

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 No. 10395-031

ORDER DENYING REHEARING
AND TERMINATING LICENSE

(Issued March 1, 2006)

1. This order denies rehearing of an order which, among other things, found that the licensee failed to commence construction of the project by the statutory deadline, rejected its revised financing plan, denied its request for a stay of the license to allow additional time to process a license amendment application, and gave notice of probable termination of the license. Therefore, this order also terminates the project license.

Background

2. In 1995, the Commission issued a license to the Electric Plant Board of the City of Augusta, Kentucky (Augusta) for the Meldahl Project, to be located at the U.S. Army Corps of Engineers' Meldahl Locks and Dam on the Ohio River in Kentucky.¹ Pursuant to section 13 of the Federal Power Act (FPA),² the Commission granted Augusta the maximum allowable time to commence construction, but Augusta was unable to do so. Augusta then obtained legislation authorizing the Commission to grant up to three additional two-year extensions of the deadline. All three extensions were granted, causing the new deadline to be July 31, 2005.

3. In December 2003 we granted Augusta's application to amend the license to change the project from a conventional design to a design based on the placement of

¹ *City of Augusta, Kentucky*, 72 FERC ¶ 61,114 (1995) (*Augusta I*).

² 16 U.S.C. § 806 (1994).

numerous microturbines within the dam. Augusta later concluded that the microturbine design would be far more costly than anticipated and, on April 29, 2005, applied to amend the license to return to the originally licensed project configuration.

4. In June 2005, Augusta notified the Commission of its intent to commence construction by the fabrication of draft tube liners. It then filed a Project Financing Plan, which was rejected as patently deficient. That was followed by submission of a letter of intent regarding the sale of project power, a Revised Financing Plan, and additional information purporting to demonstrate that construction by fabrication commenced by the deadline date. Augusta also moved for a stay of the license until the Commission acted on its pending amendment application.

5. On September 28, 2005, the Commission issued an order rejecting the Revised Financing Plan, determining that Augusta had not timely commenced construction by equipment fabrication, denying its request for a stay of license, dismissing the amendment application, and issuing notice of probable termination of the license.³ Augusta timely requested rehearing.⁴

Discussion

Financing Plan

6. Article 305 of the license for Project No. 10395 requires Augusta, prior to commencing construction, to receive Commission approval of a project financing plan which shows that it has “acquired the funds, or commitment for funds, necessary to construct the project” in accordance with the license.⁵

7. The September 28 Order rejected Augusta’s Revised Financing Plan, which included a letter from Energy Investor Funds, Inc. (EIF) pertaining to equity funding for

³ *Electric Plant Board of the City of Augusta, KY*, 112 FERC ¶ 61,342 (2005) (*Augusta II*).

⁴ On December 14, 2005, Augusta filed a request to defer action on the rehearing request, citing a December 5, 2005, document regarding project financing between certain cooperative utilities which were interested in purchasing a majority ownership interest in the project and the National Rural Utilities Cooperative Finance Corporation. On February 3, 2006, however, the cooperatives filed a letter with the Commission stating that they have been unable to reach agreement with the project developers on terms for their participation and have terminated their efforts in that regard.

⁵ *Augusta I*, 72 FERC ¶ 61,114 at 61,607.

the project. EIF's letter merely states that it will provide equity financing if the project receives outstanding regulatory approvals and executes a power purchase agreement and construction contract. Also included was a letter from BNP Paribas (BNP) regarding construction financing and term debt. That letter, however, merely states summarily that the project "should be able to access the bank markets and capital markets," and lists conditions that would apply to any commitment it might make. We also found that a letter of intent from LG&E Energy (LG&E) simply lists terms and conditions that would be included in any power purchase agreement it might execute. We concluded that these documents do not come close to demonstrating that Augusta has acquired the funds, or a commitment of funds, necessary to construct the project.

8. On rehearing, Augusta states that Article 305 contains no specific requirements to demonstrate adequate financing and should be liberally interpreted "in light of current market conditions." It insists, the language of the pertinent documents notwithstanding, that EIF and BNP are committed to financing the project, and it is merely the release of funds which is subject to various reasonable contingencies. It adds that it is unreasonable to expect these parties to release funds until all the necessary regulatory approvals are received, and that the Financing Plan can be updated after the Commission has approved the amendment, as it has done elsewhere.⁶

9. We believe Article 305's requirement for a commitment of funds is sufficiently specific regarding what is required. It is also clear that financing of the project is not merely a matter of releasing funds, because neither EIF nor BNP has committed any funds. This is not surprising, in view of the fact that Augusta has not been able to conclude a power sales agreement.

10. Although it contends that EIF and BNP are committed to financing the project, Augusta attaches an October 27, 2005 letter of intent pursuant to which three cooperative utilities would negotiate an agreement to purchase a majority share in Augusta's development partner, Meldahl Hydro.⁷ Augusta explains that the purpose of the letter of intent is to provide time for negotiation of agreements pursuant to which the cooperatives would finance the project and receive most or all of the project power.⁸

⁶ Rehearing request at 13-16. Augusta makes no effort to contradict our interpretation of the relevant documents, but suggests that they represent a financing commitment because they are the most these parties could reasonably be expected to do until the amendment application is approved.

⁷ *Id.*, Attachment 1.

⁸ *Id.* at 8-9.

11. The letter of intent with the cooperatives provides no greater commitment to finance the project than the letters from EIF and BNP. It simply sets forth “general terms and conditions” upon which the cooperatives would negotiate an ownership agreement and an operating agreement, and it is subject, in addition to receipt of all regulatory approvals, to execution of an interconnection agreement for the project transmission line and the parties obtaining financing for unspecified costs and expenses of the project or capital contributions. Although the letter of intent commits Meldahl Hydro not to work with any other potential investors for 90 days, it has no expiration date and any party may terminate the agreement at any time thereafter. At most, the cooperatives are committed to further explore the possibility of participation in the project.

Commencement of Construction

12. As explained in the September 28 Order, project construction is generally regarded as having commenced with the start of work on machinery or facilities considered to be significant, permanent elements of the project. Commencement of construction at an existing dam may be effected by the commencement of manufacture of turbines or generators or other equipment where such manufacture will take as long as or longer than physical construction at the site. In such cases, a licensee must substantiate actual construction in accordance with engineering specifications for that particular project and pursuant to an enforceable contract.⁹

13. Augusta previously contended that it commenced construction prior to the deadline, as evidenced by the fabrication of two sections of steel plate for a draft tube liner, and an agreement with Voith Siemens Hydro Power Generation (Voith) to construct the project. We disagreed because: (1) the fabricated sections were not authorized by the existing license, but pertained to the proposed amended license; (2) the fabrication resulted from a purchase order with no mention of any other work; and (3) the purported agreement is merely a term sheet setting forth conditions for any construction contract that might be negotiated if the parties could agree on, among other things, price.¹⁰

14. Augusta now states that the purchase order “binds the parties” to go forward with construction of the project and that it is unreasonable to expect an equipment manufacturer to execute a major construction contract while a license amendment application is pending. It again asserts that the Commission should cure the problem

⁹ *Augusta II*, 112 FERC ¶ 61,342 at P 19-20, and cases cited therein.

¹⁰ *Id.* at P 21-23.

regarding unlicensed construction by granting a stay until the amendment application is acted on, which will enable Voith to sign a construction contract, and that such action would be consistent with our actions in *City of Summersville, WV*.¹¹

15. We continue to disagree. The \$6,300 purchase order binds neither party to anything except the fabrication of two steel plates. Nor, as discussed below, is the term sheet an enforceable agreement. In *Summersville*, as here, the licensee commenced fabrication of draft tubes based on a proposed, rather than licensed, project configuration. The Commission granted the licensee's request for a stay pending action on the amendment application, on the basis that the licensee was diligently pursuing the amendment.¹² The Commission later granted the amendment application and lifted the stay and, because the draft tubes as fabricated then matched the project as licensed, found that construction had timely commenced.¹³ The critical difference is that the licensee in *Summersville* had submitted an executed contract for the construction of all of the project's electric generating equipment, including the turbines and draft tubes, and demonstrated that the fabrication had commenced upon payment under the contract.¹⁴

¹¹ Rehearing request at 28-30, citing *City of Summersville, WV*, 76 FERC ¶ 61,312 (1996) and 77 FERC ¶ 61,046 (1996).

We reject Augusta's implication that the Commission had sufficient time to act on the amendment application. Augusta failed to complete the three-stage pre-filing consultation requirements of 18 C.F.R. § 4.38(a)(6)(iv) (2005), which apply to capacity-related amendments. The application was also deficient in that it did not include an Exhibit E on environmental impacts, and would have required additional information, public notice and opportunity for comment. In addition, the Commission would have to prepare an environmental document pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1994).

¹² *Summersville*, 76 FERC ¶ 61,312 at 62,522.

¹³ *Summersville*, 77 FERC ¶ 61,046 at 61,164 (1996).

¹⁴ *Id.* Augusta also attempts to liken this case to *City of Orrville, Ohio*, 95 FERC ¶ 61,458 (2001) with regard to whether construction was unauthorized. There, however, the variance between the turbines as licensed and as built was determined to be so minor as not to require prior Commission authorization. Clearly, the microturbine design and the proposed conventional design are completely different.

16. Augusta next argues that the Commission has previously accepted term sheets, when accompanied by evidence of commencement of construction, as sufficient demonstration of an enforceable agreement. In this regard, it cites term sheets pertaining to construction of the Smithland Project No. 6641 and Cannelton Project No. 10228, which it contends are no different than the term sheet here.¹⁵ Those term sheets, however, are materially different from those proffered here. They are marked “final,” contain detailed terms for design and installation of the project facilities, and include fixed prices for each phase of the work. Each includes, moreover, a \$1 million termination fee if either party elects not to go forward with the execution of contracts. In contrast, the Meldahl term sheet is brief, for the most part general, commits the parties to negotiate a construction contract only if they are able to come to terms on price and other matters, and has no termination penalty.

17. Finally, Augusta suggests that the totality of expenses incurred by itself and Voith in pursuit of the project are relevant to whether construction was timely commenced.¹⁶ As we have previously stated, expenditure of funds is not a proper reason to maintain a license where, as here, the licensee has failed to commence construction by the statutory deadline.¹⁷

Request for Stay

18. As discussed in the September 28 Order, a stay of the commencement of construction deadline, or of the entire license, is granted only in narrowly circumscribed circumstances, which do not include merely relieving the licensee of the statutorily prescribed construction deadline, preventing mandatory termination where construction was not timely commenced owing to the licensee’s own actions or inactions, or accommodating 11th hour amendment applications.¹⁸

¹⁵ Rehearing request at 18-19. Term sheets pertaining to construction of these projects were filed with the Commission on August 8, 2001.

¹⁶ *Id.* at 18. A letter from Voith attached to the rehearing request states that it has invested \$500,000 in a turbine test program. The letter appears to suggest, but does not state, that the investment was made solely in furtherance of the Meldahl project.

¹⁷ *Utilities Commission and City of Vanceburg, KY*, 42 FERC ¶ 61,169 at 61,604 (1988) (*Vanceburg*).

¹⁸ *Augusta II*, 112 FERC ¶ 61,342 at P 25, and cases cited therein.

19. The September 28 Order found that Augusta has not demonstrated that a stay is warranted, in light of its inability over ten years to execute agreements to finance and construct the project and the lack of a reasonable prospect that the project will ever be built.¹⁹ Augusta responds by reiterating its assertion that the primary obstacle to financing of the project is the lack of approval of its amendment application, and that market conditions affecting the financeability of the project, including recent cost increases for fossil fuels, a need for baseload generation in the Midwest, and the availability of tax credits for capacity additions provided by the Energy Policy Act of 2005 (EPAct 2005),²⁰ are now encouraging.²¹ We have never, and will not now, base the issuance of a stay of license on general assertions about the favorability of economic conditions for hydropower development. That would be inconsistent with the purpose of section 13 to require prompt implementation of a project after it is licensed.²²

20. Finally, Augusta argues that issuance of a stay is warranted because national policy favors development of domestic, renewable, energy sources, including hydroelectric projects, and the project will bring employment, tax and other economic benefits to the project area and York, Pennsylvania, where Voith is located.²³ The economic and other benefits of the project were appropriately considered in the original licensing proceeding. Once a license is issued, it is appropriate for the Commission to take reasonable steps to support the licensee's efforts to commence construction, and we

¹⁹ *Id.* at P 27.

²⁰ Pub. L. No. 109-58 § 1301, 119 Stat. 594, ____ (2005). Section 1301 of EPAct 2005 amends the federal tax code to provide a credit for qualifying electricity from turbines or other generating devices placed into service after August 8, 2005 and before January 1, 2008. We express no opinion here regarding whether electricity from this project would, if the project were placed into service during the allowable period, meet the other requirements to qualify for the tax credit.

²¹ Rehearing request at 26. Augusta suggests that our decision to deny its stay request was based on an unstated skepticism that cost increases in the microturbine design led to the April 2005 amendment application, or that Augusta simply does not know what it wants. *See, e.g., id.* at 24-25, 26. Nothing in the September 28 Order should be construed to question Augusta's good faith or diligence. However, "even good faith efforts to fulfill preconstruction requirements, in and of themselves, cannot excuse the licensee's failure to commence any actual construction by the section 13 deadline." *Vanceburg*, 42 FERC ¶ 61,169 at 61,603 (1988).

²² *See Idaho Power Co. v. FERC*, 767 F.2d 1359, 1363 (9th Cir. 1985).

²³ Rehearing request at 31-32.

have done so by affording the licensee multiple extensions of the commencement of construction deadline. That said, we act in the context of our authorities and responsibilities under the FPA, which include the provisions of FPA section 13, the purpose of which, as noted, is to require prompt development of a licensed project. We cannot change the facts that the licensee has not commenced construction during the ten years it has had to do so, and that it has not submitted persuasive evidence that approval of its amendment application would enable it to acquire the funds, or a commitment of funds, to commence construction. We will therefore deny rehearing, and terminate the license.

The Commission orders:

(A) The October 28, 2005 request for rehearing filed by the Electric Plant Board of the City of Augusta, Kentucky is denied.

(B) The license issued to the Electric Plant Board of the City of Augusta, Kentucky for the Meldahl Project No. 10395 is hereby terminated.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.