

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Gallia Hydro Partners

Project No. 9042-069

ORDER DENYING REHEARING

(Issued May 18, 2007)

1. Rathgar Development Associates, LLC (Rathgar) has filed a request for rehearing of a March 22, 2007 Commission staff order terminating the license for the Gallipolis Project No. 9042.¹ Because the Commission was obligated by law to terminate the license, we deny rehearing.

Background

2. On September 27, 1989, the Commission issued a license to Gallia Hydro Partners (Gallia) to construct and operate the proposed 48-megawatt Gallipolis Project, to be located on the Ohio River, in Gallia County, Ohio, and Mason County, West Virginia, at the Gallipolis Lock and Dam, which is owned by the U.S. Army Corps of Engineers (Corps).² Article 301 of the project license required the licensee to commence project construction within two years from the issuance date of the license.³

3. On December 17, 1990, the Commission issued an order partially staying the licenses (including the commencement of construction deadline) for the Gallipolis Project and a number of other projects located in the Ohio River Basin, pending judicial review.⁴ The stay for the Gallipolis Project was made effective September 27, 1990.

¹ *Gallia Hydro Partners*, 118 FERC ¶ 62,218 (2007) (March 22 Order).

² *Gallia Hydro Partners, et al.*, 48 FERC ¶ 61,369 (1989).

³ *See* 48 FERC at p. 62,512.

⁴ *Gallia Hydro Partners, et al.*, 53 FERC ¶ 61,387 (1990).

4. The Commission's license orders were affirmed on appeal,⁵ after which, on April 16, 1992, the Commission lifted the stays.⁶ As of the effective date of the stay, the licensee had a year left to commence construction of the Gallipolis Project. Thus, lifting the stay on April 15, 1992 meant that the commencement of construction deadline then became April 15, 1993. By unpublished letter order dated February 11, 1993, Commission staff subsequently granted the licensee's request to extend the deadline for another two years, until April 15, 1995.

5. On November 29, 1993, the Commission granted Gallia's request for another partial stay of the license, again including the commencement of construction deadline, based on the fact that Gallia could not obtain Corps approval for project construction until after the Corps completed rehabilitation of gates at the dam.⁷ The stay was made effective July 12, 1993. The Commission required Gallia to file reports every six months detailing the Corps' progress in working on the dam.

6. On November 26, 2003, Gallia filed a progress report, stating that the dam rehabilitation work was complete.⁸ On February 9, 2004, Commission staff responded by asking Gallia, in light of the completion of the Corps' work, to provide within 30 days any reasons why the stay should not be lifted.⁹ Gallia did not respond to staff's letter.

7. On August 10, 2004, Gallia and Rathgar filed an application seeking Commission authorization to transfer the project license from Gallia to Rathgar. On March 4, 2005, the Commission issued an order approving the transfer.¹⁰ Ordering paragraph (C) provided that approval of the transfer was contingent upon (1) transfer of title of the properties under license and delivery of all license instruments to Rathgar, and (2) Rathgar acknowledging acceptance of the order and its terms and conditions by signing and returning an attached acceptance sheet. Within 60 days from the date of the

⁵ *U.S. Department of the Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992).

⁶ *City of Orrville, Ohio, et al.*, 59 FERC ¶ 61,080.

⁷ *Gallia Hydro Partners*, 65 FERC ¶ 61,274 (2007).

⁸ See letter from Michael G. LaRow (Sigma Consultants, Inc.) to Magalie Roman Salas (Commission Secretary).

⁹ See letter from Hossein Ildari (Commission staff) to Michael G. LaRow.

¹⁰ *Gallia Hydro Partners and Rathgar Development Associates, LLC*, 110 FERC ¶ 61, 237.

order, Rathgar was to submit certified copies of all instruments of conveyance and the signed acceptance sheet.

8. In addition to approving the transfer, the order lifted the stay of the license, and noted that once the stay was lifted, the licensee would have one year, nine months, and four days (*i.e.*, until December 8, 2006) to commence project construction.¹¹

9. On April 7, 2005, Rathgar filed a request for clarification on a matter not pertinent here. In that pleading, Rathgar stated that it would file the acceptance sheet and copies of the instruments of conveyance by the deadline of May 3, 2005.¹²

10. On May 3, 2005, Rathgar filed its acceptance of the license. It simultaneously filed a request for an extension of time, until June 30, 2005, to submit copies of the instruments of conveyance. Rathgar explained that it was waiting for Gallia to file a report required by the transfer order and to set a closing date. Commission staff granted the requested extension of time to file the conveyance documents, by unpublished order dated May 27, 2005.

11. On January 29, 2007, Commission staff sent a letter order to Gallia, noting that project construction had not commenced by the deadline of December 8, 2006, and therefore issuing notice of probable termination of the license.¹³

12. On February 23, 2007, Rathgar filed a letter, on behalf of itself and Gallia, asking the Commission to stay termination of the license pending Congressional action to extend the commencement of construction deadline. Rathgar also asserted that its response to the notice of termination had been delayed because the Commission, erroneously in Rathgar's view, still considers Gallia to be the licensee.¹⁴

13. On March 22, 2007, Commission staff issued an order terminating the project license for failure to timely commence construction. Staff stated that the licensee had not responded to the notice of probable termination.

¹¹ *Id.* at P 7.

¹² *See* letter from Paul V. Nolan (counsel for Rathgar) to Magalie R. Salas.

¹³ *See* letter from William Guey-Lee (Commission staff) to Michael G. LaRow.

¹⁴ *See* letter from Eugene J. Garceau (Rathgar) to Magalie Salas.

14. On April 23, 2007, Rathgar filed a request for rehearing of the March 22 order. Rathgar asserts that staff erred in stating that there was no response to the notice of probable termination and that the order incorrectly concluded that Gallia remains the licensee.

Discussion

15. Section 13 of the Federal Power Act¹⁵ requires that a licensee shall commence 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, 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 parts thereof, be terminated upon written order of the Commission.

In this case, as noted above, the commencement of construction deadline, after factoring in the two periods during which the license was stayed and accounting for the two-year extension granted by Commission staff, was December 8, 2006.

16. As an initial procedural matter, Rathgar asserts that it incurred difficulties with the Commission's electronic filing system in filing its response to the notice of probable termination. We conclude that, while it is the filer's responsibility to ensure that it successfully completes the electronic filing process, in this instance Rathgar's February 23, 2007 letter was timely proffered, and we consider it as part of the record of this proceeding. However, the letter does not provide any evidence that either Gallia or Rathgar commenced construction by the December 8, 2006 deadline. Thus, the Commission was required under law to terminate the project license.

17. Rathgar's February 23 letter seeks a stay of the project license. However, by the time the letter was filed, the commencement of construction deadline had already run. Thus, when Rathgar submitted its letter, we were under a legal obligation to terminate the

¹⁵ 16 U.S.C. § 806 (2000).

license.¹⁶ However, even had the stay request been timely, we would not have granted it. Rathgar's sole basis for requesting a stay is the possible passage of extension legislation; it does not allege that the March 22 Order erred in finding that construction had not commenced by the deadline. We have previously held that we will grant stays of commencement of construction deadlines only in cases where the delay is for reasons beyond the licensee's control, such as a failure to act by a federal or state agency, and not merely to relieve a licensee of the consequences of its own inaction.¹⁷ Moreover, it is our general practice to deny stays based solely on the possible passage of legislation, because we cannot predict when, or if, such action will occur.¹⁸

18. Rathgar also argues that because the Gallipolis Lock & Dam is owned by the Corps, "there is no title to be conveyed by Gallia to Rathgar." Rathgar states that "in confirming this in May of 2005 [it] believed that the transfer order was in error . . . [and] [n]o conveyance documents existed to file with the Commission."¹⁹

19. Had Rathgar believed that the March 2005 transfer order was in error, the time to point that out would have been during the 30-day period when rehearing of that order lay. The order became final on April 3, 2005, when no party sought rehearing of it, and Rathgar cannot attack it collaterally now. In any case, if Rathgar found out for the first time in May 2005 that no further conveyance documents were required, it should have then made an appropriate filing seeking Commission confirmation that it had satisfied the conditions of the transfer order.²⁰ It never did so, and cannot now claim that the

¹⁶ See *Northumberland Hydro Partners, LP*, 115 FERC ¶ 61,319 at P 11 (2006) (concluding that to be effective, stay must be requested and made effective before expiration of commencement of construction deadline).

¹⁷ See *Boise-Kuna Irrigation District, et al.*, 112 FERC ¶ 61,239 at P 4 (2005).

¹⁸ See, e.g., *Potter Township Hydroelectric Authority*, 90 FERC ¶ 61,312 (2000); *Boise-Kuna Irrigation District, et al.*, 87 FERC ¶ 61,138 (1999). We have explained that where a license has been terminated and Congress subsequently passes extension legislation, it can require us to reinstate a terminated license. Thus, the denial of a stay will not preclude a licensee from obtaining legislative relief, should Congress see fit to enact it.

¹⁹ Rathgar request for rehearing at 4.

²⁰ It also strains credulity to suggest, as Rathgar does, that the transferee was not aware of what documents would be necessary to complete the transfer (or that none were

(continued)

Commission erred in relying on the fact that conveyance documents were never filed, and that consequently the transfer was never effective and Gallia remains the licensee.²¹ As discussed above, the transfer order included a specific contingency requiring “transfer of title of the properties under license and delivery of all license instruments to Rathgar” and Rathgar to deliver copies of all conveyance documents to the Commission. Rathgar was under an affirmative obligation to comply with this provision, and cannot wish it away by claiming that it later found it to be inapplicable.²²

20. Finally, Rathgar asserts that sending the notice of probable termination to Sigma Consultants was an error. We disagree. As is clear from the record, Sigma has been Gallia’s representative with respect to the project for many years. It has made numerous filings in that capacity. Until the Commission received confirmation that the transfer had been consummated – which never occurred – or Gallia notified the Commission that it was no longer represented by Sigma - -which also never occurred – addressing project correspondence to Sigma was appropriate.²³

21. In conclusion, Rathgar has shown no infirmity in the March 22 order, and we therefore deny rehearing. To the extent that Rathgar asks us to hold this proceeding in

necessary) until almost a year after the transfer application was filed, and two months after the transfer order was issued.

²¹ Moreover, while it is true that the Corps owns the dam at which the project would be located, it may well be the case that Gallia has other interests in the project, such as interests in lands, contracts, intellectual property, or physical assets that would have to be conveyed to Rathgar to complete the transfer. Even had its filings been timely, to make its case that no conveyance documents were needed, Rathgar would have had to provide evidence that such was the case, such as a concurring statement from Gallia.

²² Indeed, the fact that Rathgar did not file the documents as of the extended June 30, 2005 deadline it has requested arguably voided the transfer as of July 1, 2005.

²³ Rathgar notes that it filed an application to amend the project license on June 5, 2006, and that Commission staff rejected the application as patently deficient on August 18, 2006, without noting that Rathgar was not the licensee. While such a finding would have been appropriate, the fact that Commission staff in its initial examination and rejection of a filing was not aware that a transfer of the project at issue was still pending has no legal significance.

abeyance, we see no need to do so given, as explained above, Congress' ability to provide complete relief to Rathgar should it so choose.

The Commission orders:

The request for rehearing filed by Rathgar Development Associates, LLC on April 23, 2007 is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.