

105 FERC ¶ 61,135  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
William L. Massey, and Nora Mead Brownell.

JDJ Energy Company

Project No. 10455-026

ORDER DENYING REHEARING

(Issued October 27, 2003)

1. JDJ Energy Company has requested rehearing of the Commission's July 2, 2003 Order denying the company's request for an extension of time for the commencement of construction of the River Mountain Pumped Storage Project and issuing notice of probable termination of the project license. 104 FERC ¶ 61,032. For the reasons discussed below, we deny rehearing.

**BACKGROUND**

2. On October 17, 1994, the Commission issued a license to JDJ for the proposed 600-megawatt River Mountain Pumped Storage Hydroelectric Project No. 10455, to be located on the Arkansas River in Logan County, Arkansas. 69 FERC ¶ 62,034. The project would use Lake Dardanelle, a federally-owned reservoir managed by the U.S. Army Corps of Engineers (Corps) and formed by the Corps' Dardanelle Lock and Dam, as its lower reservoir, and a new 183-acre reservoir at the summit of River Mountain as its upper 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. 10455 license required JDJ to begin project construction within two years and to complete construction within eight years from the issuance date of the license. 69 FERC at 64,057. In 1996, JDJ requested a two-year extension of time to commence project construction. The request was granted, and the deadline was extended to October 16, 1998.

4. In October 1998, Congress enacted Pub. Law No. 105-283, 12 Stat. 2700 (October 26, 1998), which states in pertinent part that, notwithstanding the FPA Section 13 time limitations, the Commission,

at the request of the licensee for FERC Project No. 10455 (and after reasonable notice), is authorized, 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 the time required for commencement of construction of the project for up to a maximum of 3 consecutive 2-year periods. This section shall take effect for the project upon the expiration of the extension (issued by the Commission under section 13) of the period required for commencement of such project.

5. On November 2, 1998, JDJ filed a request for a two-year construction deadline extension pursuant to Public Law No. 105-283. The Commission granted the request, bringing the deadline for the commencement of construction to October 16, 2000. See March 26, 1999 Order issued by the Director, Division of Licensing and Compliance (unpublished). On June 7, 2000, JDJ filed a request for a second two-year construction deadline extension pursuant to Public Law No. 105-283. The Commission granted the request, bringing the deadline for the commencement of construction to October 16, 2002. See September 20, 2000 Order issued by Peter J. McGovern, Division of Licensing and Compliance (unpublished).

6. On July 3, 2002, JDJ filed a request for the third and final two-year extension permitted by Public Law No. 105-283. The request stated (at 2-3) that the company had proceeded with numerous pre-construction license requirements and preparatory activities, including: retention of and consultation with an Independent Board of Engineering Consultants; conducting supplemental geotechnical investigations at the project site; preparing a cultural resources management plan; conducting a housing survey; filing a draft agreement with the Corps; and proposing a license amendment to facilitate the acquisition of project lands. JDJ explained that its development efforts were complicated in September 2001 by the termination of the memorandum of understanding with its selected engineering, procurement, and construction (EPC) contractor, and that it had been pursuing selection of a new EPC contractor.

7. On August 30, 2002, in response to a July 15, 2002 request from Commission staff for any additional information bearing on the progress of the project, JDJ reported that it had established a Board of Consultants, negotiated a letter of agreement for the supply of major equipment, and signed a memorandum of understanding with a new EPC contractor, who was currently preparing an EPC price and scope. JDJ also stated that it had made progress in its discussions with the Corps and the Southwestern Power Administration regarding access rights and an operating agreement. The company noted that the Commission had approved a housing survey conducted pursuant to license Article 413 and a cultural resources management plan pursuant to Article 416. JDJ also stated that it was continuing negotiations on a power purchase contract but had not yet

started the process of securing financing, and that potential lenders would not provide financing until an EPC contract price was finalized.

8. On October 2, 2002, Pine Bluff Sand & Gravel Company (Pine Bluff), a major supplier of stone in Arkansas, Louisiana, and Mississippi with interest in lands that would be occupied by the project, filed in opposition to the extension request. Pine Bluff asserted that JDJ had failed to exercise due diligence in developing the project, had not provided the supporting documentation in its August 30 response that Commission staff had requested, and in fact had recently indicated that it was abandoning the project.

9. On July 2, 2003, we issued an order denying JDJ's extension request. We noted that Public Law No. 105-283 authorizes us 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." In Summit Energy Storage, Inc. (Summit), 88 FERC ¶ 61,038 at 61,088 n.11 (1999), reh'g denied, 88 FERC ¶ 61,257 (1999), we held that a similar statute required us to apply a good faith/due diligence/public interest standard in reviewing requests to extend the deadline to commerce construction. See also 104 FERC ¶ 61,032 at P 15 n.21. Therefore, we stated, we would review JDJ's request under that standard.

10. Turning to the evidence in the record, we noted that JDJ had filed various plans and agreements required by its license, and had stated that it had negotiated a letter of agreement for the supply of major equipment, had signed a memorandum of understanding with an EPC contractor, had made progress in discussions with the Corps and Southwestern regarding access rights and an operating agreement, and was continuing negotiations regarding power sales contract. At the same time, we said, it did not appear that JDJ was making significant, concrete progress towards the construction and operation of the project. The plans with respect to which JDJ obtained our approval dealt with housing during construction and a cultural resources management plan, which did not appear to advance the commencement of construction in any meaningful way. Further, the progress reports filed by JDJ indicated that there had been little progress in project activities for well over one year.

11. We stated that while JDJ has selected a new EPC contractor, it had not yet signed a contract with that firm, and the likelihood of construction commencing in the near future thus appeared remote. We added that JDJ had not provided any substantial evidence of progress with respect to negotiating a power sales contract or in beginning the process of securing financing, and that JDJ had not complied with standard license Article 5, which requires that it obtain, within five years of license issuance, the property

rights needed to construct and operate the project, nor had it sought an extension of that requirement.

12. We explained that the fact that AES, the project developer, had sharply reduced its capital-spending budget and halted or deferred construction of several power plants, as noted by Pine Bluff, did not necessarily mean that AES will not proceed with the River Mountain Pumped Storage Project. However, we reasoned that that fact, coupled with an August 20, 2002 letter from AES counsel to a property owner on the project site, in which counsel states that "AES . . . is not at this time able to purchase your property to construct the anticipated pumped storage unit on River Mountain," and that AES expresses "sincere regrets that they are unable to move forward with this project," Pine Bluff Motion to Intervene at Attachment 1, raised substantial doubts about JDJ's ability to proceed with the project.

13. We concluded that, while JDJ had undertaken some activities toward project development, these activities have been minimal and have done little, if anything, to advance the imminence of project construction. Further, no significant project activity had occurred in the last year, and there was some evidence to indicate that the project developer was no longer moving forward with the project. Therefore, we stated, JDJ had not shown the requisite due diligence to warrant a further extension of the commencement of construction deadline.

14. On August 1, 2003, JDJ filed a timely request for rehearing. JDJ argues that the Commission, in acting on its extension request, (1) incorrectly applied a due diligence standard, (2) did not apply that standard correctly to the facts in the record, and (3) improperly attributed decisional significance to the use that Pine Bluff would make of the project site.

## **DISCUSSION**

15. Section 13 of the FPA states that:

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, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the Commission shall deem necessary . . . . The periods for the commencement of project construction may be extended once but not longer than two additional years and the period for the completion of construction carried on in good faith and with reasonable diligence may be

extended by the Commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the Commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the Commission. . . .

16. JDJ contends that “Public Law No. 105-283 incorporates without change FERC’s decisional criteria under Section 13.” Request for rehearing at 3. The company states that the language used in Public Law No. 105-283 is “mere boilerplate” that has been routinely used in a number of bills dealing with extensions of both commencement and completion of construction deadlines. JDJ maintains that the Commission erroneously relied on Summit, which, in JDJ’s view, “represents an arbitrary deviation from both the plain language of the legislation extending the time for commencement of construction and long established Commission precedent on which Congress was entitled to rely in adopting the statutory language for Public Law No. 102-283.” Id. at 4. Accordingly, JDJ argues that the Commission should have granted its extension request “so long as it [was] not clearly unreasonable and capricious to do so.” Id. at 5, citing Joseph M. Keating, 34 FERC ¶ 61,083 (1986).<sup>1</sup>

17. As we explained in Summit, Section 13 of the FPA applies a “due diligence” standard only to extensions of the deadline for the completion of project construction. In the absence of special legislation, we apply the “not unreasonable or capricious” standard discussed in Keating and similar cases to requests for extension of commencement of construction deadline. See, e.g., Maine Hydroelectric Development Corp., 15 FERC ¶ 61,107 at 61,246 (1981). However, in Summit and in this case, in authorizing the Commission to grant extensions of construction commencement deadlines beyond the limits established by Section 13, Congress has mandated that we apply a “due diligence”

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<sup>1</sup>JDJ also asserts that, in acting by delegated authority on JDJ’s prior extension requests under Public Law No. 105-283, Commission staff “gave no indication that it would employ this extraordinary standard to another request under the same statute.” Request for rehearing at 3-4. In the two delegated orders, Commission staff did not enunciate the standard under which it was reviewing JDJ’s requests, but simply stated in both instances that “[t]he reasons advanced by the licensee in support of the requested extension of time are reasonable and justify the extension.” Thus, nothing in our July 2, 2003 Order is inconsistent with the earlier orders. In any event, it is the plain language of Public Law No. 105-283 and our application of it in these proceedings that are conclusive, not any prior purported interpretation by Commission staff.

standard to requests for such extensions.<sup>2</sup> See 88 FERC at 61,088. Thus, the “due diligence” standard we have used here is appropriate.

18. JDJ next argues that, assuming arguendo that the due diligence standard is applicable here, it nonetheless qualifies for an extension. JDJ contends that its efforts to move ahead with the River Mountain Project by entering into a memorandum of understanding with an EPC contractor and seeking to negotiate with new potential power purchasers were similar to those of the licensee in Homestead Energy Resources, LLC, 103 FERC ¶ 61,211 (2003), where the Commission granted an extension of time to commence construction under a similar statute. Request for rehearing at 5-6. JDJ also states that the July 2, 2003 Order denying JDJ’s extension request noted that the extension in Homestead was unopposed, while Pine Bluff opposed the extension in this case. According to JDJ, the fact of Pine Bluff’s opposition is irrelevant. Id. at 6-7.

19. As we discussed in the July 2, 2003 Order, Homestead is distinguishable from this case. The licensee there provided some evidence of project progress: it had entered into a contract with a project manager to assist in obtaining a power purchase contract, and had provided the Commission with correspondence with power purchasers. See 103 FERC ¶61,211 at P 9. Here, we found that JDJ had not yet entered into a contract

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<sup>2</sup>JDJ attributes some significance to the fact that Summit was decided after the passage of Public Law No. 105-283. Request for rehearing at 4-5. Given that the statutory language we construed in Summit is substantially identical to that at issue here, and that we had no occasion to interpret Public Law No. 105-283 prior to our action in Summit, we find the chronology of the two proceedings irrelevant.

JDJ also attempts to distinguish Summit based on the fact that the House Commerce Committee Report regarding the Summit legislation, H.R. Rep. No. 104-317 (1995), states explicitly that the Committee expects the Commission to deny an extension request if it determines that the licensee is not prosecuting construction in good faith and with due diligence, while the report on Public Law No. 105-283, H.R. Rep. No. 105-748 (1998), does not include a similar statement. The Commerce Committee Report discussing the extension bill relating to the Summit Project states that “[i]f the licensee is not prosecuting construction in good faith and with due diligence, the Committee expects the [Commission] to refuse to grant a request for an additional two-year extension. . . .” H.R. Rep. No. 104-317 at 2 (1995). The Commerce Committee Report concerning Project No. 10455 extension bill states that “the licensee must meet the Section 13 requirement that it prosecute construction ‘in good faith and with due diligence.’” H.R. Rep. No. 105-748 at 2 (1998). We see no indication from these reports that Congress intended us to treat requests under the two similar bills differently.

with an EPC contractor, that JDJ had “not provided any substantial evidence of progress with respect to negotiating a power sales contract or in beginning the process of securing financing,” 104 FERC ¶ 61,032 at P 20, and that “no significant project activity has occurred in the last year.”<sup>3</sup> *Id.* at P 22. In addition, we noted that AES, the project developer, had reduced its capital-spending budget and informed an owner of property on the project site that it would not be proceeding with the project. *Id.* at P 21. No such evidence undercutting project viability existed in Homestead.<sup>4</sup> Finally, the extension in Homestead was unopposed, while “[i]n this proceeding, Pine Bluff vigorously opposes the extension, asserting that the lands that would be occupied by the project could be used for other useful purposes.” 104 FERC at P 22, n.25.

20. JDJ claims that Pine Bluff’s interest in project lands has no relevance to the question of JDJ’s diligence, and that, in issuing the project license, the Commission resolved the issue of whether project development and the related use of project lands is in the public interest. Request for rehearing at 6-7; 10-11. The fact of Pine Bluff’s opposition is not dispositive here, nor are we revisiting our 1994 determination that the project was in the public interest. Public Law No. 105-283 requires us to evaluate JDJ’s extension request in accordance with the good faith, due diligence, and public interest requirements of Section 13. Thus, assuming we had found that JDJ had proceeded diligently and in good faith, we would also have to determine whether continued reservation of the project lands for project purposes, to the derogation of other potential uses, including gravel mining, is compatible with the public interest, given JDJ’s lack of progress in moving the project forward. Under the facts of this case, we have concluded that it is not.

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<sup>3</sup>JDJ does not dispute these facts, and does not provide any additional evidence of progress.

<sup>4</sup> Again, JDJ does not dispute the facts cited in the July 2, 2003 Order. Rather, it argues that AES’ actions “bear[ ] no reflection on JDJ’s diligent pursuit of development for the River Mountain Hydroelectric Project.” Request for rehearing at 8. We conclude that evidence that the project developer is not planning to move forward with the project is indeed relevant to the diligence with which the project is being pursued.

The Commission orders:

The request for rehearing filed by JDJ Energy Company on August 1, 2003, is denied.

By the Commission.

( S E A L )

Linda Mitry,  
Acting Secretary.