississippi River, in Madison County, Illinois. On July 29, 2005, the Commission issued Price an original license authorizing construction and operation of the project.² The license required that project construction be commenced no later than two years from the date that the license was issued, or, by July 28, 2007. By unpublished order dated June 11, 2006, Commission staff granted the maximum two-year extension permitted by section 13, making the commencement of construction deadline July 28, 2009. Price was acquired by Brookfield Power US Holding Company in late 2007.³

¹ 16 U.S.C. § 806 (2006).

² *Price Dam Partnership, Limited*, 112 FERC ¶ 62,090 (2005).

³ See motion for stay at 2.

4. On May 27, 2009, the licensee filed a motion for stay of the entire license, or of the commencement of construction deadline. The licensee states that, while the license authorizes the installation of 192 individual turbines, the licensee now intends to file, by mid-June, an application to amend the license to authorize the installation of conventional turbines, and to reduce the project's installed capacity by at least 17 MW. The licensee argues that its owner, Brookfield, is a successful operator of power generation facilities, so that the grant of a stay will not be made pointless by a subsequent failure to develop the project.

Discussion

5. The Commission reviews requests for stays under the standard established by the Administration Procedure Act:⁴ a stay will be granted if the Commission finds that "justice so requires."⁵ The Commission grants stays of the commencement of construction deadline, or of an entire license, only in narrowly-circumscribed circumstances, and generally where the bar to commencing construction is not within the licensee's control.⁶ Examples include the failure of the Corps to timely issue a necessary dredge and fill permit,⁷ the refusal by an interconnecting utility to expand its transmission line to accommodate project power,⁸ and the Forest Service's inability to issue a necessary special use authorization pending Endangered Species Act consultation.⁹ We have on rare occasion granted a stay where we were processing an amendment application filed well in advance of the commencement of construction deadline.¹⁰ However, we have denied stays where an amendment was filed unduly close to the deadline.¹¹ Here, the licensee cites no circumstances beyond its control that have

⁴ 5 U.S.C. § 705 (2006).

⁵ See *Duke Energy Carolinas, LLC*, 124 FERC ¶ 61,254, at P 8 (2008), and cases cited therein.

⁶ See, e.g., *Southeastern Hydro-Power, Inc.*, 94 FERC ¶ 61,296, at 62,079 (2001) ("[W]e have found a stay warranted in certain circumstances *not of the licensee's making*") (emphasis supplied).

⁷ *Cogeneration, Inc.*, 70 FERC ¶ 61,184 (1995).

⁸ *Dr. Daniel C. Merrill*, 43 FERC ¶ 61,264 (1988).

⁹ *Western Hydro Electric, Inc.*, 67 FERC ¶ 61,201 (1994).

¹⁰ See, e.g., *City of Marion, Kentucky, et al.*, 85 FERC ¶ 61,401 (1998); *City of Summersville, West Virginia*, 76 FERC ¶ 61,312 (1996).

¹¹ See, e.g., *Electric Plant Board of the City of Augusta, Kentucky*, 112 FERC ¶ 61,342 at P 25 (2005), and cases cited therein.

precluded commencing project construction, and, while it asserted that it intended to file an amendment application in mid-June (which would have been approximately one month before the deadline), it has not yet done so.

6. The licensee suggests that we should view this case in light of Brookfield's track record, which it contrasts with those of other entities to whom we have denied stays and who the licensee characterizes as "lacking project financing and diligence."¹² We have never used the licensee's bona fides as a test in granting a stay of a license or the commencement of construction deadline, and we decline to do so here. In any event, Brookfield acquired the Price Dam Project almost two years ago but offers no acceptable explanation why it has not begun project construction, and has not timely filed a license amendment that it has concluded it needs.¹³

7. In consequence of the foregoing, we will deny the motion for stay.

The Commission orders:

The motion for stay filed by Price Dam Partnership, Limited on May 27, 2009 is denied.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹² Motion for stay at 5.

¹³ The licensee states, motion for stay at 3-4, that it is seeking Congressional action authorizing the Commission to issue additional extensions of the commencement of construction deadline, but notes, correctly, that it is our policy not to grant stays based on such activity. *See, e.g., Gallia Hydro Partners*, 119 FERC ¶ 61,163, at P 17 and n.18 (2007). This is because, should a license be terminated and Congress subsequently passes extension legislation, Congress can require us to reinstate the license.