

106 FERC ¶ 61,089
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Boise-Kuna Irrigation District, Nampa &
Meridian Irrigation District, Wilder Irrigation
District, and Big Bend Irrigation District

Project No. 4656-016

ORDER GRANTING REQUEST FOR EXTENSION OF TIME TO COMMENCE
CONSTRUCTION AND TO COMPLY WITH LICENSE ARTICLES

(Issued January 29, 2004)

1. The Boise–Kuna Irrigation District, Nampa & Meridian Irrigation District, New York Irrigation District, Wilder Irrigation District, and Big Bend Irrigation District (Districts) have filed a request to extend the deadline for the commencement of construction, as well as for compliance with several related license articles, of the Arrowrock Dam Hydroelectric Project. For the reasons discussed below, we will grant the extensions.

BACKGROUND

2. On March 27, 1989, the Commission issued a license to the Districts for the proposed 60–megawatt Arrowrock Hydroelectric Dam Project No. 4656, to be located on the South Fork of the Boise River, in Elmore and Ada Counties, Idaho. 46 FERC ¶ 61,385. The project would be located at the U.S. Bureau of Reclamation’s existing Arrowrock Dam and Reservoir, and the project’s tailrace would discharge into the U.S. Army Corps of Engineer’s Lucky Peak Lake Reservoir.

3. Section 13 of the Federal Power Act (FPA), 16 U.S.C. § 806, states that a licensee must commence the 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 the commencement of project construction once, for no longer than two additional years. Article 301 of the Project No. 4656 license required the Districts to begin project construction within two years (by March 26, 1991) and to complete construction within four years from the issuance date of the license (by March 26, 1993). 46 FERC at 62,210.

4. In 1990, the Districts requested two-year extensions of time to commence and complete project construction. They also requested extensions of time to comply with license Articles 101-110, 112-115, 117, and 304, which required the completion of various pre-construction activities. The Commission granted the requests, bringing the deadlines for the commencement of construction to March 26, 1993, for the completion of construction to March 26, 1995, and for compliance with the license articles to the earlier of June 15, 1992, or 90 days before the start of construction. See January 9, 1991 Order by the Director, Division of Project Compliance and Administration (Division Director) (unpublished).

5. Section 1704(c) of the Energy Policy Act of 1992, Pub. L. No. 102-486, authorized the Commission,

upon the request of the licensee of FERC project numbered 4656 and after reasonable notice . . . in accordance with the good faith, due diligence, and public interest requirements of Section 13 and the Commission's procedures under such section, to extend until March 26, 1999, the time required to acquire the real property and commence construction of the project numbered 4656.

In response to a request by the Districts pursuant to Section 1704(c), the Commission extended the deadline for the commencement of project construction to March 26, 1999. See March 22, 1993 Order by the Division Director (unpublished).¹

6. On March 23, 1999, the Districts filed with the Commission a request to stay the commencement of construction and license compliance deadlines while they sought from Congress legislation permitting further extensions of the commencement of construction deadline. On May 3, 1999, the Commission denied the request for stay, explaining that such stays are granted only in narrowly-circumscribed circumstances, which do not include instances where licensees are seeking extension legislation, but noting that any legislation subsequently enacted could require the Commission to reinstate the license and extend the construction deadline. 87 FERC ¶ 61,138. The Commission thereafter issued an order noting probable termination of the license for failure to meet the commencement of construction deadline. See May 19, 1999 Order by the Division Director (unpublished).

¹In addition, the order extended the deadline for the completion of construction to March 26, 2001, as well as the deadlines for compliance with the pre-construction activity articles listed above.

7. In October 2002, Congress enacted Public Law 106-343, which provided in pertinent part as follows:

(a) IN GENERAL- Notwithstanding the time period specified in Section 13 of the Federal Power Act (16 U.S.C. 806) that would otherwise apply to the Federal Energy Regulatory Commission project numbered 4656, the Commission may, at the request of the licensee for the project and after reasonable notice, in accordance with the good faith, due diligence, and public interest requirements of that section and the Commission's procedures under that section, extend the time period during which the licensee is required to commence the construction of the project for three consecutive 2-year periods.

(b) EFFECTIVE DATE- Subsection (a) shall take effect on the date of the expiration of the extension issued by the Commission prior to the date of the enactment of this Act under Section 13 of the Federal Power Act (16 U.S.C. 806).

(c) REINSTATEMENT OF EXPIRED LICENSE- If the period required for commencement of construction of the project described in subsection (a) has expired prior to the date of the enactment of this Act, the Commission shall reinstate the license effective as of the date of its expiration and the first extension authorized under subsection (a) shall take effect on the date of such expiration.

8. On December 18, 2000, the Districts filed a request for two 2-year extensions of the construction and compliance deadlines, pursuant to Public Law No. 106-343. The Commission granted the request, extending the commencement of construction deadline to March 26, 2003.² See August 16, 2001 Order by the Division Director (unpublished).

9. On March 18, 2003, the Districts filed another request pursuant to Public Law No. 106-343, asking the Commission to extend the commencement of construction deadline until March 26, 2005, the completion of construction deadline until March 26,

²The order extended the completion of construction deadline to March 26, 2005, and the deadline for compliance with the pre-construction license articles until the earlier of December 24, 2002, or 90 days before the commencement of construction activity. Because the previous commencement construction deadline had been March 26, 1999, the extension of that deadline until March 26, 2003 (a total of four years) was a simultaneous grant by the Commission of two of the three two-year extensions authorized by Public Law No. 106-343.

2007, and the deadline for compliance with pre-construction license articles until 90 days before the start of construction. The Districts state that, since the filing of their previous extension request, they have been diligent in their efforts to proceed with development of the Arrowrock Project. In support of this contention, the Districts set forth a number of activities they have taken to move the project forward, including the following:

(1) coordinating the project's conceptual design with the Bureau of Reclamation; (2) establishing a power committee which meets at least twice a month to negotiate with power purchasers and oversee project progress; (3) entering into a memorandum of understanding with the Lassen Municipal Utility District (Lassen), a potential power purchaser, and working with Lassen to identify additional purchasers; (4) funding feasibility and environmental studies; (5) arranging for Idaho Power Company to perform a system impact study, which identified a feasible method for the project to connect to Idaho Power's system; (6) reaching an agreement in principle with the Bureau of Reclamation to use its right-of-way for the project's transmission lines; and (7) securing a water right permit for the project from the State of Idaho. While the Districts have not yet secured financing for the project, they state that they have been working with financiers, and that Lassen and the Districts have issued municipal financing in the past and have the capability to directly fund the project. The Districts state that they have thus far expended in excess of \$700,000 on the project, including more than \$250,000 in the past two years.

10. On April 3, 2003, the Commission issued public notice of the Districts' application.

11. On April 21, 2003, Kan We Help (KWH), a local advocacy group in Lassen County, California, filed a timely motion to intervene. KWH opposes the application, stating that the project is not moving forward. KWH's concerns focus on Lassen's involvement with the project, which KWH alleges is improper and has resulted in the loss of public funds.

12. On May 5, 2003, the State of Idaho timely moved to intervene. Idaho recited its interest in the proceeding, but took no position on the application.

13. On May 5, 2003, the Department of the Interior filed comments. Interior expressed concern that the project has been granted a number of extensions without a review of changed environmental conditions at the project site or of potential project design changes, and suggested that a new or supplemental environmental analysis be prepared.

14. On May 30, 2003, the Districts filed a response to a request from Commission staff for further information and to the motions to intervene and comments. The Districts reiterated the project development activities they have undertaken.³

DISCUSSION

15. As noted, Pub. L. No. 106-343 authorizes the Commission to grant three two-year extensions of the deadline for commencement of project construction "in accordance with the good faith, due diligence and public interest requirements of Section 13 and the Commission's procedures under such section."⁴

16. In Northumberland Hydro Partners, L.P., 95 FERC ¶61,013 (2001), the licensee asserted that it had diligently pursued development of the project since its last extension request. Specifically, the licensee stated that it had been attempting to resolve a dispute concerning an existing power sales agreement with a utility, and was actively studying alternatives for the sale of project power; that it had been working to improve project economics and design by examining costs and developing alternative project configurations, including commissioning several engineering studies; and that it had circulated a draft license amendment to interested parties for consultation and comment. Id. at 61,021-22. The Commission concluded that these efforts satisfied the good faith

³ Over the next several months, the Districts and Kan We Help filed several additional pleadings disputing each other's assertions.

⁴ FPA Section 13 requires that, once project construction has begun, a licensee must prosecute such construction "in good faith and with due diligence." Accordingly, the Commission applies a "good faith/reasonable diligence/public interest" standard in reviewing requests for extensions of the deadline for completion of project construction. See, e.g., Village of Saranac Lake, New York, 67 FERC ¶61,077 at 61,212 (1994). Section 13 does not establish a standard with respect to extending the deadline for commencement of project construction, and thus the Commission may grant the extension of time allowed by Section 13, for a period not to exceed two years, so long as it is not arbitrary and capricious to do so. See, e.g., Joseph M. Keating, 34 FERC ¶61,083 (1986); Maine Hydroelectric Development Corp., 15 FERC ¶61,107 (1981). However, Pub. L. No. 102-486 applies a "good faith/due diligence/public interest" standard for extensions of the deadline for commencement of construction of the Arrowrock Dam Project. Therefore, we use a due diligence standard in reviewing the District's request. See Summit Energy Storage, Inc., 88 FERC ¶61,038 at 61,088 n.11 (1999), reh'g denied, 88 FERC ¶61,257 (1999). See also JDJ Energy, 104 FERC ¶ 61,032, reh'g denied, 105 FERC ¶ 61,135 (2003).

and due diligence standard specified by the applicable extension legislation, and therefore granted a two-year extension of the commencement of construction deadline.

17. Here, the Districts have displayed a comparable or greater level of effort. As discussed above, they have worked with the Bureau of Reclamation on project design and right-of-way matters, established a working power committee, entered into a memorandum of understanding with Lassen, one potential power purchaser, and worked to identify other purchasers, carried out feasibility, interconnection, and environmental studies, and obtained a state water rights permit. Thus, we conclude that they have satisfied the good faith/due diligence standard and will grant the requested extensions.

18. Kan We Help raises issues concerning Lassen's participation in the project, particularly with respect to the funds that Lassen has spent on project-related matters.⁵ Because Lassen is not the licensee, however, we have no jurisdiction over it with respect to this matter. The issues raised by Kan We Help must be addressed in a forum that has authority over Lassen.

19. Interior suggests that an updated environmental analysis be performed, due to the length of time that has passed since the project was licensed. The focus of this proceeding is whether the Districts have exhibited good faith and due diligence in attempting to move forward with the project. If Interior believes the license should be reopened to reflect new environmental information, it may separately file such a request, supported by a prima facie showing that the environment will not be adequately protected under the terms of the existing license. We note, however, that the license contains a number of conditions that require the licensee, prior to commencing construction, to develop, in consultation with relevant resource agencies, and to file for Commission approval plans to protect fish and wildlife and other resources. See, e.g., license Articles 101-110, 113-118, 401, and 403-413. These plans will be based on more current environmental information.

The Commission orders:

(A) The licensee for the Arrowrock Dam Hydroelectric Project No. 4656 shall commence construction of project works by March 26, 2005, and shall complete construction by March 26, 2007.

⁵ While Kan We Help states generally that the project is not viable, it does not dispute the matters that the Districts cite as evidence of progress, other than arguing that Lassen's involvement with the project is improper.

(B) Articles 101-110, 112-115, 117, and 305 of the license for Project No. 4656 are amended to provide that the deadlines set forth therein are extended until the earlier of 90 days before the commencement of construction or December 24, 2004.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.