

128 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

American Falls Reservoir District No. 2
Big Wood Canal Company

Project No. 12423-003

ORDER TERMINATING LICENSE

(Issued August 3, 2009)

1. This order terminates the license for the proposed Lateral 993 Hydroelectric Project No. 12423 for the licensees' failure to commence construction of the project in accordance with Article 301 of the license and section 13 of the Federal Power Act (FPA).¹

Background

2. On September 26, 2003, the Commission issued an original license to American Falls Reservoir District No. 2 and Big Wood Canal Company for the proposed 1.5-megawatt Lateral 993 Hydroelectric Project No. 12423,² to be located at the juncture of two irrigation canals, the 993 Lateral and North Gooding Main Canal, 20 miles northwest of the Town of Shoshone, Lincoln County, Idaho. The canals are features of the Bureau of Reclamation's Minidoka Reclamation Project. The Lateral 993 Hydroelectric Project would occupy 17 acres of Federal land managed by the U.S. Bureau of Land Management (BLM).

3. As licensed, the project would include a 10-foot-high diversion structure constructed across the North Gooding Main Canal (approximately 50 feet long) and would divert the entire canal flow into a new canal to be constructed along the same alignment as the 993 Lateral. The new canal would convey the water approximately

¹ 16 U.S.C. § 806 (2006).

² *American Falls Reservoir District No. 2 and Big Wood Canal Company*, 104 FERC ¶ 62,216 (2003).

7,000 feet to the penstock intake structure. An emergency bypass spillway would be constructed in the new canal and would divert irrigation water into the existing canal during an emergency shutdown of the turbines. The intake structure would divert water into a 72-inch-diameter penstock. The penstock would convey the water approximately 2,900 feet to a powerhouse housing two turbine-generators and sited on the northerly bank of the existing North Gooding Main Canal. Water leaving the powerhouse would return to the North Gooding Main Canal. Approximately 500 feet of the downstream canal channel would be excavated to lower the tailwater level. The project would also include a 100-foot-long primary transmission line.

4. Article 301 of the license required the licensees to commence project construction within two years of license issuance, i.e., by September 26, 2005. Licensees requested and were granted a two-year extension of the commencement of construction deadline (the maximum permitted by law), until September 26, 2007.³ Licensees failed to commence project construction by the extended deadline.

5. In a letter issued April 28, 2009,⁴ Commission staff gave licensees notice of the probable termination of the license, in light of the fact that project construction had not commenced by the extended deadline of September 26, 2007. On May 28, 2009, as supplemented May 29, 2009, licensees filed a response in opposition to termination. The licensees admit that construction had not commenced, but argue that the Commission should grant an extension of the deadline because the licensees have been actively planning development of the project and that several factors, including the “cost of materials, right-of-way issues with BLM, and negotiations with Idaho Power on a power sales contract” made the start of construction infeasible. In their supplemental filing, the licensees request the Commission not to act upon its April 28, 2009 notice of probable termination, because they are pursuing Congressional authorization for the Commission to provide them with additional time to commence construction.

Discussion

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

[T]he 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

³ Unpublished order issued April 1, 2005 (2005).

⁴ Letter to Lynn Harmon from William Guey-Lee, Division of Hydropower Administration and Compliance.

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.

7. Section 13 of the FPA permits only one extension of the commencement of construction deadline, which the licensees have received. The licensees do not argue that they commenced construction of the project. Indeed, they admit that they did not. Thus, section 13 of the FPA requires that the license be terminated.

8. As to the licensees' request that the Commission delay license termination while the licensees seek Congressional action authorizing the Commission to issue additional extensions of the commencement of construction deadline, it is our policy not to delay license termination based on such activity.⁵ This is because, should a license be terminated and Congress subsequently passes extension legislation, Congress can require us to reinstate the license.

9. Accordingly, we will terminate the license for Project No. 12423.

The Commission orders:

(A) The license for the proposed Lateral 993 Hydroelectric Project No. 12423, issued on September 26, 2003, is terminated effective Monday, August 31, 2009, for failure to commence construction by the deadline in Article 301 of the license, as amended. No license, exemption, or preliminary permit applications for the project site may be filed until Tuesday, September 1, 2009.

⁵ See *Gallia Hydro Partners*, 119 FERC ¶ 61,163, at P17 and n.8 (2007), citing *Potter Township Hydroelectric Authority*, 90 FERC ¶ 61,312 (2000); *Boise-Kuna Irrigation District, et al.*, 87 FERC ¶ 61,138 (1999). As for requests to stay the commencement of construction deadline, or the entire license, the Commission has granted such requests in narrowly circumscribed circumstances, and generally where the bar to commencing construction is not within the licensee's control. See, e.g., *Southeastern Hydro-Power, Inc.*, 94 FERC ¶ 61,296, at 62,079 (2001). That is not the case here.

(B) This order constitutes final agency action. Requests for rehearing of this order by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 C.F.R. § 385.713 (2009).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.