

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Golden Lotus, Inc.

Docket No. UL05-1-001

ORDER DENYING REHEARING

(Issued June 23, 2006)

1. In this order, we deny rehearing of a Commission staff decision that the Lansing Club Hydroelectric Project is not required to be licensed under section 23(b)(1) of the Federal Power Act (FPA). The project is located on the Pigeon River near the town of Vanderbilt in Otsego County, Michigan. The Michigan Department of Natural Resources (Department) argues that the project must be licensed because the Pigeon River is navigable. For the reasons discussed below, we find that licensing is not required because the project is not located on a navigable river.

Background

2. The Lansing Club Hydroelectric Project, owned and operated by Golden Lotus, Inc., is a small project with an installed capacity of 74 kilowatts. The project consists of a 13-foot high, 255-foot-long earthen dam; a 45-acre reservoir known as Lansing Club Pond; a powerhouse containing one generating unit; and appurtenant facilities. The dam predates the generating facilities, which were added in the 1950s. Golden Lotus describes itself as “a Michigan-based, non-profit religious organization that operates a retreat center called *Song of the Morning*” at the project site.¹

3. On April 21, 2005, the Department filed a request for a jurisdictional review of the project. The Department expressed concern that the project is negatively affecting fish populations and other aquatic resources of the Pigeon River, and requested a jurisdictional review to ensure that fish and wildlife resources are not adversely affected by unauthorized activities.

¹ Letter from Ian Wylie, Golden Lotus, to Magalie Salas, FERC (filed August 17, 2005).

4. On June 7, 2005, Commission staff requested that Golden Lotus provide information about the project's generation, connection to the interstate electrical grid, and source of back-up power. Golden Lotus responded that it generated power for its own use at the site, did not sell any excess power, and planned to disconnect the generator control room from the local power company. Golden Lotus added that it would rely on a backup diesel generator to provide all emergency power to the generator control room, and would access the interstate grid solely for backup power to other buildings not connected to the control room.

5. On January 31, 2006, Commission staff issued an order finding licensing not required.² The order stated that no evidence has been found to document past or present use of the Pigeon River for navigation in interstate commerce from above and past the project site; the project does not occupy any public lands or reservations of the United States; and the project does not use surplus water or water power from a federal government dam. The order noted that, although the project was constructed after 1935 and is located on a Commerce Clause stream, it is not connected to the interstate electrical grid. The order therefore found that the project did not require licensing under section 23(b)(1) of the FPA.

6. On February 28, 2006, the Department filed a request for rehearing, arguing that the order relied on erroneous information and did not give proper weight to available information. With its request, the Department filed copies of documents that it asserts are sufficient to support a finding of navigability.

Discussion

7. Under section 23(b)(1) of the FPA,³ a non-federal hydroelectric project (that does not have a still-valid pre-1920 permit) must be licensed if it: (1) is located on a navigable stream of the United States; (2) occupies lands or reservations of the United States; (3) utilizes surplus water or water power from a federal government dam; or (4) is located on a body of water over which Congress has Commerce Clause jurisdiction, undergoes construction or major modification on or after August 26, 1935, and affects the interests of interstate or foreign commerce.

8. The Lansing Club Hydroelectric Project does not occupy U.S. lands or reservations and does not use surplus water or waterpower from a government dam.

² 114 FERC ¶ 62,083 (2006).

³ 16 U.S.C. § 817(l) (2000).

Although the project is located on a Commerce Clause stream and was constructed after 1935, it is not connected to the interstate electrical grid and does not, therefore, affect interstate commerce. Thus, whether licensing is required under section 23(b)(1) is dependent on whether the Pigeon River is navigable.

9. On rehearing, the Department makes four arguments. Two of these are not relevant to our jurisdictional determination and can be disposed of for that reason at the outset.

10. First, the Department argues that the project is operated in a peaking mode, and is not a run-of-river project as the Commission staff found in its order of January 31, 2006. While this may be the case, we need not decide the matter because the project's manner of operation has no bearing on our jurisdictional finding. Under the FPA, we have no authority to regulate the manner in which a project may be operated unless it meets the statutory requirements for the exercise of our licensing jurisdiction.

11. Next, the Department argues that the project has affected interstate commerce, because it was connected to the interstate electrical grid at the time the Department requested a jurisdictional review and had been operating illegally for some unknown period. The Department maintains that the Commission should not have permitted the project owner to avoid jurisdiction by disconnecting from the grid, and requests that we base our jurisdictional determination on the information that was available at the time the Department requested a jurisdictional review.

12. Contrary to the Department's suggestion, it is well settled that the operator of an unlicensed hydroelectric project may avoid the Commission's mandatory licensing jurisdiction by ceasing to engage in the activities that would otherwise require a license.⁴

⁴ See, e.g., *Puget Sound Energy, Inc.*, 106 FERC ¶ 62,038 (2004) (rescinding license order and dismissing requests for rehearing after operator of unlicensed hydroelectric project notified the Commission of its decision to reject the license and cease hydropower operations). In contrast, once a project operator has accepted a license, it may not simply discontinue licensed activities and "walk away" from the site, but rather must apply to surrender the license on terms that are acceptable to the Commission. See, e.g., *Southern California Edison Co.*, 106 FERC ¶ 61,212 (2004) (affirming that, for a project required to be licensed, project operator must either seek a new license or accept an annual license and file a surrender application); *Pennsylvania Electric Co.*, 56 FERC ¶ 61,435 at p. 62,550 (1991), *reh'g denied*, 57 FERC ¶ 61,211 (1991) (affirming that, for a project not required to be licensed, holder of a validly-issued voluntary license must either seek to surrender it or await its expiration).

The Commission cannot require licensing under the FPA on the grounds that a project operator engaged in jurisdictional activities in the past but is no longer doing so.

13. Concerning the merits of the jurisdictional issue, the Department argues that the Pigeon River is navigable, based on information included with its rehearing request. Specifically, the Department relies on the following material, which it provided in an appendix: (1) a copy of a Michigan Supreme Court case stating that the Pigeon River was used for logging; (2) excerpts from an article discussing the historical use of log marks in northeastern Michigan; (3) copies of deeds for property at the project site that include specific references to use of the dam for the purpose of driving or floating timber; and (4) excerpts from a navigability report for the Cheboygan River and Inland Waterway Basin prepared by the U.S. Army Corps of Engineers (Corps).

14. A waterway is navigable under section 3(8) of the FPA if: “(1) it presently is being used or is suitable for use, or (2) it has been used or was suitable for use in the past, or (3) it could be made suitable for use in the future by reasonable improvements”⁵ as a highway for commerce with other states or foreign countries, by itself or by connecting with other waters.⁶ Navigability can be shown “from the carriage of ocean liners to the

⁵ *Rochester Gas & Electric Corp. v. FPC*, 344 F.2d 594, 596 (2nd Cir. 1965) (original emphasis omitted).

⁶ See *Sierra Pacific Power Co. v. FERC*, 681 F.2d 1134, 1138 (9th Cir. 1982), quoting *The Montello*, 87 U.S. (11 Wall.) 411, 415 (1870). Section 3(8) of the FPA defines navigable waters as follows:

“navigable waters” means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority.”

floating out of logs,”⁷ and need not be based on commercial use if “personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation.”⁸

15. The court case that the Department provided, *Nelson v. The Cheboygan Slack-water Navigation Company*,⁹ primarily concerns tolls charged for navigation improvements on the Cheboygan River. Among other things, it states that the Pigeon River is forty miles long, empties into Mullet Lake, and was “made use of for floating logs and lumber on their way to the place of manufacture or to market.”¹⁰ Because the decision does not specify where logs entered and exited the Pigeon River, or indicate what portion of the river was used in this manner, it does not provide sufficient evidence to support a conclusion that the entire Pigeon River, from above the project site down to Mullet Lake, was used for transportation of logs and lumber in interstate commerce.

16. Similarly, the article on Michigan log marks states that the Pigeon River was used for logging, but does not specify where this activity occurred. It indicates that, once the logs reached Mullet Lake, the problem of transporting logs over the great rapids leaving the lake was solved by building a lock and canal through which the Cheboygan Navigation Company annually passed millions of feet of logs and lumber.¹¹ The Pigeon River flows in a northeasterly direction to its mouth at Mullet Lake, which in turn flows into the Cheboygan River, which flows into Lake Huron. Thus, through these links, at least some portion of the Pigeon River was used as part of a highway for interstate commerce. However, the article does not contain sufficient information to identify whether the river at or near the project site was ever so used.

17. The Department also provided copies of deeds for the location of the Lansing Club Project, one of which includes a reference to use of the dam for transporting timber.

⁷ *Appalachian Electric Power Co.*, 311 U.S. 377, 405 (1940).

⁸ *Id.* at 416.

⁹ 5 N.W. 998 (Mich. 1880); 1880 Mich. LEXIS 463 (included as Appendix 1 to the Department’s rehearing request).

¹⁰ *Id.* at 999; 1880 Mich. LEXIS at *3.

¹¹ Michigan Log Marks: Their Function and Use During the Great Michigan Pine Harvest, at 41-43 (Michigan State College, 1941) (included as Appendix 3 to the Department’s rehearing request).

Specifically, on October 22, 1910, the Cornwalls (first parties) conveyed the dam to Richardson Lumber Company (second party) with the following limitation:¹²

[P]rovided that the right and privilege is reserved to said first parties or any one of them to operate said Dam in connection with said second party, if said first parties or any one of them so desire for the purpose of driving or floating timber of any kind, which they own or control or may hereafter acquire where the use of the Dam may be necessary; and it is agreed that said first parties or any of them shall not sell, assign or transfer the reserved right and privilege herein mentioned to any other person or persons.

This suggests that the parties to that particular transaction recognized the possibility that the dam might be usable for the transport of timber on the Pigeon River.¹³ However, it does not indicate whether the dam was ever used for that purpose, or whether any portion of the Pigeon River at the project site may have been so used. Thus, it does not provide sufficient evidence to determine whether the Pigeon River at the project site was used or was suitable for use as part of a highway for interstate commerce, either alone or in connection with other bodies of water.

¹² See Deed from Estate of Lewis Cornwall, *et al.*, to Richardson Lumber Co. (dated Oct. 22, 1910, and recorded on Nov. 10, 1910) (included in Appendix 4 to the Department's rehearing request). Subsequent deeds for the property adjacent to the dam included a clause "excepting and reserving therefrom, all rights, privileges and franchises in and to the Dam, across Pigeon river, located on said Section (19), the same having been heretofore deeded to Richardson Lumber Co., and said second parties shall not have any claim for losses or damage caused by the use or operation of said Dam by overflow or otherwise to the lands described herein." See documents included in Appendix 4 to the Department's rehearing request. Richardson Lumber Company eventually sold the dam in 1920. *Id.*

¹³ As discussed in the Michigan Log Marks article, dams in northeastern Michigan were generally installed every few miles along some rivers and were used to help control log drives, taking the logs through sluice gates in sections to control both water and logs. A sluice dam located below rapids could be used to flood the shallow area so that logs could float over it. A sluice gate above rapids could be used to accumulate logs and water until both could be sent downstream in great rushes. See Michigan Log Marks, note 11 *supra*, at 45 (included as Appendix 3 to the Department's rehearing request).

18. The Department also provided excerpts from a Corps report on the navigable status of the Cheboygan River and the Inland Waterway Basin in Michigan.¹⁴ Among other things, this report quotes an 1871 Corps report as stating that “logs are now run for an extent of 45 miles in Pigeon River.”¹⁵ Later, the report states:¹⁶

The Pigeon River is cited as having logs run in it for 45 miles. While the method of measuring this mileage is uncertain, it can be assumed that this extends log driving to the source. Currently, the river is mapped as being 36 miles long, measured from Sparr, Michigan, to its mouth.

Based on these quotes, the Department argues that the Corps clearly concluded that logs were floated throughout the Pigeon River, from the headwaters to Mullet Lake, and that this includes points both above and below the Lansing Club Project location. The Department concludes that it provided ample evidence that the Pigeon River was used for interstate commerce and is therefore navigable.

19. Our examination of the 1871 Corps report reveals that the author made a reconnaissance of the watercourse as far up as into Burt Lake. However, the report describes the author’s trip as following the inland water route of the Cheboygan River into Mullet Lake, then into the Burt Lake via the Indian River. Thus, the author did not visit the Pigeon River, which empties into Mullet Lake but is not part of the route into Burt Lake. The report lists the Pigeon River as one of the principal tributaries of the watercourse, and states: “All these rivers are of ample width and depth for running down long timber and sawlogs from the extremities of the branches. Logs are now run for an extent of forty-five miles in Pigeon River.”¹⁷ No further mention of the Pigeon River is made.

¹⁴ A Report on the Findings of Navigability, Cheboygan River and Inland Waterway Basin, Michigan (U.S. Army Corps of Engineers, Dec. 1979) (included as Appendix 5 to the Department’s rehearing request).

¹⁵ *Id.* at 11.

¹⁶ *Id.* at 17.

¹⁷ Annual Report of the Chief of Engineers, U.S. Army Corps of Engineers (1871) at 183. A copy of this report is available in the Commission’s eLibrary system in the docket for this proceeding (filed concurrently with issuance of this order).

20. In 1939, the Commission issued a report of the navigable status of the Cheboygan River in Michigan. Among other things, the report mentions lumbering activities on tributary streams, including the Pigeon River, and references the 1871 Corps report. More importantly, however, it includes a map depicting the upper reaches of then-present navigation and past logging use for various rivers in the Cheboygan River Basin, including the Pigeon River. This map indicates that the Pigeon River was not used for navigation, and that only the lower 20 miles of the river were used for logging.¹⁸

21. Despite conducting additional research, both here and in Michigan, Commission staff was unable to locate any additional information that could support a finding that the Pigeon River was used for transporting logs at the site of the Lansing Club Hydroelectric Project. As noted, the 1871 Corps report was not based on an examination of the Pigeon River and contains no explanation of how mileage was measured, whether linearly or by river miles. The 1939 Commission staff report indicates that only the lower 20 miles of the river were used for logging. Although it is clear that parts of the Pigeon River were so used, we are unable to infer from the information before us that this use extended as far upstream as the project site.

22. The Department further argues that, under section 3(8) of the FPA, evidence of actual use in interstate commerce is not required; a river need only be shown to be suitable for such use. The Department maintains that the characteristics of the Pigeon River make it clearly suitable for use in interstate commerce, given the history of lumbering in Michigan. Apart from that history, however, the Department does not present any additional evidence of suitability for commercial navigation.

23. In appropriate cases, navigability can be shown if the stream's characteristics make it suitable for commercial use, or if "personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."¹⁹

¹⁸ Federal Power Commission, Chicago Regional Office, Navigable Status Report on Cheboygan River, Michigan (1939). A copy of this report is available in the Commission's eLibrary system in the docket for this proceeding (filed concurrently with issuance of this order).

¹⁹ *Appalachian Electric Power Co.*, 311 U.S. 377, 405 (1940). See *FPL Energy Maine Hydro LLC v. FERC*, 287 F.3d 1151, 1160 (2002) (test trips made by canoe, together with the stream's physical characteristics, constitute substantial evidence to support finding of navigability); *David Zinkie*, 53 FERC ¶ 61,029 at p. 61,113 (1990) (documented historical account of interstate canoe voyage); *Swans Falls Corp.*, 53 FERC ¶ 61,309 at p. 62,144 (1990) (interstate canoe trips, including rental canoes).

According to a Department report prepared in 1982 and revised in 2002, the Pigeon River originates in central Otsego County several miles east of Gaylord and flows generally north until it empties into Mullet Lake in Cheboygan County. It has a moderately fast gradient, dropping 545 feet over its 42-mile length, with an average drop in elevation of approximately 13 feet per mile. In one area, from about a mile above Afton to a distance downstream for four to five miles, the river drops 100 feet, or roughly 22 feet per mile. From its headwaters to the Lansing Club Dam, a total of about 14 miles, the streambed is predominantly sand, although some gravel is found. The headwaters are composed of small feeder streams about 3-4 feet wide and less than three feet deep. In the vicinity of Lansing Club Dam, the stream is usually less than three feet deep with numerous windfallen trees and logjams.²⁰

24. The river is free flowing, except for the Lansing Club Dam. However, the Department reports that it is not a good river for canoeing. The 27 miles of river from Red Bridge up to the headwaters is relatively small, shallow, and contains numerous logjams and downed trees. The 17 miles of river below Red Bridge is more suitable for canoeing.²¹ Commission staff's research suggests that, although portions of the Pigeon River are used for canoeing, such use does not extend as far up the river as the project site.²²

²⁰ Michigan Department of Natural Resources, Pigeon River Natural River Plan, Otsego and Cheboygan Counties at 8 (June 1982, Revised March 12, 2002). The report is available at www.michigan.gov/documents/Pigeon_River_Plan_22975_7.pdf.

²¹ *Id.* at 19.

²² The website for the Michigan Association Paddlesport Providers, www.michigancanoe.com, does not list the Pigeon River. The Fishweb/Michigan Interactive site, www.fishweb.com/maps/pigeon/, features maps that show canoeing as far up as the Pigeon Bridge Campground near Sturgeon Valley Road, which is several miles below the project site. A third site states that canoeing is best from Sturgeon Valley Road to Michigan highway M-68 (below the project site), and that above the Pigeon Bridge Campground, "local residents advise that the club [at Lansing Club Pond] has not been friendly to canoers in the past and they make portage around the dam difficult." See www.thecanoeguys.homestead.com/Pigeon.html. Since this is the only reference to the possibility of canoeing above the Pigeon Bridge Campground, and it refers to unverified statements of unidentified persons, we do not consider it sufficient to support a finding that the Pigeon River is suitable for commercial navigation at the project site.

25. In sum, there is not enough evidence for us to conclude that the Pigeon River in the project area is navigable. Accordingly, we find that the Lansing Club Hydroelectric Project is not required to be licensed under section 23(b)(1) of the FPA because it is not located on a navigable river.

The Commission orders:

The request for rehearing filed in this proceeding by the Michigan Department of Natural Resources on February 28, 2006, is denied.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.