

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

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

CPS Products, Inc.

Project No. 10371-008

ORDER TERMINATING LICENSE

(Issued April 18, 2005)

1. On March 3, 2004, Commission staff issued a notice finding that CPS Products, Inc., licensee for the Bear Creek Project No. 10371, had failed to commence construction of the project by the statutory deadline, and notifying the licensee of the consequent probable termination of the license.<sup>1</sup> The licensee filed comments opposing termination. For the reasons set forth below, we find that, for purposes of section 13 of the Federal Power Act (FPA), construction did not timely commence at the project site, and we terminate the license, as section 13 requires. This order is in the public interest because it implements the provisions of the FPA and opens a site for potential development by other entities.

**Background**

2. The Bear Creek Project, which was to be located at an existing dam on Bear Creek in Skagit County, Washington, was licensed to CPS Products in 1993.<sup>2</sup> The Bear Creek Project license authorizes the construction of a powerhouse containing two 2-megawatt (MW) generating units, a 2,800-foot-long penstock, a 4.5-mile-long transmission line, and a 4,800-foot-long access road.

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<sup>1</sup> See letter from Regina M. Saizan, Office of Energy Projects, to Thomas R. Childs.

<sup>2</sup> 65 FERC ¶ 62,211.

3. Section 13 of the FPA <sup>3</sup>states in pertinent part:

. . . the 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 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.

4. Article 301 of the license required the licensee to commence project construction within two years of license issuance, *i.e.*, by December 9, 1995. Pursuant to section 13 of the FPA, Commission staff extended the commencement of construction deadline two years, until December 9, 1997.<sup>4</sup> In 1998, Congress passed Pub. L. No. 105-192, which authorized the Commission, at CPS Products' request, to extend the time period for commencement of construction to December 9, 2003, which the Commission did.<sup>5</sup>

5. In general, commencement of project construction, under section 13 of the FPA, is marked by the date of the start of actual work on machinery or facilities considered to be significant, permanent elements of the project.<sup>6</sup> Because construction requirements range from building new dams and powerhouses to refurbishing existing ones, the acts which constitute commencement of construction will vary from project to project. In cases where a project will use an existing dam but requires the construction of a new powerhouse, if the actual time for manufacture of site-specific turbines or generators is equal to or greater than the period of physical construction at the site, the start of manufacture of turbines or generators (pursuant to an enforceable contract) can be considered the commencement of project construction.<sup>7</sup> In such cases, the licensee must show actual fabrication of turbines or generators in accordance with the engineering

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<sup>3</sup> 16 U.S.C. § 806.

<sup>4</sup> Unpublished order issued October 2, 1995.

<sup>5</sup> Unpublished order issued October 24, 2001.

<sup>6</sup> See *Cascade Water Power Development Corporation*, 69 FERC ¶61,167 (1994).

<sup>7</sup> *Id.* at 61,643.

specifications for the turbines or generators specifically authorized in the license.<sup>8</sup> The purchase of already-manufactured turbines does not qualify as commencement of project construction.<sup>9</sup>

6. On March 3, 2004, Commission staff notified the licensee of the probable termination of the license for failure to commence construction by the deadline. The licensee responded April 2, 2004, claiming that construction of the project had commenced with the renovation of one of the turbines slated for installation at the site. The licensee stated that the work under contract included the general renovation of the turbine's adjustable nozzle assembly and evaluation of the cost/benefit of installing new larger pelton buckets on the runner for increased output from the turbine.<sup>10</sup>

7. Commission staff replied on May 5, 2004.<sup>11</sup> Staff asked for additional information to support licensee's claim that its activities constituted start of construction. The letter explained that commencement of construction is generally marked by the date of the start of actual work on machinery or facilities considered to be significant, permanent elements of the project. Further, the letter noted that in order for the work on the project's turbines or generators to be used to establish start of construction, the actual time for manufacturing of new turbines and generator units must be equal to or greater than the period of physical construction at the project site.

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<sup>8</sup> See *Geoffrey Shadroui*, 70 FERC ¶ 61,237 (1995).

<sup>9</sup> *Id.*

<sup>10</sup> Letter from Jason Hines, CPS Products, Inc., to Magalie Roman Salas, Commission Secretary, filed April 2, 2004. The letter also included a request that those license articles requiring preconstruction environmental and engineering studies to be filed with the Commission 60 or 90 days before the start of construction be revised to require those studies be filed the same number of days before the start of land-disturbing activities.

<sup>11</sup> Letter from Regina M. Saizan to Jason M. Hines, CPS Products, Inc.

8. By letter filed June 4, 2004, the licensee stated that the turbine being renovated was an existing turbine that had been purchased from the Mount Rainier National Park in 1986.<sup>12</sup>

9. Commission staff responded by letter issued July 19, 2004.<sup>13</sup> Commission staff found that the information provided regarding the fabrication of the generator units did not qualify for start of construction. The letter explained again that commencement of construction can start with the manufacturing of turbines or generators for the project only where the actual time for manufacturing of new turbines and generator units is equal to or greater than the period of physical construction at the site.

10. Staff noted that CPS Products' project required the construction of a powerhouse containing 2-MW generating units, a 2,800-foot-long penstock, a 4.5-mile-long transmission line, and a 4,800-foot-long access road. Staff found that the turbine that CPS Products intended to use already existed, represented only a fraction of the total estimated project construction cost of \$7.1 million, and did not meet the requirement that manufacturing time should be greater than the period of physical construction at the site. Staff concluded that the evidence filed did not establish start of construction by fabrication of the generating units. Staff further concluded that, since no physical construction had commenced at the project site, CPS Products had not met the terms of FPA section 13 regarding start of construction.

11. In filings of July 27 and November 10, 2004, the licensee continued to provide information on the renovation of the one turbine. The filings did not dispute the conclusion in the July 19, 2004 Letter that manufacture of turbines did not qualify for start of construction in this instance and that no physical construction had occurred at the site.

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<sup>12</sup> Letter from Jason Hines, CPS Products, Inc. to Magalie Roman Salas, Commission Secretary. The filing contained several supporting documents including: (1) a December 5, 1986 notice from the U.S. Department of the Interior (Interior), accepting a bid of \$ 3,200 for property sale of the hydroelectric plant located within the boundaries of Mount Rainier National Park; (2) a notice from Interior dated February 23, 1987, directing CPS Products to proceed with the work, including the removal of all generating equipment from the Mount Rainier National Park site; and (3) a demolition contract dated March 4, 1987, from Interior.

<sup>13</sup> Letter from Mohammad Fayad, Office of Energy Projects, to Jason Hines, CPS Products, Inc.

12. By letter dated January 10, 2005, Commission staff gave the licensee an additional opportunity to document any appropriate activities that could have constituted start of construction.<sup>14</sup> The licensee responded but provided no information that indicated any physical construction had occurred at the project site.<sup>15</sup> The information provided by the licensee in response did, however, reveal that the turbine upon which the adjustments were made was one of two 400-kW turbines, not one of the 2-MW generating units authorized by the license.<sup>16</sup>

### **Discussion**

13. As explained above, for the manufacture of turbines to be considered commencement of project construction, the estimated time for manufacture of the equipment must be equal to or greater than the anticipated period of physical construction at the project site. It is difficult to see how the extensive site construction required for this project (construction of the powerhouse, penstock, transmission line, and access road) could have taken less time than manufacture of two new generating units for the project. But we need not decide this question here, inasmuch as the generating equipment the licensee intended to use was not only already in existence (having been manufactured more than 20 years ago for use at another project), but also very different from that authorized by the license. The execution of a contract (even if enforceable) for the purchase of turbines that already exist does not qualify as commencement of project construction, nor can work on unauthorized equipment be considered construction for start-of-construction purposes. Finally, it is undisputed that no site construction has taken place.<sup>17</sup>

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<sup>14</sup> See letter from William Guey-Lee, Office of Energy Projects, to Jason M. Hines.

<sup>15</sup> See letter from Thomas McMaster, agent for CPS Products, to Commission Secretary (filed July 25, 2005).

<sup>16</sup> The letter stated that the licensee planned on eventually ordering a third turbine with a capacity of 3.3 MW.

<sup>17</sup> Indeed, the licensee has submitted none of the plans that must be filed and approved prior to starting ground-disturbing activities. CPS states that it does not plan to begin site construction until late 2005.

14. Because the licensee did not commence physical construction at the project site or begin work on authorized generating units where the work would take longer than on site construction by the December 9, 2003 deadline, it did not meet the terms of section 13 of the FPA regarding start of construction. Accordingly, the license will be terminated.

The Commission orders:

(A) The license for the Bear Creek Project No. 10371, issued on December 10, 1993, is terminated effective 30 days after the issuance date of this order unless that day is a Saturday, Sunday, part-day holiday that affects the Commission, or legal public holiday as described in 18 C.F.R. § 385.2007, in which case the effective date is the first business day following that day.

(B) This order constitutes final agency action. Requests for rehearing 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.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.